"Visual obstructions" that prevent a visitor from seeing a dangerous condition may themselves be open and obvious

By: Drew W. Broaddus **March 29, 2016**

SECREST WARDLE NOTES

When a plaintiff claims to have been hurt by a condition of the land, the claim sounds *exclusively* in premises liability, and he or she must overcome the open and obvious defense.

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. Therefore, it makes sense that courts will not allow plaintiffs to avoid the defense through mere pleading maneuvers.

Holcomb tells us that even if the driveway was not visible, the trees undoubtedly were and the fact that the Plaintiff could not see around them was itself an open and obvious condition. In other words, a reasonable person of ordinary intelligence may not have known there was a driveway between the trees, but they would have known that there was a "blind spot." This is analogous to the way the Court of Appeals has treated darkness; panels have held that a reasonable person would appreciate the risk of entering a dark, unfamiliar room or stairway. See, for example, *Schlecht v Doom*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2012 (Docket No. 304446).

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The so-called "open and obvious" doctrine has, 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. While this was not an entirely new concept, *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. *Lugo* therefore significantly expanded the class of slip and fall cases that may be dismissed via motion.

However, the open and obvious defense is a premises liability concept; it does not apply to claims of ordinary negligence. *Laier v Kitchen,* 266 Mich App 482, 494 (2005). On the other hand, the Supreme Court has clarified that when the plaintiff was allegedly injured by a condition of the land, his claim sounds *exclusively* in premises liability, and he must overcome the open and obvious defense. *Compau v Pioneer Res Co, LLC,* 498 Mich 928 (2015). Nuisance theories can also avoid the open and obvious defense, but only in very unusual circumstances. *Holcomb v Moose Traxx Grill & Bar,* unpublished opinion per curiam of the Court of Appeals, issued March 1, 2016, p 9 (No. 325410).

The Court of Appeals recently applied these principles in *Holcomb.* The Plaintiff in *Holcomb* was riding a bicycle on the sidewalk near a bar at about 8:00 p.m. on an early spring evening. As the Plaintiff approached the restaurant's driveway from the sidewalk, an intoxicated driver left the bar's parking lot. The two collided, and the Plaintiff suffered serious injuries. The Plaintiff initially sued the driver and the bar under the Dramshop Act. The driver testified that because of "two overgrown trees" planted at the intersection of the sidewalk and the driveway, he "could not see the sidewalk." *Holcomb,* unpub op at 1. This prompted the Plaintiff to amend his dramshop complaint to assert a premises liability claim against the bar, under the theory that "the trees dangerously obstructed the view between the sidewalk and driveway." *Id.*

The bar moved for summary disposition of the premises liability claim, based in part on the Plaintiff's testimony that he had to swerve to the right side of the sidewalk to avoid the trees, and as a result was unable to see the vehicle until it was too late. Plaintiff also proffered photographs of the driveway which showed the trees. This, according to the bar, established that the "obstruction of view was an open and obvious condition." *Id.* at 2. Plaintiff responded that "such a visual obstruction was by its nature not open and obvious." *Id*. Plaintiff further argued that he had a viable claim for "ordinary negligence" based on the bar's failure "to maintain the trees to ensure a clear sightline as required by city ordinance and state statute." *Id.* The bar, in turn, contended that it owed no duty to the Plaintiff to maintain the land in a safe condition; its only duty was to warn of known dangers of which the Plaintiff would not be reasonably aware, because the Plaintiff was merely a licensee on the property (as opposed to an invitee).[1]

The trial court agreed with the bar, finding that the Plaintiff was a licensee, and the reduced duty nullified any potential ordinary negligence claim. In any event, the trial court held that the claim sounded in premises liability alone, and no premises liability duty was owed because the visual obstruction was open and obvious. The Court of Appeals affirmed.

First, the panel rejected the Plaintiff's attempt to re-characterize his claim as one for ordinary negligence. The majority (one judge concurred in the result only) found that the Plaintiff's "claim is based on a condition of the land" and "was not converted into one for ordinary negligence simply because [the Plaintiff] alleged that [the bar] created the condition by failing to adequately maintain the trees." *Holcomb,* unpub op at 4.

[1] In a premises liability suit, the duty of care owed by the property owner or possessor depends upon the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596 (2000). "Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee." *Id.* Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. *Id.*

The panel then found that the condition was open and obvious. This entailed a discussion of the Plaintiff's status on the land, and the panel agreed with the trial court in this regard. "A person walking down a public sidewalk is considered to be 'on' the adjacent landowner's property. If that person is on the sidewalk for a non-business purpose, they are a licensee." *Id.* at 5. After confirming that the open and obvious doctrine applies to licensees much the same way it does to invitees, the panel had little trouble determining that the visual obstruction created by the trees was open and obvious as a matter of law. The panel also rejected the Plaintiff's assertion that, although open and obvious, the trees presented a "special aspect." An "obstruction caused by trees standing next to a business driveway is not unusual or uncommon. Nor does such an obstruction rise to the level of danger posed by an unguarded thirty foot deep pit in the middle of a parking lot, or an unrailed second-story balcony at the only entrance to a residential apartment. It also does not present a uniquely high likelihood of harm or severity of harm, such as that caused by an extremely heavy bale of hay left suspended … over an area in which people were working." *Id.* at 6 (citations omitted).

Various ordinances and statutes cited by the Plaintiff likewise did not avoid the open and obvious defense. *Holcomb*, unpub op at 5-6. The majority found that a statute cited by Plaintiff simply did not apply factually, while a "violation of an ordinance is not negligence *per se*, but only evidence of negligence. … If no duty is owed by the defendant to the plaintiff, an ordinance violation committed by the defendant is not actionable as negligence." *Id.* at 6 (citations omitted). Since there is no duty to protect against open and obvious hazards, the alleged ordinance violations were not relevant (evidence of negligence presupposes a duty).

Finally, the majority rejected the Plaintiff's attempt to avoid the open and obvious doctrine by amending his complaint to assert a public nuisance theory. *Id.* at 7-8. Apart from being untimely, any such amendment would have been futile because in order to be a public nuisance, the condition must create a "significant interference with the public safety." *Id.* at 9. The condition must interfere with the public's use of the sidewalk in general, not just this particular Plaintiff at this particular time. *Id.* "If every land condition that interferes in any small way with public safety could be considered a public nuisance, the open and obvious doctrine would be swallowed whole." *Id.*

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Please contact Drew W. Broaddus at

dbroaddus@secrestwardle.com

or 616-272-7966

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SECREST WARDLE

Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editors
Linda Willemsen
Sandie Vertel

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