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SIDEWALK RESPONSIBILITY AND LIABILITY

A Primer for Municipal and Private Landowner Responsibilities and Liabilities with Respect to Sidewalks

Presented By:

PETER B. WORDEN, JR.

Garan Lucow Miller, P.C.
1131 East 8th Street
Traverse City, Michigan 49685
Telephone: (231)941-1611
Fax: (231)943-0338
Email: pworden@garanlucow.com

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ABOUT THE PRESENTER

Peter B. Worden, Jr. is a senior shareholder in the law firm of Garan Lucow Miller, P.C., and is the managing attorney of its Traverse City office. He practices in the field of insurance defense, defending insurance carriers and their insureds against a variety of personal injury and property damage claims, including premises liability cases and cases involving municipalities. He is works with title insurers and is well-versed in claims involving real estate and zoning law. He has also frequently served as a mediator or arbitrator in a broad spectrum of cases, including premises liability, construction, real estate and other matters.

Mr. Worden was born May 31, 1964 in Sault Ste. Marie, Michigan and is a graduate of Lake Superior State University (B.S. Political Science, 1985). He was admitted to the Michigan bar in 1988 after graduating from the University of Detroit School of Law (J.D., 1988). He is a member of the bars of the State of Michigan (where he serves as a member of the Negligence and Real Property Law Sections, as well as the bars of the federal U.S. District Courts for the Eastern (1988) and Western (1993) Districts of Michigan and the U.S. Sixth Circuit Court of Appeals (1993). He has been frequently admitted to handle cases on a special basis by courts in Minnesota, Wisconsin, Ohio, New York, and Pennsylvania. His professional affiliations include the Grand Traverse-Leelanau-Antrim Bar Association, the Michigan Defense Trial Counsel, the Defense Research Institute, the Maritime Law Association, the International Shipmasters' Association, and the Incorporated Association of Irish-American Lawyers.

He has also been recognized in *Best Lawyers in America* in the field of insurance law from 2009 to present.

ABOUT GARAN LUCOW MILLER, P.C.

The law firm of Garan Lucow Miller, P.C. was founded in 1948 and now covers the entire state of Michigan and portions of Indiana, Ohio and Illinois through ten strategically placed offices. Each of these offices is managed and staffed by attorneys who are a part of the community in which they practice, also supporting our commitment to personal representation.

The firm has always been focused on insurance defense, in virtually every area of tort litigation. Over the years we have grown into a full service law firm. We can meet your needs from Admiralty, Business Transactions, Commercial Litigation, Family Law, Probate, Wills and Estates, Real Estate transactions and disputes, and Zoning. We also have represented a number of municipalities across the state of Michigan.

Further information about the firm and its attorneys can be found at www.garanlucow.com.

I. GOVERNMENTAL IMMUNITY AND SIDEWALK LIABILITY: An Overview

The responsibilities and potential liabilities of municipalities and other governmental agencies with respect to sidewalks need to be understood in the context of the Governmental Tort Liability Act (GTLA), MCLA § 691.1401 *et seq*.

The GTLA was first enacted in 1964 and was significantly revised by the Michigan legislature in 1986. It essentially provides that municipalities and other governmental agencies are generally immune from tort liability for injuries arising out of the exercise or discharge of a "governmental function." MCLA §691.1407(1). However, it allows for municipality and governmental agency liability for sidewalks in two ways: first, it sets for a specific exception to the general grant of immunity called the "highway exception" which includes sidewalks, MCLA §§691.1401(c), 691.1402(1); and second, the GTLA sets forth a specific duty to maintain sidewalks and the specific circumstances that need to be met in order for a municipality or other governmental agency to be liable for the condition of a sidewalk, MCLA §691.1402a.

Before addressing the specific provisions of the GTLA that related to municipality and governmental agency liabilities for sidewalks, we should begin by examining the scope of the governmental immunity that is generally granted by the statute to begin with:

The GTLA grants general tort liability to any "governmental agency" that is engaged in a "governmental function." The term "governmental agency" means simply the State of Michigan or any political subdivision, MCL §691.1401(a); inherently this includes cities, villages, townships, state agencies, or other agencies or entities that are engaged in maintaining a sidewalk. However, this does *not* include joint ventures, partnerships, arrangements between governmental agencies and private entities, or any other combined state-private endeavors. *Nash v Duncan Park Com'n,* 304 Mich App 599 (2014), app granted 497 Mich 884, vacated 862 N.W.2d 417.

