

# LEGAL ALERT

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## Premises Liability: No Duty to the Careless in Michigan

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The open and obvious doctrine in the State of Michigan examines whether an average person of ordinary intelligence would have discovered an alleged danger on another's premises upon casual inspection. If the condition is so open and obvious that a person could and should be expected to discover it for himself, then there is no duty to the premises owner to protect the person from that risk of harm. In other words, no duty exists to keep careless persons from hurting themselves.

An exception to the open and obvious rule was carved out by the Michigan Supreme Court in situations where there are "special aspects" to the hazard or condition that create an unreasonable risk of harm. Even though a condition is open and obvious, if these "special aspects" exist with regard to that condition, the premises owner is still required to provide warnings to its invitees to protect them from harm. The Supreme Court in *Lugo v Ameritech Corp*, 464 Mich 512 (2001), provided two examples of what might constitute a "special aspect" which may still render a premises owner liable for an open and obvious condition leading to an injury to one of its invitees. In the first example, the court hypothesized a puddle of water on the floor at the only exit for the general public; in other words, an open and obvious condition that is "effectively unavoidable." As a second example, the court envisioned the now-famous "unguarded 30-foot-deep pit in the middle of a parking lot," which poses an unreasonable risk of death or serious bodily harm.

In recent years, the plaintiff's bar has made a concerted effort to avoid summary disposition in snow and ice cases by fashioning their claims to avoid the open and obvious doctrine. Two of the more popular approaches were to claim that the ice upon which they slipped was "black ice," which was supposed to mean that it is invisible.<sup>1</sup> A second

approach has been to claim that the ice was covered by snow and therefore was concealed to an ordinary observer.

Recently, the Michigan appellate courts have effectively done away with these two avenues for plaintiffs to avoid a summary disposition motion and get their cases to a jury. The two seminal cases are *Kenny v Kaatz Funeral Home, Inc*, 474 Mich 954 (2005) and *Ververis v Hartfield Lanes*, 271 Mich App 61 (2006). In *Kenny*, the Supreme Court reversed the Court of Appeals by simply adopting a previous dissenting opinion at the lower court. In that case, the Supreme Court held as a matter of law that, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." In that case, the elderly plaintiff drove to the funeral home to attend the funeral of a co-worker. It was snowing and plaintiff and her companions parked their car in the defendant's snow-covered parking lot. Before getting out of the car into the snowy parking lot, the plaintiff observed three of her companions holding onto the hood of the car for support. Thereafter, as the plaintiff walked around the back of the vehicle toward the passenger side, she slipped and fell and suffered a fractured hip. According to the plaintiff, she slipped and fell on clear, "black ice" that was camouflaged by a layer of snow. The Supreme Court, however, by adopting the dissenting opinion from the Court of Appeals found that plaintiff had been put on notice that the conditions of the parking lot were slippery by her observations of her companions. And as a Michigan winter resident, she should have concluded that the snow-covered parking lot was slippery. As such, because of the *Kenny* decision, even if the condition giving rise to the injury was obscured, if there are other indicators that such a condition exists, the courts will find that the condition is "open and obvious."

<sup>1</sup> I have yet to find a definitive explanation of what constitutes "black ice" but it seems to be ice which appears wet and may actually blend in with a dark asphalt surface below it.

According to the now commonly accepted definition of black ice, it is the kind of ice that you cannot detect until you have already slipped on it and are lying on the ground on top of it.

In recent months, the Michigan Court of Appeals has taken this opinion one step further. In *Ververis, supra*, the Court of Appeals held that, even without the external indicators, a snow-covered surface (with or without ice) constitutes an open and obvious condition. In the *Ververis* case, the plaintiff did not have the same warnings as the plaintiff in *Kenny*, such as observing people struggling to keep their balance. Mr. Ververis was simply attempting to enter the defendant's bowling alley when he slipped on snow-covered ice. The Court of Appeals concluded that the "potential slipperiness" of a snow-covered surface is an open and obvious danger even in the absence of any separate independent factors suggesting that, in fact, the surface is slippery. The *Ververis* court recognized that the opinion in *Kenny v Kaatz, supra*, suggested two possible rules with regard to snow-covered ice. The court in the *Kenny* case reasoned that the 79-year-old plaintiff, who had lived in Michigan all her life, should have been aware that ice frequently forms beneath snow during snowy December nights. Thus, a snow-covered surface might always, by its very nature, present an open and obvious danger because it is likely to be slippery as a result of underlying ice or for some other reason. The second alternative suggested is that a snow-covered surface would not present an open and obvious danger unless there is some other reason, in the facts of a particular case that would lead a plaintiff to reasonably conclude that it is slippery. In the *Kenny* case, of course, she witnessed other people struggling to keep their balance.

