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Supreme Court orders snow covered curbs can be 'open and obvious'

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Following a recent Michigan Supreme Court order, a change in elevation near a curb covered by snow may be an open and obvious danger.

In an order dated June 21, 2006, the Michigan Supreme Court, in the case of *Robert Jackson, Jr. vs. Lone Star Steakhouse & Saloon of Michigan, Inc.,* considered Lone Star's Application for Leave to Appeal the December 2005 judgment of the Michigan Court of Appeals. In lieu of granting leave to appeal, the Supreme Court summarily reversed the appellate court's ruling and reinstated the trial court's summary disposition in favor of Lone Star. In so ruling, the Supreme Court embraced the reasons set forth by Michigan Court of Appeals' Judge Bill Schuette in his dissenting opinion.

The plaintiff in the underlying case, Mr. Jackson, frequented the defendant Lone Star Restaurant for dinner, patronizing the establishment "[p]robably half a dozen times." On the day of the alleged slip and fall, he parked his car in the parking lot and entered the restaurant without incident. There was some snow residue on the ground.

Upon exiting the restaurant, Jackson followed a different path back to his vehicle, choosing instead to walk on matted snow. When he reached his car, Jackson unlocked the door, and went to open it. He stepped back into a pile of snow, which he saw there. The minute he stepped down into what he thought was snow pile he fell. He later noticed that there was a curb under the snow and a slight depression next to the curb.

The trial court, and Judge Schuette in his dissent, reasoned that the change in elevation between the parking lot and the area behind the curb was visible to Jackson and that the snow covering the curb area put Jackson on notice that he could not see the surface beneath. In his dissent, Judge Schuette further stated that: "after identifying

the presence of a curb partially obscured by snow, an average user would be put on notice of the potential danger of stumbling on an unseen, uneven surface beneath the snow and behind the curb."

In addition, Judge Schuette reasoned that the danger presented was avoidable and that Jackson, when returning to his car, could have approached it from the rear instead of the front, thus avoiding the curb entirely. In any event, Judge Schuette said that a curb did not give rise to an unreasonably high risk of severe harm, and thus there were no special aspects to the condition to avoid the open and obvious doctrine.

In this case, it was important to the trial court that Jackson had safely entered the defendant's restaurant by walking through the plowed parking lot, that he chose to return to his car by a different route, which entailed traversing over matted down snow, and that he knew of the existence of the curb having seen it on prior trips to the restaurant. Furthermore, Jackson had seen the pile of snow on top of the curb before he stepped into the snow and slipped on the curb or the change in elevation behind it.

This appeal was handled by Christine Oldani of Plunkett & Cooney's Appellate Department. The Supreme Court's favorable summary ruling demonstrates the importance of establishing the factual basis for finding a condition to be open and obvious. Even if an individual is on notice that a condition is hidden by snow, a court may still deem it to be open and obvious.

To read the full text of the Michigan Court of Appeals opinion, click here.

To read the full text of Judge Bill Schuette's dissenting opinion, click here.

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