A "governmental function," on the other hand, is any activity that is expressly or impliedly mandated or authorized by the constitution, statute, local charter or ordinance, or other law, MCLA § 691.1401(f). The design, construction, maintenance and upkeep of a sidewalk should, absent unusual and probably very rare circumstances, meet the definition of "governmental function."

The GTLA also extends tort immunity to the following categories of individuals who may be acting on behalf of the governmental agency: officers and employees of the agency, volunteers, and each member of a board, council, commission or statutorily created task force of a governmental agency. MCLA §691.1407(2). However, this "individual liability" is subject to some limitations which in practice mean the general

immunity is less comprehensive than that afforded to the governmental agencies themselves.

First, the immunity only extends to conduct of the individual while in the course of the employment or service with the governmental agency. *Id.* Second, all of the following have to be met:

1. The individual is acting or reasonably believes he or she is acting within the scope of his or her authority;

2. The governmental agency that is involved is itself engaged in the exercise or discharge of a governmental function; and

3. The individual's conduct does not amount to gross negligence or intentionally caused harm.

MCLA §691.1407(2)(a)-(c), (3).

"Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern with whether an injury results. MCLA §691.1407(8)(a). Whether alleged conduct in a particular case rises to the level of "gross negligence" or not has to be determined on a case by case basis, based on the facts of each individual case.

The "gross negligence" and "intentional conduct" exceptions to individual immunity have no equivalent as to the municipalities and governmental agencies themselves, who remain generally immune from tort liability even if their conduct is arguably grossly negligent or intentional in nature. In effect this creates a double standard whereby an individual might lack immunity, because his or her conduct was grossly negligent or intentional, while the governmental agency he or she was working for remains immune.

(Insurance policies taken out by municipalities and other governmental agencies may nonetheless provide some level of coverage to the individuals involved, even if the agencies themselves are immune; however, many policies of insurance exclude grossly negligent or intentional conduct. Some municipalities and other governmental agencies might also assume the liabilities of such an individual as a matter of policy, though it is expected this would probably be rare).

However independent contractors who may be retained by the governmental agency involved are *not* afforded immunity. *Jackson v New Center Community Mental Health Services,* 158 Mich App 25 (1987), app den 430 NW2d 458. If independent contractors have liability, that liability will not be imputed to the municipality or governmental agency, which remains immune under the GTLA. *Rambus v Wayne*

County General Hospital, 93 Mich App 264, reaffirmed on rehearing, 197 Mich App 480 (1992).

II. THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY

All that having been said, the GLA contains five specific statutory exceptions to immunity: the failure to maintain highways, MCLA § 691.1402; the negligent operation of government-owned vehicles; public building defects; the performance of proprietary functions; and the ownership or operation of a government hospital. Of these exceptions, the remainder of this presentation will focus on the highway exception. While in individual cases involving sidewalks one or more of the other exceptions to immunity may apply, to the extent that they do the involvement of a sidewalk would be merely incidental to their application; and each of the other exceptions to immunity is an involved subject in its own right and would require a more extensive discussion than is intended here.

As the name suggests, the highway exception to governmental immunity applies to "highways." The GTLA defines the term "highway" to mean "a public highway, road, or street that is open for public travel." MCLA §691.1401(c). The statute also provides that "Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway." *Id.* It does not, however, include an alley, tree or utility pole. *Id.*

MCLA § 691.1402(1) requires each governmental agency having jurisdiction over any highway to maintain that highway in a state of reasonable repair. Because the term "highway" includes sidewalks and other trailways, this obligation extends to municipalities or other governmental agencies having jurisdiction over those types of rights of way. The statute further provides that:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Thus, if a sidewalk or trailway is not kept in reasonable repair by the responsible municipality or other governmental agency, the person affected may bring suit against the municipality or governmental agency for money damages. This is true whether the specific injury is to property, or whether it involves bodily injury to the person affected.

