"Effectively unavoidable": An effective way to avoid the Open and Obvious Doctrine

By: Drew W. Broaddus **March 31, 2016**

SECREST WARDLE NOTES

Lymon underscores – in a precedentially binding decision – that property owners can face liability even for open and obvious hazards if "special aspects exist" that present an "unreasonable risk of harm."

In recent years, the Michigan Supreme Court has been extremely pro-defense when it comes to the open and obvious doctrine, particularly in cases involving snow and ice. See, for example, *Compau v Pioneer Res Co, LLC,* 498 Mich 928 (2015); *Stimpson v GFI Mgmt Servs, Inc,* 498 Mich 927 (2015); *Bredow v Land & Co,* 498 Mich 890 (2015); *Cole v Henry Ford Health System,* 497 Mich 881 (2014). Therefore, it will be interesting to see whether the defendants file a leave application in *Lymon.*

The *Lymon* holding is arguably at odds with *Bullard v Oakwood Annapolis Hosp,* 308 Mich App 403, 412 (2014) ("The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable."). As a published case, *Bullard* had to be followed unless it was factually distinguishable, but the *Lymon* opinion does not mention *Bullard*.

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Attorneys who represent businesses and their insurers have, in the past 15 years, become very familiar with the "Open and Obvious Doctrine," as articulated in *Lugo v Ameritech Corp,* 464 Mich 512 (2001). Cases involving snow and ice have, in particular, frequently been subject to defense motions brought under *Lugo*. See *Lymon v Freedland.* __ Mich App __; __ NW2d__ (2016) (Docket No. 323926); slip op at 7. *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." Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover, upon casual inspection. *Lugo* recognized an exception to the open and obvious doctrine, however, for conditions that present "special aspects" – meaning, hazards that are "effectively unavoidable" or are "unreasonably dangerous." 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.

Slaughter v Blarney Castle Oil, 281 Mich App 474 (2008) noted that generally, "the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." However, *Robertson v Blue Water Oil*, 268 Mich App 588 (2005) found that even an open and obvious ice hazard may be effectively avoidable (and summary disposition may be denied) if there is no alternative, ice-free route. The Supreme Court dealt with these issues in *Hoffner v Lanctoe*, 492 Mich 450 (2012), noting that an "effectively unavoidable condition must be an inherently dangerous hazard that a person is inescapably required to confront," and holding that an accumulation of ice at the entrance of a fitness center *was not* "unavoidable" because the gym member did not need to work out at that particular time. The *Hoffner* Court emphasized that "special aspects" are a limited exception to the open and obvious doctrine.

But recently, the Court of Appeals distinguished *Hoffner* in *Lymon*, a published decision that is precedentially binding under MCR 7.215(J)(1). In *Lymon*, the Plaintiff was a home health care aide providing assistance to an 84 year old cognitively impaired individual in the Defendants' home. The Defendants' home was located on a hill and had two levels. A steep asphalt driveway located to the right of the home led to a two-stall attached garage. The garage had a door that provided access to the home and the lower level of the home where the patient stayed. The health care aides entered and exited the home through the garage. On January 1, 2013, the Plaintiff worked at the Defendants' home overnight and had difficulty walking down the driveway the following morning, due to "slippery slush." It snowed that day and the two days that followed (1/3/13 and 1/4/13). Plaintiff returned to the home on the 4th at about 6:00 p.m. It was dark, but Plaintiff was able to see that the driveway was "by far" in worse shape than it had been two days prior. The driveway was covered in snow with ice build-up underneath. Plaintiff testified that she could tell the driveway and the yard apart, but she could not walk on the yard because it was on an incline, and stated that the only way it could be safely traversed was "maybe with ski poles." Plaintiff parked on the street (because her car had previously "bottomed out" on the inclined driveway) and proceeded to walk up the driveway toward the home. About half way up the drive, the Plaintiff slipped and fell, fracturing her tibia and fibula.

The homeowners argued that the slippery condition of the driveway was open and obvious and did not present any special aspects. More specifically, the homeowners argued that "snow and ice cannot constitute an unreasonable risk of severe injury or death. In addition … the danger was not effectively unavoidable where plaintiff could have taken a different route to the house by walking on the snow-covered yard." *Lymon*, __ Mich App at __; slip op at 3. Plaintiff responded, arguing that her claim was not barred by the open and obvious doctrine because there were special aspects; specifically, "plaintiff argued that the driveway presented an unreasonable risk of severe injury or death where the driveway was very steep and covered in ice." *Id.* at 4. Plaintiff also argued "that the danger was effectively unavoidable … [because] her employment compelled her to go into the house and there was no safe path to the house where the snow-covered area adjacent to the driveway was dangerous and presented uncovered risks. Plaintiff maintained that she was presented with two perilous paths to the house and therefore the danger was unavoidable." *Id.*

The trial court agreed with the Plaintiff that the condition was effectively unavoidable, and the Court of Appeals affirmed. In reaching this conclusion, the panel first noted that there are two kinds of special aspects: (1) "when the danger is unreasonably dangerous" or (2) "when the danger is effectively unavoidable." *Lymon*, __ Mich App at __; slip op at 6. "Although slippery conditions coupled with the nature of the sloped driveway presented unsafe conditions, our Supreme Court has set an extraordinarily high bar for a condition to … present a substantial risk of death or severe injury." *Id.* at 7. "Based on this heightened standard, courts have repeatedly held that ice and snow generally do not meet this threshold." *Id.* But the panel found that the condition was "effectively unavoidable," as there was a question of fact regarding whether the Plaintiff was "compelled to confront the hazardous risk posed by the snowy and icy conditions at the Freedland residence." *Id*. at 9. "Unlike the plaintiff in *Hoffner*, here, a reasonable juror could conclude that plaintiff did not have a choice as to whether to confront the icy conditions." *Id*. "As a home health care aide, plaintiff did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease." *Id.*[1] "Plaintiff did not confront the hazard merely because she desired to participate in a recreational activity, but rather, a rational juror could conclude that she was compelled by extenuating circumstances and had no choice but to traverse the risk." *Id.* "[A]ll routes to the home were covered in ice and snow. Plaintiff was faced with two open and obvious hazards that posed a danger to her safety." *Id.*

[1] The opinion indicates that the Plaintiff was relieving another home health care aide, who in fact returned and covered the Plaintiff's shift after the injury rendered the Plaintiff unable to work. *Lymon*, __ Mich App at __; slip op at 2-3. So the panel's suggestion that Plaintiff's only other option was to "abandon her patient" may not be entirely accurate.

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