

# MICHIGAN SUPREME COURT



## *Office of Public Information*

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### **NEGLIGENCE – OR PREMISES LIABILITY? NATURE OF CLAIM AT ISSUE IN SLIP AND FALL CASE MICHIGAN SUPREME COURT WILL HEAR ON APRIL 15**

**Berrien County high school students will attend argument, study case and meet Michigan Supreme Court justices as part of “Court Community Connections” program**

LANSING, MI, March 31, 2010 – A man washing his car on a cold March day at a Genesee County car wash slipped and fell, breaking a wrist. Is his claim against the car wash one for negligence – or is it a premises liability claim that could be barred under the “open and obvious danger” doctrine? That’s the question that the [Michigan Supreme Court](#) will consider when it hears oral argument in [Kachudas v Invaders Self Auto Wash, Inc.](#) on April 15 at the Mendel Center on the campus of [Lake Michigan College](#).

The plaintiff in *Kachudas* sued the car wash contending that its owner was negligent. A heating system, designed to keep ice from forming on the car wash floor, was not working when the plaintiff began washing his car. The plaintiff claims that, although the owner knew that the heating system was malfunctioning at the time, he failed to warn the public or close the car wash. But a circuit court judge found that the case was not about negligence, but about premises liability, specifically whether a dangerous condition existed at the car wash. Under the “open and obvious danger” doctrine, the car wash was not liable because the hazards of an icy floor on a cold day should have been “open and obvious” to the plaintiff, the circuit court concluded in dismissing the case. But the Court of Appeals reversed, with two of the three judges holding that the case was really about the car wash owner’s conduct, not about a condition on the property. The Supreme Court has ordered oral argument in the case.

While the Supreme Court normally hears oral argument at the [Michigan Hall of Justice](#) in Lansing, it also holds hearings at communities throughout Michigan as part of its “Court Community Connection” program, which is aimed principally at helping high school students have a better understanding of Michigan’s judicial branch. The Berrien County event is the sixth oral argument that the Court has held off-site as part of “Court Community Connections.”

Students from Berrien County high schools will attend the 1 p.m. session at the Mendel Center Auditorium on the campus of [Lake Michigan College](#). Students and teachers will study the case in advance with help from local attorneys. Following the argument, the students will meet with attorneys in the case for a debriefing.

[Chief Justice Marilyn Kelly](#) thanked the organizers. “Many Berrien County groups have helped make this educational opportunity possible,” she said. “The Court thanks Lake Michigan College, Berrien County judges and staff, Berrien County Bar Association, Berrien County

Regional Education Service Agency, Berrien Community Foundation, and community educators and students for supporting this event. My colleagues and I are honored to hear this case in Berrien's beautiful lakeside community."

Berrien County 2<sup>nd</sup> Judicial Circuit Chief Judge Alfred Butzbaugh said the opportunity for students to experience the appellate courts first-hand will help them better understand Michigan's judicial system. "Most citizens have some understanding of what goes on in a trial court; fewer understand the appellate courts," he said. "By inviting the Michigan Supreme Court to Berrien County, we hope students, teachers, parents, and community alike will have a better grasp of the courts and the justice system in everyday life."

***Please note:** The summary that follows is a brief account of the case and may not reflect the way in which some or all of the Court's seven Justices view the case. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of the case. Briefs are available on the Supreme Court's "One Court of Justice" web site at [http://www.courts.michigan.gov/supremecourt/Clerk/MSC\\_orals.htm](http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm). For further details about the case, please contact the attorneys.*