In premises liability cases generally (tort actions arising from claimed defects or other hazards in land), a common question is whether the defect or hazard in question was "open and obvious" because, generally speaking, there is no liability on the part of

the land owner for open and obvious dangers. In *Jones v Enertel, Inc.*, 467 Mich 266 (2002), the Michigan Supreme Court concluded that the open and obvious doctrine of common law premises liability cases does not apply to a claim that a municipality or other governmental agency violated its statutory duty under MCLA § 691.1402(1) to maintain a highway in reasonable repair. However, on December 10, 2015 the Michigan House of Representatives passed a bill, HB 4686, that would essentially overrule *Jones* and allow municipalities and other governmental agencies to use the "open and obvious" danger defense in sidewalk cases. The House Bill was filed with the Senate on December 15, 2015 and is presently in committee in that chamber.

In order for a sidewalk or trailway to constitute a "highway" for purposes of this responsibility and potential liability, the right of way has to be actually open for public travel. MCLA § 691.1401(c). Temporary closure of a street removes the street from the highway exception to governmental immunity. *Grounds v Washtenaw County Road Commission,* 204 Mich App 453 (1994); *Pusakulich v City of Ironwood,* 247 Mich App 80 (2001). By extension, temporary closure of a sidewalk or trailway should also remove the municipalities or other governmental agencies responsibility to keep the right of way in reasonable repair.

However, not all sidewalks, trailways, and crosswalks are subject to the highway exception. The duty extends only to the "improved portion of the highway designed for vehicular travel." MCLA § 691.1402(1), *Nawrocki v Macomb County Road Com'n,* 463 Mich 143 (2000). The improved portion of the highway for which a municipality or governmental agency is responsible does *not* include sidewalks, crosswalks, or other installations outside the improved portion of the highway designed for vehicular travel, except as may be provided at MCLA §691.1402a (which is discussed below). *Id.*

Therefore, the highway exception applies only to sidewalks, crosswalks, trailways, and other pedestrian rights of way that exist *within the portion of the highway that is intended and designed for vehicular traffic*. The most likely situation where this will occur would be a crosswalk across a road designed for vehicular traffic.

For example, in *Seabring v City of Berkley,* 247 Mich App 666 (2001), a pedestrian who alleged injuries arising from a defect in a crosswalk laying within the improved portion of the highway was not barred by the GTLA from bringing a claim for damages. The Court of Appeals held that the crosswalk in question was not an installation separate from the road bed, but was the road surface itself, so the highway exception applied and the plaintiff could maintain her claim.

A topic somewhat related to sidewalks would be how these rules might apply to bicycles, especially given that bicycle lanes and paths are increasingly popular in highway and urban design. Can the highway exception apply to bike lanes and paths?

The term “vehicular traffic” does not contemplate bicycles or other non-motorized transport. MCLA §257.79 defines a vehicle as “every device . . . excepting devices exclusively moved by human power . . .” So a bicycle path or lane cannot fall within the highway exception merely because it was designed for that particular mode of vehicular transport; “vehicular” in this context refers to motorized transport. For an area to be a highway and thus fall within the highway exception, it must be accessible to and intended for motor vehicles.

The Michigan Supreme Court has held that a paved bicycle path is not part of the “highway” even if it is located relatively close to a roadway. *Hatch v Grand Haven Charter Township*, 461 Mich 457 (2000); *Roy v Dep’t of Transportation,* 428 Mich 330 (1987). And in *Grimes v Dep’t of Transportation*, 475 Mich 72 (2006), the Michigan Supreme Court held that a marked paved shoulder of a road is not “designed for vehicular travel” because it is not an intended travel lane, overruling *Gregg v State Hwy Dep’t,* 435 Mich 307 (1990).

Gregg, interestingly, had held both that a shoulder was designed for vehicular traffic, and that the mode of transportation involved in that case – a bicycle – did not remove the agency’s responsibility to make the highway reasonably safe. *Grimes* overruled *Gregg* on the first point, but did not expressly address the second. Thus, it appears that the *location* of the injury remains more important than does the mode of transportation involved – so long as the injury occurs in an area designed for vehicular travel, immunity is waived even if the mode of transportation involved is not vehicular; i.e., pedestrians and bicycles.

Recently, in *Yono v Dep’t of Transportation,* 2016 Mich LEXIS 1587 (decided July 27, 2016), the Michigan Supreme Court confirmed *Grimes* by holding that an area on a highway marked for designated parallel parking along M-22 in Suttons Bay was not “intended” for vehicular travel, and thus was not subject to the highway exception to governmental immunity. Plaintiff, who claimed she had fallen while traversing the area as a pedestrian, was unable to hold MDOT liable; it was immune from her claims.

