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# BLACK ICE CASE REVERSED BY SUPREME COURT

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The Michigan courts have been struggling with the open and obvious doctrine as it applies to ice and snow (see: Plunkett & Cooney's in Summary Law Update April, 2005), however, the Michigan Supreme Court by an order issued June 17 has reversed the Michigan Court of Appeals decision in *Kenny v Kaatz Funeral Home*, 264 Mich App 99; 689 NW2d 737 (October 24, 2004), and held that black ice, even when covered with snow, can be open and obvious.

In *Kenny* the plaintiff, while exiting her vehicle, slipped on black ice which was covered by a layer of snow. The court of appeals, in reversing the trial court's granting of summary disposition in favor of the defendant, held that there was a question of fact as to whether or not the icy conditions were open and obvious and, further, whether or not the icy conditions presented special aspects.

The Supreme Court reversed the court of appeals decision and adopted the dissenting opinion of Judge Richard Griffin, which found that **"under these facts, the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the parking lot was open and obvious."** This means that black ice can be open and obvious even when covered by snow and the plaintiff testifies it could not be seen.

The court in this ruling, affirmed that it is an objective standard not a subjective standard. The test is "**whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection**." The court was persuaded that since 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. Further, the court noted that snow and ice in a Michigan parking lot on Dec. 27 is a common, not unique, occurrence and it did not present "a uniquely high likelihood of harm or severity of harm" such that it constituted a special aspect.

The court's ruling has effectively narrowed the exceptions to the open and obvious doctrine. A plaintiff's argument that the ice they slip 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 issue and the more facts supporting a finding that "an average user 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 appeals court will find that a condition is open and obvious.