The *Ververis* case has done away with the necessity of other independent factors, beyond the snowy surface itself, which would have reasonably alerted a plaintiff to the fact that it was slippery. The *Ververis* court held that as a matter of law, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery. This reasoning may lead to the conclusion that anyone slipping on snow or ice in the winter in Michigan had encountered an open and obvious condition. It no longer matters that the ice which caused the fall was covered by snow and therefore obscured from the plaintiff. The courts have reasoned that people should "know better" that there might be ice underneath the snow.

So where does this leave us? It may be easy to conclude that virtually all slip and fall cases in the winter in Michigan will disappear or be dismissed. As one might suspect the plaintiff's bar, on otherwise good, solid cases, will find other avenues to get these cases to a jury. That avenue may very well be the "special aspects" exception carved out in *Lugo, supra*. Specifically, the *Lugo* court allowed for plaintiffs to pursue premises liability claims even when the condition is open and obvious, so long as that condition fits into one of these special aspects, such as

the 30-foot-deep pit that poses a risk of very serious injury or, more likely, that the condition was "effectively unavoidable." One would anticipate that there will be more claims that the condition on which the plaintiff fell was effectively unavoidable, in that they had no other choice but to attempt to traverse the hazardous condition.

This "special aspects" approach was attempted by the plaintiff in an unpublished Court of Appeals opinion, *Garges v Todd* (Docket No. 260084, September 12, 2006). In that case, the plaintiff argued that special aspects existed by depressions in the parking lot and a faulty downspout that allowed water to unnaturally accumulate and freeze in a high foot-traffic area. The plaintiff claimed that this unnatural ice formation, and defendant's failure to clear the snow that covered it, resulted in an unreasonably dangerous condition. The Court of Appeals rejected this approach and found that plaintiff had not presented facts showing anything out of the ordinary, or "special," about this particular patch of ice. The risk of slipping and falling on the snow-covered patch of ice did not pose an

unreasonably high risk of *severe* harm such as presented by the unguarded 30-foot-deep pit. Also, the condition was not effectively unavoidable according to the Court of Appeals. In the case of *Robertson v Blue Water Oil Co*, 268 Mich App 588 (2005), the plaintiff slipped and fell on an ice-covered parking lot at the defendant's gas station as he walked from the pump

where he had fueled his truck to the station's convenience store. The plaintiff had run out of windshield washer fluid and intended to purchase coffee and washer fluid from the convenience store. In that case, however, the Court of Appeals indicated that a fact question existed for the jury that would preclude a summary disposition since a reasonable trier of fact could rationally find that the plaintiff was "effectively trapped" because it would have been sufficiently unsafe, given the weather conditions at that time, to drive away from the premises without windshield washer fluid. In other words, the plaintiff in that case basically had no other choice but to attempt to enter the convenience store to buy his windshield washer fluid.

### Recommendations

In the event you are presented with a slip and fall claim this, consider a few recommendations for the investigation and documentation of the event. First, it would be very useful to have an employee document whether the area where the claimant fell was snow-covered. As the court outlined in the *Ververis* case discussed above, the simple presence of snow on the ground puts invitees on notice that the ground may be slippery. It would be even more helpful to have some record that the claimant was aware of the snow on the ground or that the claimant was aware of or

*The courts have reasoned that people should "know better" that there might be ice underneath the snow.*

had observed others in the area attempting to negotiate the slippery conditions (much like the plaintiff in *Kenny*, *supra*). Photographs of the area taken at or near the time of the incident would also be helpful in establishing the visibility of snow in the area, which would give rise to notice to the claimant of the “potential slipperiness” of the surface. Lastly, if you or your employees are able, it would be beneficial to learn from the plaintiff his or her reasons for being on the premises at the time of the fall. As the plaintiff in *Robertson* established, it would have been more dangerous for him to drive without his washer fluid than it was for him to attempt to traverse the icy conditions. If there is a way to establish that the condition was not “effectively unavoidable” or that the claimant had other options (both in the path of travel he chose and in his reasons for being on the premises), the claim is less likely

to be successful. The courts have also held long-time Michigan residents to a seemingly higher standard, given that they should know better that it gets slippery in Michigan in the winter. Therefore, if there is any way to gather that biographical information, it may be useful.

*Should you have any questions or concerns arise about claims that are filed or about your methods of investigation, you can contact Tom directly at [ttermaat@shrr.com](mailto:ttermaat@shrr.com) or 616.458.6295. Tom practices primarily in the areas of No-Fault Automobile Insurance Law, Transportation Law, Commercial Litigation, and General Civil Litigation at Smith Haughey.*

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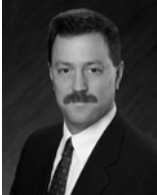
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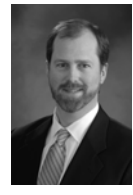
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