In light of *Grimes* and now *Yono*, dedicated bike lanes within highway shoulders will still be subject to immunity. However, in many other instances, the bike-related markings call on cyclists and motorists to share a lane of travel. In light of *Grimes* and *Gregg,* a shared bike lane which is laid out on the travel portion of a highway which is intended for vehicular traffic will fall within the highway exception to immunity. Conversely, a bike lane which is part of a highway but which is *segregated* from the part of the travel portion of the highway for motor vehicles does *not* fall within the highway exception. And it is quite clear that a bike bath that is completely separate from the highway does not fall within the highway exceptions.

Given that the highway exception only applies to sidewalks, trailways, and crosswalks that are within the travel portion of the highway that is accessible by motorized vehicles, it may be tempting at this point to say that there would be no liabilities for the vast majority of sidewalks. However, the discussion to this point has only been on the subject of the highway exception; we have not yet addressed MCLA §691.1402a, which imposes additional responsibilities on municipalities and governmental agencies as to sidewalks that are adjacent to a public highway. As to these sidewalks MCLA §691.1402a may nonetheless impose other liabilities. These liabilities will be discussed in the next section.

For now, however, it should be observed that the practical effect of highway immunity applying to relatively few sidewalks and crosswalks while MCLA §691.1402a applies to those running adjacent to highways is that sidewalk liability is not identical for all the governmental agencies that are involved. If the injury occurs on the sidewalk outside the travel portion of the highway, potential liability rests, if at all, with the other whichever governmental agency is responsible for maintaining the sidewalk. This typically is not going to be the state or the county road commission, which is tasked just with the maintenance of the travel portion of the highway; this responsibility will fall to the cities, townships, and villages. *Pomeroy v Department of Transportation,* 175 Mich App 556 (1988).

Only one agency may have jurisdiction over the affected area. There is no concurrent jurisdiction for purposes of the highway exception to governmental immunity. *Sekulov v City of Warren,* 251 Mich App 333 (2002), vacated and remanded on other grounds, 468 Mich 863 (2003); *Sebring v City of Berkley,* 247 Mich App 666 (2001). Liability for an improperly maintained “highway” (and thus sidewalks and trailways) is limited to the one agency having jurisdiction over the right of way at the time of the injury. *Kuhn v Associated Truck Lines,* 173 Mich App 295 (1988). However, an agency remains liable for design and construction defects it may have created while the “highway” was under its jurisdiction, even if it transferred the “highway” to another governmental agency before the accident occurred. *Killeen v Department of Transportation,* 432 Mich 1 (1989).

The municipality or other governmental agency responsible for the sidewalk or trailway remains liable for its condition, even if another governmental agency performs maintenance on the highway under a contract with the responsible agency. A municipality or other governmental agency may not divest itself of jurisdiction over a right of way my maintenance agreements with other municipalities or other governmental agencies. *Kuhn,* supra; *Zyskowski v Habelmann,* 150 Mich App 230 (1986), vacated 249 Mich 873, modified on remand, 169 Mich App 98 (1988).

A municipality or other governmental agency has no liability for injuries or damages caused by a defective "highway" (including sidewalk and trailway) unless the municipality or agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable amount of time to repair the defect before the injury took place. A conclusive presumption of knowledge of the defect and a reasonable amount of time to repair it arises if the defect was readily apparent to an ordinarily observant person for 30 or more days before the injury took place. MCLA § 691.1403.

Also, the duty to "maintain a highway in reasonable repair" does *not* mean that *all* potentially hazardous conditions need to be removed. The Legislature has only waived immunity for liability if a road has become, through lack of repair or maintenance, not reasonably safe and convenient for public travel. Thus, an injury is compensable only when the injury is caused by an unreasonably unsafe condition, of which the agency had actual or constructive note, and which stems from a failure to keep the highway in reasonable repair. When the highway has been reasonably maintained but it remains unreasonably unsafe for some other reason, immunity still applies. *Wilson v Alpena County Rd C'mmn*, 474 Mich 161 (2006).

