PLUNKETT COONEY

ATTORNEYS & COUNSELORS AT LAW

The Big Chill

Handling Polar Vortex "Inspired" Snow & Ice Claims

Patrick D. Ryan
(586) 466-7602
pryan@plunkettcooney.com

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SNOW AND ICE LIABILITY

I. Introduction

Each year, the arrival of winter brings cold temperatures, accumulations of snow, the formation of ice and a resultant increase in slip and falls from such conditions.

The winter of 2013-2014 has brought extremely cold temperatures and large accumulations of snow. Likely there will be an increase in the filing of premises liability slip and fall claims as a result of ice and snow. This paper's purpose is to generally outline the liability issues faced in this type of litigation.

Generally speaking with respect to liability for slip and falls and injuries resulting from the accumulation of snow and ice, Michigan law looks at the status of the individual as an invitee, licensee or trespasser to determine the duty owed.

1. Invitees

With respect to a slip and fall on ice and snow, the case of *Quinlivan v Great Atlantic & Pacific Tea Co., Inc.*, 395 Mich. 244, 235 NW2d 732 (1975), long ago established the duty that a business invitor owes its invitees. The duty requires a business invitor to use reasonable care to protect against hazards arising from natural accumulations of ice and snow by taking reasonable measures within a reasonable time after the accumulation to diminish hazards to invitees. (Obviously, a standard subject to many different interpretations).

2. Licensees

The general rule with regard to the liability of a property owner for injuries sustained by a licensee as a result of icy conditions is referred to as the "natural accumulation doctrine." It provides that the landowner does not have an obligation to a licensee to remove the natural accumulation of ice or snow from any location. *Hampton v Master Products,* Inc., 84 Mich. App. 767, 270 NW2d 514 (1978); *Zielinski v Szokola,* 167 Mich. App. 611; 423 NW2d 289 (1988). In *Zielinski, supra,* it was noted that the natural accumulation doctrine applied only to injuries suffered by a licensee and did not apply to situations involving an invitee.

The *Zielinski* case addressed a hybrid situation between the natural accumulation doctrine applicable to a licensee and the higher standard of *Quinlivan, supra,* for invitees. *Zielinski, supra* involved a business invitee who was injured on a public sidewalk abutting the business. Since the plaintiff was injured on a public sidewalk, the court held that the plaintiff could only recover if there was an exception established to the natural accumulation doctrine.

The plaintiff in *Zielinski, supra*, slipped on ice adjoining the defendant business owner's property. The plaintiff claimed that the ice resulted from the defendant's past salting practices. The allegations were that the repeated salting of the sidewalk caused pits in the sidewalk, which allowed water to accumulate and form ice.

The court held that the accumulation of ice and the one-half inch pit holes was an accumulation from natural causes. The court further held that the defendant landowner would not face liability even if the ice had accumulated as a result of the re-freezing of a salted surface, since the salting was viewed not as the introduction of a new hazard, but rather alleviating, albeit temporarily, a hazard that already existed. It went on to reason that liability should not attach merely because the powerful forces of nature re-assert themselves and a salted surface re-freezes.

3. Trespassers

In relation to this discussion, no unique obligation is owed.

4. Municipalities

It should be pointed out that the natural accumulation doctrine applies equally to municipalities that are sued for ice and snow slip and falls related to alleged failure to maintain public ways such as sidewalks.

The natural accumulation doctrine provides that neither a municipality nor a landowner has an obligation to a licensee to remove the natural accumulation of ice or snow from any location, except where the municipality or property owner, by taking affirmative action, has increased the travel hazard to the public. *Zielinski v Szokola*, 167 Mich. App. 611; 423 NW2d 289 (1988); *Morrow v Boldt*, 203 Mich. App. 324; 412 N.W.2d 83 (1994)

II. DEFENSES IN ICE AND SNOW CASES

1. Snow and Ice and the Open and Obvious Doctrine

The open and obvious doctrine as it applies to snow and ice has been an area of ongoing development over several years. A number of cases have held that the danger presented by snow and ice is open and obvious. These decisions have set forth certain factors to be established in order to satisfy the open and obvious danger doctrine with respect to snow and ice, 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.

The case of *Kenny v Kaatz*, 264 Mich App 99; 689 NW2d 737 (2004), is a good example of how different panels at the Michigan Court of Appeals deal differently with the issues of snow and ice and the open and obvious doctrine.

A panel at the Michigan Court of Appeals ruled that, as a matter of law, ice under snow is not open and obvious. It is a question of fact for the jury.

