

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Parking Lot Pothole In Dimly Lit Area Was Open And Obvious

By Todd M. Rowe

In *Hernandez v. Taylor Commons Ltd.*, unpublished decision of the Michigan Court of Appeals, Plaintiff stepped in a pothole in the parking lot of Defendants' grocery store and twisted his left ankle while making a delivery. Plaintiff was stepping out of his delivery truck while carrying "a lot of product" at the time. Plaintiff filed a premises liability suit alleging negligence and asserting he twisted his ankle and suffered an injury as a result of stepping in the pothole.

Plaintiff admitted in his deposition that he had traversed the area with the pothole two or three times on the morning of the accident without incident. Plaintiff also testified that he had made numerous deliveries to the store prior to the accident, he had previously complained to Defendants' employees about the "potholed" condition of the parking lot, and that he was simply in a hurry on the morning in question and was not paying attention to where he was walking.

Plaintiff argued that the pothole was not open and obvious because it was dark outside at the time of the delivery. One of Defendants' employees testified that there was ample light to see the pothole as a number of artificial lights were located in the parking lot and the sun had risen by the time Plaintiff fell. Plaintiff also argued that the pothole possessed special circumstances because delivery people had to enter the store from a portion of the parking lot that was covered with potholes. Plaintiff took the position that the potholes were unavoidable; therefore, the open and obvious defense was inapplicable.

SECRET WARDLE NOTES:

Generally, a premises owner owes a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by hazards on the property. However, Courts require invitees to take reasonable precautions for their own safety, such as avoiding open and obvious hazards. As this case demonstrates, the invitee was not forced to encounter the pothole and risk injury; therefore, the open and obvious doctrine was applicable. The Court of Appeals distinguished between the general area where deliveries were made (which was unavoidable) and the pothole that Plaintiff tripped in (which was avoidable).

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The trial court granted Defendants' motion for summary disposition based on the open and obvious defense, finding the pothole was avoidable and there was no evidence to establish the lighting was insufficient in the delivery area.

Relying in part upon the Supreme Court's ruling in *Lugo v. Ameritech Corp.* that potholes in pavement are an "everyday occurrence", the Court of Appeals upheld the dismissal. The Court of Appeals rejected Plaintiff's argument that the open and obvious defense was inapplicable because the pothole was unavoidable to those making deliveries at Defendants' grocery store. Instead, the Court of Appeals found the pothole was avoidable as evidenced by the hundreds of occasions where Plaintiff and other delivery people traversed the area without incident. The Court of Appeals also rejected Plaintiff's argument that the open and obvious doctrine was inapplicable because there was insufficient lighting in the parking lot. First, the Court held that the lighting in the parking lot was irrelevant as the Plaintiff admitted to not paying attention as he descended from his truck. Second, the Court held that there was no evidence that the parking lot had insufficient light. Finally, Plaintiff admitted knowledge of the potholes in the parking lot prior to his accident; therefore, he "should have been more vigilant especially if the lighting was limited."

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