The injured party bears the burden of showing that the municipality or other governmental agency knew or should have known of the presence of the defect and had a reasonable amount of time to repair it before the injury occurred. There is no liability under the GTLA if the plaintiff fails to show the defendant knew or should have known of the presence of the defect. *Peters v State,* 400 Mich 50 (1977).

As a condition of recovery, an injured person must also serve notice of the injury and of the defect on the municipality or governmental agency that is involved in 120 days of the date of the injury. MCLA § 691.1404(1). The notice is required to state the exact location and nature of the defect, the injuries sustained and the names of the witnesses known at the time by the claimant. *Id*. The notice does not need to take any particular form, so long as the statutorily identified information is provided within the required 120 days. *Burise v City of Pontiac,* 282 Mich App 646 (2009). A longer notice period is provided for those under the age of 18 at the time of the injury (180 days) or those rendered physically or mentally disabled (not more than 180 days after the termination of the disability). MCLA § 691.1404(3); *Plunkett v Department of Transportation,* 286 Mich App 168 (2009). In instances involving death, where the decedent obviously is incapable of giving notice, the time limit of 180 days applies once the disability of death is removed by the appointment of a personal representative. *Blohm v Emmet County Board of County Road Commissioners,* 223 Mich App 383 (1997).

In *Rowland v Washtenaw County Road Commission,* 477 Mich 197 (2007), the Michigan Supreme Court overruled *Hobbs v Michigan State Highway Department,* 398 Mich 90 (1976) and *Brown v Manistee County Road Commission,* 452 Mich 354 (1996) and held that failure to provide the 120 day notice is an absolute bar to the plaintiff's recovery, even if failure to give actual notice did not cause any actual prejudice to the defendant agency.

III. STATUTORY DUTY TO MAINTAIN SIDEWALKS: MCLA §691.1402a

The primary obligations with respect to sidewalks will come from Section 2a of the GTLA, MCLA § 691.1402a, which provides:

> **MCLA § 691.1402a**
>
> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.
>
> (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following:
>
> > (a) A vertical discontinuity defect of 2 inches or more in the sidewalk.
> >
> > (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.
>
> (4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court.

> (5) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

MCLA §324.81131 relates to local ordinances regarding the operation of ORVs (Off Road Vehicles) on and around public streets. It basically provides that a municipality can allow for such use and is immune from tort liability for having done so unless it was grossly negligent. Thus as to ORVs, municipalities are given broad discretion and where applicable the immunity provisions related to ORV ordinances will govern over the statutory duty to maintain a sidewalk set forth at MCLA §691.1402a.

Note that per MCLA § 691.1402a(3), the municipality or other governmental agency maintaining a sidewalk is presumed to have maintained it in reasonable repair. This presumption may be rebutted by evidence of a vertical defect of 2 inches or more on the sidewalk. There was previously a so-called "two-inch rule" which applied in Michigan cases up until 1972, dictating that there was no municipal liability as a matter of law for discontinuity defects of 2 inches or less in sidewalks. That common law rule was abolished by the Michigan Supreme Court in *Rule v Bay City,* 387 Mich 281 (1972). In 1999, the Michigan legislature reintroduced the concept by incorporating it at MCLA § 691.1402a(3)(a).

However, the legislature also provided that some other "dangerous condition of a particular character" (other than solely a vertical discontinuity) could also rebut the presumption that the sidewalk had been maintained in reasonable repair. MCLA § 691.1402a(3)(b). So, the old "two inch" rule has not been completely re-introduced. An injured person can still overcome the presumption of reasonable repair by showing some other dangerous condition, the nature of which will depend on the specific facts of each case.

Apparently, however, a "dangerous condition" that can overcome the presumption of reasonable repair does not include lack of warning signage. In *Weakley v City of Dearborn Heights,* 246 Mich App 322 (2001), the plaintiff was injured when he tripped and fell on a removed portion of a public sidewalk that was maintained by the defendant city. The city had removed the entire section of the sidewalk for repair, leaving a deep hole, but did not place a warning blockade or sign near the hole. A previous case decided by the Michigan court of appeals had held that the city in that circumstance would have had a duty to place a barrier or warning sign. *Pick v Szymczak,* 451 Mich 607 (1996). However, in light of the Michigan Supreme Court's subsequent holding in *Nawrocki v Macomb County Road Commission,* 463 Mich 143 (2002), which had overruled *Pick*, the *Weakley* court held that Bay City "did not have a duty to make the sidewalk reasonably safe by placing a barrier or warning device around the portion of the sidewalk that was under repair." *Weakly*, Supra at 328.