The Michigan Supreme Court, thereafter, ruled that even black ice, when covered with snow, can be open and obvious. The Supreme Court held that reasonable minds could not differ that the slippery condition of the parking lot under the snow was open and obvious, and was persuaded that because the plaintiff had witnessed three people hold onto the hoods of their cars to keep their balance when they exited their vehicles, that all reasonable Michigan winter residents would conclude that a snow covered parking lot was slippery. The court noted that snow and ice in a Michigan parking lot on Dec. 27 is a common, not unique, occurrence, and did not present a "uniquely high likelihood of harm or severity of harm such that it constituted a special aspect."

This ruling effectively narrowed exceptions to the open and obvious doctrine. A plaintiff's argument that the ice he/she slipped on was black ice, or that it was covered with snow will not, in and of itself, avoid the open and obvious doctrine. The issue still remains a fact based one, and the more facts supporting a finding that "an average person with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection" will increase the chances that a trial court, as well as the appellate court, will find that a condition is open and obvious.

As an example, in *Slaughter v Blarney Castle Oil Company*, 281 Mich. App. 474 (2008), the Michigan Court of Appeals, for the first time in a published decision, specifically addressed whether black ice, without the presence of snow, is considered an open and obvious danger in and of itself.

The appellate court first presented a comprehensive review of case law involving the open and obvious doctrine, and its application to snow and ice conditions. The court then went on to review several dictionary definitions of black ice. Each of the definitions included a description of an invisible or nearly invisible, transparent or nearly transparent, icy condition. As a result, the court found that black ice is inherently inconsistent with the open and obvious danger doctrine.

In the end, the appellate court found that there was a question of fact regarding whether an average person of ordinary intelligence would be able to discover the danger and risk upon casual inspection of black ice, without the presence of snow. It should be noted that critical to the court's analysis in *Slaughter, supra* was the fact that there was no snow on the ground, and it had not snowed in several days.

The *Slaughter, supra,* decision held that whether the open and obvious doctrine is applicable is a question of fact for the jury to decide, not the court, in situations where

there is no evidence that black ice would have been visible upon casual inspection before the fall or where there are no other indicia of its presence.

In order for a premises possessor to successfully defend a black ice case by use of the open and obvious danger doctrine, the premises possessor will have to show the court that other "indicia" were present and that the plaintiff either failed to observe the indicia or failed to take it into consideration. This "indicia" can include snow fall at or around the time of the alleged incident, other evidence of ice, the presence of water during below or near below freezing temperatures, or any other thing that would put a reasonable person on notice of the possible presence of black ice.

III. THIRD-PARTY CONTRACTOR LIABILITY

The law in Michigan has recently changed with respect to the liability of third-party contractors such as ice and snow plow/removal company's relative to slips and falls on ice and snow.

The law in this area had been controlled by *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004), which basically created a form of tort immunity that barred negligence-based claims raised by a non-contracting third party. The *Fultz, supra* test required a "separate and distinct duty" by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligation required by the contract or whether the hazard was a subject of or contemplated by the contract.

The Michigan Supreme Court in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011) held that a contracting party's assumption of contractual obligations does not extinguish or limit separate, pre-existing, common-law or statutory tort duties owed to non-contracting third parties in the performance of a contract. The court in *Loweke, supra* stated:

> "Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligation required by it, and determining whether the plaintiff's injury was contemplated by the contract, *Id*. Instead, *Fultz's* directive is to determine whether defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligation to another ... a separate and distinct duty to support a cause of action in tort can arise by statute. *Clark*, 379 Mich. at 261, 150 N.W. 2d 755, or by a number of preexisting tort principles including duties imposed because of a special relationship between the parties ... and the generally recognized common law duty to use due care in the undertakings."

Stated another way, under the "separate and distinct mode of analysis," "entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there [exists] a preexisting obligation or duty to avoid harm when one acts."

The *Loweke, supra* case in clarifying *Fultz, supra* held that:

> "*Fultz* did not extinguish the "simple idea that is imbedded deep within the American common law of torts ... : if one 'having assumed to act, does so negligently,' then liability exists as to a third party for 'failure of the defendant to exercise care and skill in the performance itself.'"

The court also stated that:

> " ... courts should not permit the contents of the contract to obscure the proper initial inquiry: whether aside from the contract, the defendant owed any independent legal duty to plaintiff. In this case, defendant – by performing an act under the contract – was not relieved of its preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertaking."

In the *Loweke* case, the contractor leaned drywall boards against the wall in a negligent manner – in an unstable position causing the boards to fall and injure another employee. The court held that duty under the common law is separate and distinct from defendant's contractual obligation with the general contractor.

