Catherine Deter, and we will not do so.

IV. DECREE NISI.

NOW, February 10, 1992, Catherine W. Deter is declared to be an incompetent person pursuant to the provisions of the Probate, Estate and Fiduciaries Code.

It appearing that the incompetent executed a durable power-of-attorney while still competent and that there is no need at present for the appointment of a guardian, the Court declines to appoint a guardian of the Estate or of the Person of the said incompetent.

This decree shall become absolute unless exeptions are filed within the time provided by Pa. O.C.R. 7.1

ALEXANDER, ET AL. V. CROWN AMERICAN CORPORATION, ETC., ET AL., C.P. Franklin County Branch, Civil Action, A.D. 1991-140

Slip and Fall - Ice - Summary Judgment

1. In a slip and fall case involving icy conditions, a plaintiff no longer has to show the accumulation of ice into ridges or elevations in order to recover.
2. The question of whether an ice patch is an obvious risk is for the jury and a summary judgment is inappropriate.

William P. Douglas, Esquire, Attorney for Plaintiff
William A. Addams, Esquire, Attorney for Crown American Corporation
Kevin E. Osborne, Esquire, Attorney for Charles E. Brake Co.

OPINION AND ORDER

WALKER, J., February 12, 1992:

FINDINGS OF FACT

On April 4, 1991, the plaintiffs, Steven S. and Marilyn K. Alexander, filed suit against the defendants, Crown American Corporation t/a/d/b/a Chambersburg Mall ("Chambersburg Mall") and Charles E. Brake Co. ("Brake"). The complaint alleged that on March 9, 1989,[1] while walking on the Chambersburg Mall parking lot, Mr. Alexander slipped and fell on an accumulaton of ice. The complaint further alleged that this fall was a direct result of the defendant's negligence in maintaining the parking lot free of snow.

On April 17, 1991, the defendants filed an answer.

On December 12, 1991, defendant Brake filed a motion for summary judgment.

On December 16, 1991, defendant Chambersburg Mall also filed a motion for summary judgment. These motions were scheduled for argument on February 6, 1992.

On February 6, 1992, argument was heard on the defendant's motions. William Douglas - counsel for the plaintiffs, William Addams - counsel for defendant Chambersburg Mall, and Kevin Osborne - counsel for defendant Brake were all in attendance. In addition, briefs from the parties were received prior to argument. Thus, this matter is ripe for determination.

DISCUSSION

[1].Interestingly enough, the briefs for both defendants assert that the accident occurred on March 9, *1991*. To make matters even more interesting, at one point even plaintiffs' complaint asserts that the accident occurred on March 9, 1991. *See* complaint, paragraph 7.

This is of course impossible. The plaintiffs filed a praecipe for issuance of writ of summons on March 8, 1991. It was received by the sheriff's department for service on the same day. Therefore, unless counsel for the plaintiffs is omniscient, the accident could not have occurred on March 9, 1991.

Further review by this court establishes that the accident in question did in fact occur on March 9, 1989. *See* complaint paragraph 18; deposition of Steven Alexander, pages 22,23,26.

A motion for summary judgment may be granted only when the moving party is entitled to judgment as a matter of law. *Mariscotti v. Tinari,* 335 Pa.Super. 599, 485 A.2d 56 (1984), *Coleman v. City of Philadelphia,* 131 Pa.Commw. 605, 571 A.2d 528 (1990). The defendants, citing *Rinaldi v. Levine,* 406 Pa. 74, 176 A.2d 623 (1962), and *Roland v. Kravco, Inc.* 355 Pa.Super. 493, 513 A.2d 1029, *allocatur denied* 535 A.2d 1058 (1986), maintain that Pennsylvania law does not allow recovery for a plaintiff in a slip and fall case involving icy conditions unless the plaintiff can show that the snow or ice in question had accumulated into ridges or elevations. The plaintiffs, citing *Ferencz v. Milie,* 517 Pa. 141, 535 A.2d 59 (1987), maintain that the lack of evidence of snow or ice ridges or snow or ice elevations does not bar their claim.

The court finds that *Milie* is determinative of the issue at hand. In *Milie,* the plaintiff, Florence Ferencz, had been injured when she slipped and fell on a patch of ice on a parking lot ramp maintained by Monsour Hospital and Clinic. After being released by the hospital, she retained the defendant, Attorney Robert Milie, to take whatever action was necessry to recover damages for her injuries.

Unfortunately, defendant Milie allowed the statute of limitations to lapse without filing suit. The plaintiff then filed a suit against the defendant alleging professional negligence and malpractice.

The Court of Common Pleas granted a compulsory nonsuit for the defendant. It held, correctly, that in order for the plaintiff to succeed in her professional negligence and malpractice suit against the defendant, she must show by a preponderance of the evidence that she would have recorded a judgment on the underlying cause of action. The Common Pleas Court held that the plaintiff had not established that the defendant had actual or constructive notice of the icy conditions in the parking lot. Since notice is an integral part of the plaintiff's underlying cause of action, the plaintiff's failure to provide evidence of such a notice defeated her underlying and instant claims.