Whether the presumption of reasonable repair is rebutted is an issue for the trial judge to decide, not for the jury. MCLA § 691.1402a(4).

As will be discussed below, in commonly law premises liability cases private landowners are not liable for conditions of the land that are "open and obvious." For years it was understood this doctrine did not extend to municipalities; it had previously been thought that by virtue of *Jones v Enertel, Inc.* 467 Mich 266 (2002), (holding that the open and obvious doctrine does not apply to a claim that a municipality or other governmental agency violated its statutory duty under MCLA § 691.1402(1) to maintain a highway in reasonable repair), the doctrine likewise would not apply to an alleged violation of the statutory duty under MCLA § 691.1402a(4). However, in early January of 2017, Public Act 419 became law and extended the open and obvious danger doctrine to municipalities. Accordingly, a municipality may not be liable for a sidewalk defect that is considered "open and obvious."

There are various cases holding that certain rights of way are not, in fact, sidewalks. In *Hatch v Grand Haven Charter Township,* 461 Mich 457 (2000), the Michigan Supreme Court held that a bicycle path did not qualify as a sidewalk even though it was located quite close to the roadway. In *Roby v City of Mount Clemens,* 274 Mich App 26 (2006), an area paved with asphalt and cement between a fenced parking lot and the road was not intended for pedestrian travel and therefore was not a sidewalk. In *Haaksma v City of Grand Rapids,* 247 Mich App 44 (2001), a sidewalk that ran between a city owned parking lot and a privately owned building was not adjacent to a public roadway did not qualify as a sidewalk. Pursuant to the definition at MCLA § 691.1401c, while the term "highway" includes a sidewalk, trailway, etc. they have to be associated with an actual public highway, road, or street that is open for public travel.

IV. ACCUMULATONS OF ICE AND SNOW

Accumulations of snow and ice on sidewalks have their own considerations to take into account.

The "natural accumulation doctrine" provides that neither a municipality/governmental agency nor an adjacent land owner have an obligation to remove natural accumulations of ice or snow from any location, except where the municipality/governmental agency or landowner has actually increased the travel hazard to the public by taking affirmative action. *Morrow v Boldt,* 203 Mich App 324 (1994), appeal denied, 447 Mich 995. However, when an accumulation of ice and snow is a result of *unnatural* causes (such as improperly designed drainage), the municipality or governmental agency may be liable for injuries that are proximately caused by the accumulation. *Hampton v Master Products, Inc.*, 84 Mich App 767 (1978).

In *Estate of Buckner v City of Lansing,* 274 Mich App 672 (2007), reversed 480 Mich 1243 (2008), a city sidewalk was obstructed and made impassible because of an accumulation of snow and ice that resulted from the defendant city's snowplowing activities. Not being able to use the sidewalk, plaintiffs walked in the roadway next to the curb and were struck by a car. The court of appeals held that the trial court properly denied summary disposition because the city could be found liable for creating an unnatural accumulation of snow. However, the Michigan Supreme Court reversed, stating "Because the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a "defect" in the sidewalk, plaintiffs have not shown that defendant violated its duty to "maintain" the sidewalk "in reasonable repair."

Under common law, a landowner is under no obligation to repair and maintain an abutting public sidewalk. *Haaksma v City of Grand Rapids,* 247 Mich App 44 (2001), appeal denied 465 Mich 973. However, local ordinances obligating adjacent landowners to remove snow and ice and/or to keep public sidewalks in reasonable repair are not uncommon. *Ordinarily*, such an ordinance does not impose personal liability to an injured party on the adjoining landowner from failure to repair or remove snow and ice. *Tugender v Rosenblatt,* 23 Mich App 580 (1970). However, such an ordinance will result in liability if it expressly provides for it. *Levendoski v Geisenhaver,* 375 Mich 225 (1965). In any event such an ordinance would not remove any responsibilities or liabilities that might otherwise attach to the municipality or governmental agency. *Hughes v City of Detroit,* 336 Mich 457 (1953).

V. PRIVATE LANDOWNER RESPONSIBILITIES AND LIABILITIES

Municipal planners may also wish to take into consideration the possible responsibilities and liabilities of private landowners with respect to sidewalks.