IV. DEFENSES TO LAWSUITS FILED AGAINST THIRD-PARTY CONTRACTOR/SNOW REMOVAL COMPANIES

1. Premises Liability Defenses

Many plaintiff lawyers have recently resorted to filing lawsuits directly against third-party contractors based upon *Loweke* (discussed above), arguing that the premises liability defense of open and obvious does not apply because it is a negligence case not a premises liability case.

The argument in response to that is found in recent Michigan cases that hold that it is well settled that "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704 (2007). In that case, the plaintiff slipped and fell as a result of ice and/or snow in a parking lot in Michigan. That is an allegation of premises liability as a result of a condition of the premises.

The more recent case of *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685; 822 NW2d 254 (2012) is a case in which the plaintiff slipped and fell on ice. The plaintiff's complaint alleged ordinary negligence. The Michigan Court of Appeals held that it was a premises liability case and stated:

> "Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613, 485; NW2d 539 (1998). Indeed, "[i]t Is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. See *James v Alberts*, 464, Mich 12, 18-19; 626 NW2d 158 (2001). In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of the land. *Laier v Kitchen*, 266 Mich App 483, 493; 702 NW2d 199 (2005). If the plaintiff's injury arose from an allegedly dangerous condition of the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *James,* 454 Mich at 18-19; 626 NW2d 158

The court in *Buhalis, supra* went on to state:

> "Here, Ms. Buhalis alleged that she was injured when she slipped on ice and fell; that is, she alleged that she was injured when she encountered a dangerous condition on Trinity's premises. Though she asserted that Trinity's employees caused the dangerous condition at issue, this allegation does not transform the claim into one of ordinary negligence. *Id*. Rather, she clearly pleaded a claim founded on premises liability. Therefore, Ms. Buhalis' negligence claim is a common-law premises liability claim and, to the extent that she purported to allege and ordinary negligence claim in addition to her premises liability claim, the trial court should have dismissed that claim."

In the recent unpublished opinion of *Jessee v Walgreen Co*, No. 306563, 2012 WL 52903111 (Mich Ct App Oct., 2012), the Michigan Court of Appeals cited the *Buhalis, supra* case in arriving at a conclusion that plaintiff's claim of slipping and falling on water on the floor was a claim of premises liability.

Jessee, supra involved a slip and fall at a Walgreen store wherein the plaintiff slipped and fell in a puddle of water produced by a separate defendant floor cleaner. Since one of the defendant's was not the premise owner, the court dealt with whether the open and obvious doctrine would apply to dismiss a negligence claim against such a party.

To address the issue, the appellate court scrutinized the claim as pled. In doing so, the court determined the plaintiff's claim sounded in premises liability, not ordinary negligence, because the plaintiff's injury primarily arose out of a dangerous condition in the land. The court ultimately held that because the plaintiff's allegation in the complaint sounded in premises liability, and not ordinary negligence, that the open and obvious

doctrine would be applicable and would result in the dismissal of the claims against defendants who were not in possession and control of the premises.

If it can be successfully argued that the claim asserted by the plaintiff is a premises liability claim, then the defense of open and obvious is equally available to the third-party contractor/snow plowing/removal company.

2. Open and Obvious

There is no liability in Michigan with respect to a condition that is open and obvious. This applies equally to ice and snow and applies to a claim against a third-party contractor, if the court accepts that it is a premises liability case. A premises possessor or, in this case, a third-party contractor, doesn't have a duty to invitees to warn or protect them against open and obvious dangers. *Riddle v McClouth Products Corp*, 440 Mich 85, 92; 45 NW2d 676 (1992)

The test to determine if a danger is open and obvious is whether an average person with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection, not whether a particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App. 231, 238-239; 642 NW2d 360 (2002), citing *Novotney v Burger King* (on remand), 198 Mich App. 470, 475; 499 NW2d 379 (1993)

The Michigan Supreme Court in *Kenny v Katz Funeral Home, Inc*, 472 Mich 929 (2005) reversed the Michigan Court of Appeals' decision, and held that "black ice" by itself, is an open and obvious danger. The Supreme Court unequivocally held that "black ice" conditions are open and obvious when there are "indicia of a potentially hazardous condition," which include the "specific weather conditions present at the time of the plaintiff's fall." *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 7832 NW2d 201 (2010)

Cold temperatures in the winter time, along with snow being present on the ground, on the sidewalk and on the parking lot all makes a presence of black ice an open and obvious condition. In addition in this case, the plaintiff knew there was snow, knew that ice could form under snow, knew that snow and ice are slippery, and also testified that she was walking gingerly because it might be slippery.

