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## TORT LAW

### MARYLAND COURT OF APPEALS RULES BLACK ICE DIFFERENT FROM VISIBLE ICE OR SNOW FOR ASSUMPTION OF THE RISK PURPOSES

*Poole v. Coakley & Williams  
Const.*, No. 130, 2011 Md.  
LEXIS 659 (Md. Oct. 27, 2011).

The case of *Poole v. Coakley & Williams Construction* arises from an incident where an employee of a business in a shopping center slipped and fell on black ice that had formed under a stream of running water a construction crew directed across a parking lot and to an available drain. Poole, the employee, at deposition indicated knowledge of some ice generally in the parking lot on the morning of the incident that occurred on

December 21, 2005. *Poole v. Coakley & Williams Constr.*, No. 130, 2011 Md. LEXIS 659 at \*2 (Md. Oct. 27, 2011). Poole, who had crossed the resulting stream of water approximately seven (7) times the day before and saw at least an inch of running water in the “stream,” nevertheless elected to walk through the stream to enter the building. Poole slipped on black ice situated under the stream of water and was injured.

The trial court concluded, as a matter of law, that Appellant Poole knew about the risk of black ice under the stream of flowing water in the parking lot and thus, granted Appellees motions for summary judgment based on assumption of the risk. The Judge for the Circuit Court of Montgomery County provided:

The Court of Appeals and  
the Court of Special

Appeals have made it abundantly clear that when someone is aware of icy conditions in an area and nevertheless elect[s] to proceed through those areas[,] they assume the risk as a matter of law. While I agree that the various factual permutations of cases are somewhat different, they're not materially different. *Allen v. Marriott*, 183 Md. App. 460, is[,] in my judgment on point. As was further explicated by the Court of Special Appeals recently in the *Muscatello* case, 189 Md. App. 620. Both Judge Hollander in *Muscatello* and Judge Moylan in *Marriott*[,] extensively survey, review, discuss, dissect all of the appellate cases. There's no need for me to do it here. I conclude that the plaintiff assumed the risk of falling on ice as a matter of law.

*Poole v. Coakley & Williams Constr.*, No. 130, 2011 Md. LEXIS 659 at \*14-15 (Md. Oct. 27, 2011). Appellant appealed this ruling and the resulting grant of summary judgment based on assumption of the risk as well as concerns about grants of summary judgment/dismissal to parties outside of three-years following the incident to the

Maryland Court of Special Appeals. However, the Maryland Court of Appeals intervened prior to the Maryland Court of Special Appeals hearing the case.

In its review, the Court considered and reversed the Montgomery County Circuit Court's grant of summary judgment based on assumption of the risk. In Maryland, establishing a defense of assumption of risk requires a defendant to show that the plaintiff: "(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger." *Id.* at \*21 (citing *ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997)). Here, the issue in dispute was the first element—whether Appellant Poole had knowledge of the risk of slipping and falling as a matter of law. The standard that must be met to achieve this element is an objective standard with a subjective aspect, meaning that a person either "sees, knows, understands, and appreciates" the risk subjectively or the risk is of a nature that an adult of normal intelligence should understand as normal and ordinary risks for the premises/situation. *Id.* at \*27 (quoting Restatement (Second) of Torts §496D cmts. c & d.). *See also C&M Builders*, 22 A.3d at 867, 882 (Md. 2011)("[T]he party must have known and

appreciated the risk either because it is not credible that a *similarly situated person* would not have done so, or because the risk was so obvious that it could not have been encountered unwittingly."); *Schroyer v. McNeal*, 592 A.2d 1119, 1123 (Md. 1991) ("[T]he doctrine of assumption of risk will not be applied [as a matter of law] unless the undisputed evidence and all permissible inferences therefrom *clearly* establish that the risk of danger was *fully* known to and *understood* by the plaintiff") (internal quotations omitted) (emphasis added). The Court indicated through a survey of Maryland case law that grants of summary judgment as a matter of law based on the assumption of the risk objective theory require the danger to be "one that any person in the plaintiff's position *must* have understood, meaning either a foreseeable consequence of engaging in an activity, or an otherwise patent or obvious danger." *Poole, supra*, 2011 Md. LEXIS 659, at \*33.