A key consideration is whether the private landowner merely owns property adjacent to a public sidewalk, or whether the landowner actually owns (or otherwise possesses or controls) the property that the sidewalk is situated on. In many cases the private landowner owns the real property but it is subject to an easement or right-of-way which allows the public authority to place a sidewalk.

As noted above, an adjacent private landowner has no obligation to repair or maintain a public sidewalk if the private landowner's property is merely adjacent to the sidewalk. There is an exception where a local ordinance requires the adjacent private landowner to do so, but even such an ordinance does not ordinarily provide for the private landowner's personal liability for any property damage or injuries caused by his or her failure to so maintain the sidewalk, unless the ordinance specifically provides for such private liability. Also, the "natural accumulation doctrine" which protects

municipalities and other governmental agencies from liability as to natural accumualtions of ice and snow also applies to adjacent private landowners.

However, the situation can be different if the private landowner actually owns (or possesses or controls) the property that the sidewalk is situated on. In such circumstances a private landowner could potentially find himself or herself with some personal liability arising from the condition of the sidewalk.

Unlike potential municipal liability for the condition of sidewalks which is statutory in origin, the potential liability of private landowners is based on common law. To establish a private landowner's liability, a plaintiff in a given case has to show that the plaintiff was owed a duty by that landowner and that the duty was breached.

Private landowner liability, however, is predicated upon possession and control. In other words, a party that does not have possession and control of land does not owe a duty to the injured party and has no liability. The duties that are owed by a private landowner, and which depend upon the plaintiff's status, will only be owed if the private owner can be said to be in possession and control of the property. Ownership alone is not dispositive of this question. *Orel v Uni-Rak Sales Co,* 454 Mich 564 (1987).

A person is in possession and control of property where:

1. That person is in occupation of land with an intent to control it;

2. That person has been in occupation of land with an intent to control it, if no other person has subsequently occupied it with an intent to control it; or

3. That person is entitled to immediate occupation of the land, if no other person is in possession.

Orel, supra., and *Merritt v Nickelson,* 407 Mich 544 (1980).

Invitee. An invitee is owed the highest duty in premises liability cases, and generally are persons whose presence on the property can reasonably said to confer a business, commercial, monetary, or other tangible economic benefit on the owner of the premises. *Kreski v Modern Wholesale Elec Supply Co,* 429 Mich 347 (1987). If the plaintiff is an invitee, the property owner must maintain the premises in a reasonably safe condition; warn the invitee of dangers the property owner knows of, or should know of, or have created, unless the danger is open and obvious; and inspect the premises to discover possible dangerous conditions if a reasonable person would have inspected under the circumstances. *Kroll v Katz, supra*. However, possessors of land are not the

insurers of their invitees' safety; rather, the duty is to exercise reasonable care for the invitees protection. *Bryant v Brannen,* 180 Mich App 87 (1989).

Child invitees are entitled to a heightened duty of care. *Bragan v Symanzik,* 263 Mich App 324 (2004). When the invitee is a child, the court must consider whether a dangerous condition would be open and obvious to a reasonably careful minor; that is, whether the minor would discover the danger and appreciate the risk of harm. *Id.*

Licensee. A licensee is a person on another's land for a purpose other than business who is not conferring a pecuniary benefit to the premises holder but who has the express or implied permission of the premises holder to be on the premises. *Kreski, supra*. Social guests, for instance, are licensees rather than invitees. *Preston v Sleziak,* 383 Mich 442 (1970). In many cases involving sidewalks, the plaintiff will arguably be at most a licensee of the private landowner.

The duty possessors of land owe to adult licensees is less than the duty owed to invitees. A possessor of land is liable for physical harm caused to a licensee caused by a condition on the land only if the following conditions apply:

> 1. The possessor knew or should have known of the condition, should have realized that it involved an unreasonable risk of harm to a licensee, and should have expected that the licensee would not discover or realize the danger;
>
> 2. The possessor failed to exercise reasonable care to make the condition safe or to warn the licensee of the condition and of the risk; andThe licensee did not know or have reason to know of the condition and the risk involved.

Preston v Sleziak, *supra*.