3. Potential Exception to Open and Obvious pursuant to MCL 554.139(1) for Tenants

It is important to note that defenses pursuant to MCL 554.139 only arise from a tenant/landlord relationship that is created pursuant to a contract/lease. A non-tenant can never recover pursuant to the mentioned statute because the plain reading of the statute only applies to landlord and tenant situations and common areas being fit for the use intended by the parties. With respect to application to snow and ice conditions, the

statutory duty indicates that such common areas are to be fit for their intended use, not that they are specifically devoid or clear of all snow and ice conditions.

The Michigan Supreme Court specifically applied snow and ice conditions to the statutory provisions in *Allison v AEW Capital Management, LLP,* 481 Mich. 419 (2008). In *Allison,* the plaintiff fell in the parking lot of an apartment complex which was covered with two inches of snow. It was conceded that the snow in the parking lot was open and obvious, but plaintiff argued that MCL 554.139 precluded **the use of** the open and obvious doctrine and that the two inches of snow rendered the parking lot unfit for its intended use.

The Supreme Court performed an analysis that concluded that two inches in a parking lot does not render it unfit for its intended purpose as a parking lot. It was further indicated that mere inconvenience is not enough to render a common area unfit pursuant to violate the statutory duty.

It is also noted in *Allison* that even if MCL 554.139(1) had been violated, the plaintiff was only entitled to "contract damages" as the alleged breach of statutory duty is only imposed through a lease.

"Contract damages" have not been specifically defined within the constraints of MCL 554.139(1). However, generally, contract damages are much more beneficial **to the defendant** than general personal injury damages which permit non-economic damages, economic damages, and even emotional damages. Arguably, contract damages would limit a plaintiff's potential damages to rent amounts defined in the applicable lease and any consequential damages directly related to the breach of the lease contract. This may effectively limit non-economic damages and would definitely limit any claim for emotional distress pursuant to Michigan law.

By way of examples of what has been determined not to be fit for intended use pursuant to statutory duties that can avoid open and obvious, a poorly lit stairway covered with snow and ice created a question of fact as to whether a stairway was fit for its intended purpose. *Hadden v McDermitt,* 287 Mich.App 124 (2010). Alternatively, two inches of snow in a parking lot did not make it unfit for its intended purpose. *Allison, supra.* Further, a walkway in a common area that was covered with snow and ice was fit for its intended purpose and the primary evidence that was dispositive of this fact was that the walkway had been utilized without incident several times on the day of the incident prior to the incident. *Gumina v 90 LLC,* Mich. Court of Appeals decided Jan. 23, 2014.

In *Klasuer v Harmon & Tyler,* it was specifically determined that slush in a well-lit foyer did not render the common area unfit for its intended purpose. Mich.App 2011 WL 5009821

It is also of note that it has been specifically held that condominium bylaws and other non-lease documents do not create statutory duties pursuant to MCL 554.139. *Hurd v Franklin Village*, Mich.App, 2011 WL 1049190

V. INDEMNITY AFFECTING LIABILITY

It is important to remember in ice and snow cases involving third-party contractors that the contracts that exist between the property owners and the third-party contractor snow plowing removal companies often contain indemnification language. It is important to analyze those contracts, and how that risk is spread between the premises liability owner and the third-party contractor.

Generally speaking, a general liability indemnification clause in a contract entered into between the property owner and the third-party contractor is used to provide a contractual remedy to shift the risk between the premises liability owner and the third-party contractor. In most cases, the property owner requires the third-party contractor snow removal company to enter into a contract such that the contractor indemnifies the property owner.

It is important when analyzing the liability in these cases to closely read any indemnification language to see what type of language is included and the scope of it.

Questions to be asked include: whether or not the cost of defense is included in the indemnification provision? Is there a duty to defend/hold harmless? Is the indemnitee indemnified for its own negligence? Does the contract require the indemnitor to add the indemnitee as "an additional named insured?"

Many contracts between a premises owner and third-party contractor call for the third-party contractor indemnitor to name the premises owner as an additional insured on the indemnitor's commercial general liability policy.

VI. CONCLUSION

Winter brings cold temperatures, ice, snow and slips and falls. The resultant lawsuits that are filed can be filed against premises liability owners/possessors, as well as third-party contractors. It is important to know the defenses that are available to both types of defendants, and also the importance of analyzing the contracts that exist between third-party contractors and premises liability owners with respect to spreading the risk of the liability.

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