On appeal the Superior Court affirmed but on a different

theory. They held that the plaintiff had established that the icy patch was obvious. Therefore, the plainfiff's underlying claim fails because the hospital would have had no duty to remove an obvious risk.

The Supreme Court, noting the incongruity of the theories relied on by the courts below, reversed and remanded. They held:

> On the basis of the competent evidence in the record, and under the circumstances, we think that Appellant presented more than enough evidence to go to the jury on the underlying claim against the hospital and hence avoid a non-suit in this case. A jury could reasonably have inferred from the testimony of Donna Ferencz alone that various patches of ice were present and discoverable in the general parking lot area at this time, both in the evening and early morning hours at least, and that hospital employees, once they had already undertaken to plow and clear the lot, knew or, in the exercise of reasonable care, should have known, of the ice patches and, hence, of a generally dangerous set of conditions. A jury would be further entitled to conclude that once it was aware (or should have been aware) of the existence of such ice patches, which were not obvious and avoidable, the hospital had a duty to exercise reasonable care to search out the ice patches, and spread salt or ashes thereon.

Milie, 517 Pa. 150,. 535 A.2d 64.

This court notes that there is no mention of icy ridges or elevations in *Milie.* Indeed, plaintiff's daughter testified that the ice patch in question was so smooth and transparent that it was only visible when she kneeled beside her fallen mother. *Milie,* 517 Pa. 147, 535 A.2d 63. This court cona only conclude, therefore, that the presence of ice ridges or revelations is no longer a requirement for slip-and-fall suits.[2]

[2] Defendants argue that *Milie,* is "bad" precedent, not in a legal sense, but because the Pennsylvania Supreme Court was ignoring its own precedents in order to "punish" a particularly bad defendant. They urge this court to ignore *Milie,* and rely on *Kravco* and *Levine* instead. While this court agrees with the defendants' interpretation of the underlying rationale of *Milie,* this court is not free to ignore it. This court's function is not to make law but to apply it. While it may disagree with the result in *Milie,* this court is duty-bound to follow it.

Futher, while *Milie* may prevent the ordering of summary judgment against the plaintiffs, they by no means have an easy task at trial. As this

Defendants' only other argument is that they are not liable because the dangerous condition complained of was obvious. The court feels that whether the particular ice patch in question was obvious is a question for the jury and thus summary judgment would be inappropriate.

CONCLUSION

Since the Pennsylvania Supreme Court in *Milie*, did not require proof of icy ridges or elevations for a plaintiff to recover in a slip-and-fall suit, the lack of ice ridges or elevations in the instant case does not defeat the plaintiffs' claim. Summary judgment for the defendants, based on the plaintiffs' inability to assert that they slipped and fell on an icy ridge or elevation, is therefore inappropriate.

The question of whether the ice patch plaintiff Steven Alexander slipped and fell on was an obvious risk is one for the jury, and thus summary judgment on that question would be inappropriate.

ORDER OF COURT

February 12, 1992, defendants' motions for summary judgment are denied.

court reads *Milie*, the plaintiffs at trial must show that the ice patch in question was known or discoverable by the defendants and, at the same time, not known or obvious to the plainiff. *See Berman v. Radnor Rolls, Inc.*, 374 Pa.Super. 118, 133, 542 A.2d 525, 532 (1988).

CHARLES AND WIFE VS. REEDER AND WIFE, C.P. Fulton County Branch, No. 162 of 1990 C.

Landlocked Property - Easment by Necessity
Easement by Prescription - Tacking of Adverse Use

1. An easement by necessity required both that a tract is completely landlocked and no other means of access exists and at some point in time the plainitff's and defendant's property was commonly owned.
2. Use is continuous where property is used for recreational purposes, six or eight times a year for only a few hours at a time.
3. To tack adverse uses when creating a prescriptive easement, there is no requirement that a predecessor in title actually convey the easement to a successor.
4. Unlike adverse possession claims to fee simple title, easements ran with the dominant estate and require no deed or writing to support them.

Stanley J. Kerlin, Esq., Attorney for the Plaintiffs
Ira Weinstock, Esq., Attorney for the Defendants

OPINION AND ORDER

WALKER, J., March 28, 1991:

This action arose out of a dispute between two adjacent landowners concerning the existence of a right-of-way from the plaintiffs' landlocked property across the defendants' land to a public road. This court has considered all of the evidence and finds that plaintiffs do not possess a right-of-way by necessity. However, plaintiffs have obtained a prescriptive easement and may continue to use the roadway for access to their land.

Joseph M. Charles and Helen D. Charles ("plaintiffs") are the owners of a 35-acre tract of land located in Dublin Township, Fulton County. The land has no access to a public highway and is surrounded by neighboring properties. The plaintiffs purchased the land in October, 1969 from Penn Seventy, Inc., which had acquired the tract from Lester Detwiler in April, 1969. Mr. Detwiler and his family had resided in a farmhouse on the property since purchasing it from the Chester C. Truax family in 1954. The Truaxes had acquired the property by deed from