From this, the Court distinguished recent Maryland cases based on assumption of the risk for situations involving snow and ice. Specifically, case law indicated that "visible snow and ice may be imputed to the plaintiff as a matter of law. *Id.* at \*34-35 (citing *Morgan State Univ. v. Walker*, 919 A.2d 21, 27 (Md. 2006) (involving a plaintiff

who slipped and fell on visibly icy parking lot while visiting her daughter's college); *ADM P'ship, supra*, 702 A.2d at 733 (involving a plaintiff who slipped and fell on a visibly icy walkway while making a delivery at a building owned by the defendants); *Schroyer, supra*, 592 A.2d at 1125-26 (involving a plaintiff who slipped and fell while traversing a visibly icy hotel parking lot); see *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 645, 985 A.2d 156, 171 (2009) (noting "our appellate courts have strictly applied the doctrine of assumption of the risk in suits brought by persons who were injured when they fell on ice that was plainly visible").

After considering the case law, however, the court found the "black ice" situation/incident as unique from other "visible ice" situations. "Black ice," at least for the purposes of this matter, is not something that an adult of normal intelligence should be expected to objectively understand and comprehend, specifically because of its concealed and camouflaged nature. *Id.* at 41-42. Specifically, the Court articulated "[i]n the absence of this level of proof, any determinations as to 'bits and pieces of information' required to achieve a 'critical mass' sufficient to impute knowledge

to a plaintiff, is a puzzle properly put together by the jury." *Id.* at \*25-26. Importantly, though, the Court makes clear that its opinion does not mean that a black ice slip and fall could never be resolved as a matter of law as to assumption of the risk. *Id.* at \*36 n.13. In the matter at hand, the Court of Appeals determines that the Circuit Courts actions improperly stepped over into the providence of the trier of fact, i.e. the jury, based on the record.

In its opinion, the Court also overrules that portion of a holding by the Court of Special Appeals which effectively altered the standard for establishing a risk as a matter of law, by creating/imposing a constructive knowledge standard akin to contributory negligence. *Allen v. Marriott Worldwide Corp.*, 961 A.2d 1141 (Md. Ct. Spec. App. 2008). In articulating the error of the Court of Special Appeals, the Court of Appeals provides:

Notwithstanding the fact that black ice is, by its nature, invisible or difficult to see, the *Allen* Court stated "the path to knowledge is not limited to the sense of sight alone. . . . [k]nowledge springs not only from direct sense perception but from the drawing of inferences from circumstantial evidence. Induction is as worthy a highway to

knowledge as is sensation."

*Id.* at \*43 (quoting *Allen, supra*, 961 A.2d at 1149). The Court overrules the Court of Special Appeals' opinion, "as diminish[ing] the requirement that a plaintiff actually and fully know and understand the risk he or she is confronting and propos[ing] that a plaintiff may be judicially charged with knowledge in a circumstance where he or she should *infer* the existence of a dangerous condition." *Id.* at \*46.

In addition to this major portion of the case, the Court of Appeals ruled on other actions of the Circuit Court for Montgomery County. The Court of Appeals reversed a grant of summary judgment to an impleaded party where there was "sufficient evidence" of the "contingent liability" of the impleaded party to impleading defendant in the event that impleader was found liable to Appellant. *Id.* at \*52 (citing *Harford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 674 A.2d 106, 138 (Md. Ct. Spec. App. 1996), *aff'd*, 695 A.2d 153 (Md. 1997)).

Additionally, and of relatively minor comparative importance, the Court affirmed the dismal/grant of summary judgment for the two parties added after the running of the three-year statute of limitations,

a matter secondary to the primary ruling of the matter.

**Samuel T. Wolf notes that, in light of this decision, attorneys must: (a) always try to establish through discovery that the plaintiff saw the ice, get a description of light shining off of the ice, etc., to show that the plaintiff knew the ice was there; (b) if the plaintiff argues that he/she did not see or otherwise observe the ice before he/she slipped, fully develop how he/she concluded that what he fell on was ice; (c) have the plaintiff acknowledge that he knew ice**

**could have been there; (d) have the plaintiff describe what he/she did to make sure that the path was clear, *i.e.*, whether he/she checked for ice before walking to the area, whether he/she tested the surface with his/her foot to see if it was slippery (this is because the objective test is still applicable for contributory negligence); and (e) attempt to obtain enough from the plaintiff to show that the ice was so undetectable in advance, that the defendant should not reasonably be required to discover it.**