**KACHUDAS v INVADERS SELF AUTO WASH, INC. ([case no. 139794](#))**

**Attorney for plaintiff Paul Kachudas:** Edward B. Davison/(810) 234-3633

**Attorney for defendant Invaders Self Auto Wash, Inc.:** Nicolette S. Zachary/(248) 593-1440

**Trial Court:** Genesee County Circuit Court

**At issue:** On a cold March day in Michigan, the plaintiff slipped and fell at a car wash. The car wash was equipped with a heating system for the floor, but it had not been running when the accident happened. The plaintiff sued the car wash claiming that its owner was negligent. Although the owner knew that the heating system was malfunctioning at the time, he failed to warn the public or close the car wash, the plaintiff maintained. But a circuit court judge found that the case was not about negligence, but about premises liability, specifically whether a dangerous condition existed at the car wash. Under the "open and obvious danger" doctrine, the car wash was not liable because the hazards of an icy floor on a cold day should have been "open and obvious" to the plaintiff, the circuit court concluded in dismissing the case. But the Court of Appeals reversed, with two of the three judges holding that the case was really about the car wash owner's conduct, not about a condition on the property. Is the plaintiff's claim one for negligence, as he argues, or is it a premises liability claim that could be barred under the "open and obvious" doctrine?

**Background:** Paul Kachudas slipped and fell at a car wash in March 2005. The car wash had a heating system to keep ice from forming on the floors of the car wash bays. A temperature control inside the car wash office was set to about 36 degrees, so that the heating system would run any time the air temperature fell to 36 degrees or lower. On the day of the accident, the temperature was between 11 and 24 degrees.

Sometime shortly before Kachudas fell, car wash owner Richard Weishuhn inspected the four bays at the car wash; he noticed ice forming on the floors of bays one and two, while three and four did not have ice. Upon checking the breaker connected to the heating system pump, Weishuhn found that the breaker was off; he reset it, after which the pump restarted. Meanwhile, Kachudas arrived at the car wash and began washing his car in bay three.

Weishuhn started taking orange cones to place them in front of the bays, when a friend of

his arrived and began talking with him. During this interruption, which lasted less than five minutes, Kachudas fell in bay three, breaking his wrist. He then went to the car wash office and told Weishuhn that he, Kachudas, had just fallen. Weishuhn apologized, saying that the “heating system on that bay is not working.” Weishuhn went to bay three to move Kachudas’ car; according to Weishuhn, he noticed that there was ice on the car, but the floor looked wet to him rather than icy. But because the floor felt slippery as he walked on it, Weishuhn concluded that there was ice on the floor.

Kachudas sued the car wash. In his complaint, Kachudas alleged that the heating system was malfunctioning at the time of his accident and that Weishuhn knew this, but failed to warn the public or close the car wash. While the car wash disputed that there was any ice on the bay floor, the parties agreed that, if ice did form in that bay, it was created when Kachudas sprayed his car with water. Kachudas testified in his deposition that he expected the car wash to have an in-floor heating system because a friend, who had opened the first car wash in the county, had told Kachudas that his car wash had such a system because of Michigan’s cold winters.

The car wash’s attorney brought a motion for summary disposition, seeking to have Kachudas’ case dismissed. Because the case involved an allegedly dangerous condition at the car wash, the claim was one for premises liability, the car wash’s counsel argued. Under the “open and obvious danger” doctrine, which applies to premises liability lawsuits, a plaintiff may not recover for injuries caused by a dangerous condition which was “open and obvious” to a reasonably careful person. Kachudas’ attorney argued that the case was not about premises liability, but Weishuhn’s alleged negligence. But the circuit court agreed with the car wash’s position and dismissed the case, finding that the icy floors were an “open and obvious” danger at a car wash in winter.

In an unpublished per curiam opinion dated September 1, 2009, the Court of Appeals reversed and remanded, sending the case back to the circuit court for further proceedings. Two of the judges on the three-judge appellate panel concluded that Kachudas’ case “is not based on the alleged existence of a dangerous condition on the premises ... [but] concerning *conduct* that sounds in negligence.” The third judge concurred that the lower court’s decision should be reversed, but for a different reason: “In my view, plaintiff pleaded a premises liability claim but that claim should not have been dismissed because there was no evidence of any open and obvious danger for a reasonable person to casually observe.”

Counsel for the car wash has appealed to the Michigan Supreme Court. In an order dated January 22, 2010, the Supreme Court directed the parties to participate in oral argument “on whether [the Court should] grant the application or take other preemptory action.”

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