Living on the Edge: Court of Appeals Divided Over Whether Landscaping Edging is Open and Obvious

By: Drew W. Broaddus **March 3, 2016**

SECREST WARDLE NOTES

The Supreme Court has described the open and obvious defense "as an integral part of the definition of" a property owner's duty, *Lugo,* 464 Mich at 516.

"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 it upon casual inspection." *Hoffner v Lanctoe,* 492 Mich 450, 461 (2012).

When considering whether a defect is open and obvious, courts must consider the "objective nature of the condition of the premises at issue." *Lugo,* 464 Mich at 524.

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The so-called "open and obvious" doctrine has – in the fifteen years since *Lugo v Ameritech Corp,* 464 Mich 512 (2001) – become integral to the defense of seemingly every premises liability suit. *Lugo* states that a property owner is under no duty to protect an "invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id.* Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover, upon casual inspection. Although some form of the open and obvious defense had existed under Michigan law for decades, *Lugo* made the open and obviousness of a hazard determinative of the defendant's duty – an issue of law decided by a judge – whereas it had previously related to the plaintiff's contributory or comparative negligence – something typically argued before a jury. In other words, *Lugo* significantly expanded the class of slip and fall cases that may be dismissed via motion. In particular, cases involving snow and ice have frequently been subject to defense motions brought under *Lugo.*[1]

In *Held v North Shore Condo Ass'n,* unpublished opinion per curiam of the Court of Appeals, issued February 4, 2016 (Docket No. 321786), Judges Stephen Borrello, Jane Beckering, and Patrick Meter were tasked with deciding whether the open and obvious doctrine barred the claim of a plaintiff who tripped over landscaping edging in broad daylight, with no rain, ice or snow. On March 18, 2011, the plaintiff went to defendant's

[1] See *Boundaries,* January 29, 2016, "A rose by any other name….: Court of Appeals illustrates that the open and obvious doctrine cannot be avoided by simply labeling a premises liability claim one for 'ordinary negligence,'" by Drew Broaddus.

condominium complex to turn off a security alarm for a cleaning person. Upon her arrival, plaintiff parked her car in the driveway, walked up the sidewalk to the door and entered the condominium. After turning off the alarm, plaintiff exited the condominium and walked back along the sidewalk toward her vehicle. In referencing a photograph of the sidewalk, plaintiff showed that the sidewalk curves away from the door of the condominium and toward the adjacent driveway. Plaintiff explained that when she reached the curve, she tripped and fell and suffered numerous injuries. Plaintiff believed that she tripped on landscape edging abutting the sidewalk because there was nothing else to trip on. The edging lined both sides of the sidewalk, was made of plastic, and protruded about 2-1/8 inches above the top of the sidewalk. The edging served to contain mulch.

Plaintiff filed suit under a premises liability theory, and North Shore moved for summary disposition, arguing that the condition was open and obvious. North Shore compared the edging to a pothole and an unmarked step, calling these conditions "common" and explaining that such common and "ordinary occurrence[s]" should be observed and carefully navigated by a "reasonably prudent person." *Held*, unpub op at 2. Plaintiff argued that there was an issue of material fact as to whether the edging was open and obvious because of the edging's color, profile, and height. *Id.* Plaintiff argued that the "edging blended in with the surrounding ground." *Id.* The trial court denied North Shore's motion, and the Court of Appeals denied North Shore's interlocutory application. But North Shore applied for leave to the Michigan Supreme Court, and the Supreme Court sent the case back to the Court of Appeals for consideration "as on leave granted." *Held v North Shore Condo Ass'n,* 497 Mich 1026 (2015).

On remand from the Supreme Court, the Court of Appeals majority (Judges Borrello and Beckering) found that the plaintiff "submitted evidence that would allow reasonable minds to differ as to whether the edging was observable to the average observer upon casual inspection," in the form of "photographs that showed that the edging was similar in color to the surrounding mulch and that the edging was of a low-profile, which would allow a rational trier of fact to conclude that it was not easily observed." *Held*, unpub op at 4. The majority also cited reports from plaintiff's proffered experts which stated that "the edging likely would not have been discovered upon casual inspection." *Id.* "Both experts concluded that the color similarity between the edging and the surrounding mulch may have made the edging difficult to discover." *Id.* While North Shore (represented by Secrest Wardle on appeal) argued that the plaintiff's deposition testimony confirmed the open and obvious nature of the condition, the Court of Appeals majority found that the plaintiff's testimony was inconclusive on this point. *Id.* at 4-5.

The majority also rejected "North Shore's argument that expert reports may not be considered when answering the legal question of whether a condition presents an open and obvious danger…." *Id.* at 5. North Shore argued that because the open and obvious defense is "an integral part of the definition" of a property owner's duty, *Lugo*, 464 Mich at 516, and experts may not testify as to the existence of a duty (as duty is a question of law for the court), *Burnett v Bruner*, 247 Mich App 365, 368 (2001), the experts' reports should not have been considered "substantively admissible evidence" that could defeat a motion under MCR 2.116(C)(10). But the Court of Appeals majority found that "neither expert offered a legal conclusion regarding whether North Shore owed a duty to plaintiff. Rather, the reports focused on the nature of the condition on the land, which was relevant to whether the condition was observable upon casual inspection." *Id.*

Judge Meter wrote a short dissent, noting that he would have reversed, and remanded for entry of an order granting North Shore's motion for summary disposition, because:

> As the old saying goes, "a picture is worth a thousand words." I have reviewed the photographs of the area where plaintiff fell, and despite the opinions of plaintiff's experts, I conclude that the plastic landscape edging was open and obvious. The photographs reveal a distinct color difference between the edging and the mulch. In addition, the incident took place during the day

and there was no ice or snow. … Plaintiff only bolstered this conclusion when she testified that "[i]f it was there, I must have seen it."

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