For a licensee, no duty is placed on the landowner to know of every potential danger, even if there might have been an opportunity, though unexercised, to fully inspect. The duty is limited to hazards that the defendant actually knows about, regardless of whether further inspection would have revealed them. *Shaw v Wiegartz,* 1 Mich App 271 (1965).

As with invitees, the courts recognize that where children are licensees a special rule imposing a higher degree of care may apply. In *Klimek v Drzewiecki,* 135 Mich App 115 (1984), the Michigan court of appeals held that there was an affirmative duty to exercise reasonable or ordinary care to prevent injury to child social guests.

Trespasser. A trespasser is a person who goes upon the premises of another without any express or implied invitation, for his or her own purposes, and not in the performance of any duty to the owner. *Alvin v Simpson,* 195 Mich App 418 (1992). Trespassers are lowest on the legal scale in terms of the level of care required to owners or occupiers of land. As a general rule, a land owner is liable to a trespasser only if the landowner is grossly negligent or commits a willful or wanton act that results in injury to the trespasser. *Wymer v Holmes,* 429 Mich 66 (1987). However, it is difficult to imagine circumstances where a member of the public utilizing a public sidewalk, albeit one located on private property, could be considered to be a trespasser.

Open and Obvious Danger Doctrine. Cases involving private landowner liability often revolve around the probable application of the open and obvious hazard doctrine. Essentially, the duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated or from a condition that is so open and obvious that an invitee could be expected to discover it on his or her own. *Bertran v Alan Ford, Inc.*, 449 Mich 606 (1995) and *Riddle v McLouth Steel Products Corp,* 440 Mich 85 (1992).

Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp,* (on remand), 198 Mich App 470 (1993).

Notwithstanding, if special aspects of a condition make even an open and obvious risk reasonably dangerous, or if the danger is "effectively unavoidable," a possessor of land must take reasonable precautions to protect against the risk. *Lugo v Ameritech Corp,* 464 Mich 512 (2001).

Lugo held that routine hazards do not constitute "special aspects." Thus, ice and snow (discussed below) are often considered to be "open and obvious" dangers for which there is no liability.

The courts have been very reluctant to find that a condition is "effectively unavoidable." For example, even where there is only one entrance and walkway leading up to the entrance is covered with ice, the hazard is not unavoidable because the plaintiff could simply have chosen to come back another day. *Joyce v Ruvin,* 249 Mich App 231 (2002).

Special Considerations Involving Ice and Snow. In *Mann v Shusteric Enters, Inc.* 470 Mich 320 (2004), the Michigan Supreme Court held that a premises holder does not have a duty to diminish the hazards of ice and snow if the accumulation is open and obvious. The premises holder must take reasonable measures within a reasonable period of time after the accumulation to diminish (not alleviate) the hazard of

injury, but only if there is some “special aspect” that makes such accumulation “unreasonably dangerous.” *Lugo, supra.* Again, *Lugo* held that routine hazards such as ice and snow do not constitute “special aspects.”

Even “black ice” might constitute an open and obvious condition where there are “indicia of a potentially hazardous condition” including the “specific weather conditions present at the time of plaintiff’s fall.” *Janson v Sajewski Funeral Home, Inc.* 486 Mich 934 (2010).

Generally speaking since *Janson* the courts have almost always found that snow and ice cases are involve an open and obvious danger and as such the private landowner has no liability. The only potential set of facts that may allow for recovery where the plaintiff is “effectively trapped” and must cross snow and ice. A court may find that such a “trapping” situation creates a “special aspect” that renders the property owner liable, notwithstanding the open and obvious danger involved. *Robinson v Blue Water Oil Co,* 268 Mich App 588 (2005).

Snow removal contractors are typically not liable to the plaintiff. A snow removal contractor owes no legal duty at common law to the plaintiff. *Fultz v Union-Commerce Associates,* 470 Mich 460 (2004). Unless the plaintiff is specifically named as a third-party beneficiary to the snow removal contract, the plaintiff will not state a claim based upon a theory that the plaintiff is a third-party beneficiary to the contract. *Koenig v City of South Haven,* 460 Mich 667 (1999).

Attractive Nuisance. The doctrine of attractive nuisance has long been recognized in Michigan and may also be taken into consideration. Basically, the doctrine holds that a landowner is liable for harm caused by artificial conditions that are highly dangerous to trespassing children. *Elbert v Saginaw,* 363 Mich 463 (1961).