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Another open and obvious result that wasn't so obvious? In split decision, Court of Appeals finds that 8-inch drop-off inside a residence was not discoverable upon casual inspection

By Drew Broaddus **February 1, 2017**

The so-called "open and obvious" doctrine has – in the sixteen 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.

This was initially the result in *Blackwell v Franchi*, ___ Mich App ___; ___ NW2d ___ (2017) (Docket No. 328929). In *Blackwell*, the plaintiff attended a dinner party at the defendants' home. Defendants' home includes a hallway that leads from the front door to the living room and dining room area. There are two rooms on each side of the hallway, a bathroom and a mud room. There is an approximately 8-inch drop-off as one steps into the mud room from the hallway. The mud room was not illuminated. Plaintiff went to put her purse in the mud room, after arriving at defendants' home, and fell upon entry as a result of the drop-off. Plaintiff was

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Although the Michigan Supreme Court has firmly applied the open and obvious doctrine in recent years – see *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) – the doctrine remains controversial and many Circuit Court and Court of Appeals judges dislike applying it, something reflected in the *Blackwell* decision.

The fact that *Blackwell* is published, coupled with the fact that there was a dissenting opinion and a response to the dissent, as well as the potential conflict with *Singerman*, make it a strong candidate for Supreme Court review, should the defendant apply for leave.

Blackwell underscores that although "the danger of tripping and falling on a step is generally open and obvious[,] … where there is something unusual about the steps because of their character, location, or surrounding conditions, then the duty of the possessor of land to exercise reasonable care remains." *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18 (2002).

injured and filed suit. Defendants moved for summary disposition arguing that the drop-off was open and obvious. The trial court agreed.

But the Court of Appeals reversed, citing conflicting testimony about the conspicuity of the drop-off. *Id.* ___; slip op at 4. The majority summarized the record as follows:

> Plaintiff presented evidence in the form of deposition testimony from several other party guests establishing that the drop-off into the mud room was not discoverable upon casual inspection at the time she encountered it. Guest Endia Simmons testified that she was walking with plaintiff when plaintiff fell. Simmons testified, "[W]e didn't realize that there was a step down because there [were] no lights in that particular room." Simmons further testified that "you could not see that there was a level down" and stated that "[i]t just looked like it was straight across." Simmons also stated that had she been walking ahead of plaintiff she likely would have fallen. Guest Ebony Whisenant, while acknowledging that she did not specifically see plaintiff fall, corroborated Simmons's description of the mud room entrance testifying at her deposition that the hallway into the mud room looked level and that the height differential could not be seen. Whisenant described the mud room as "very dark." Additionally, while the deposition testimony of the guests was not unanimous as to the lighting condition of the hallway adjacent to the mud room, everyone, including defendant Dean Franchi, was in agreement that the light inside the mud room was turned off at the time of plaintiff's fall. The photographs submitted by the parties also demonstrate that the drop-off is not easily seen, even with sufficient lighting. The testimony and photographs clearly demonstrate a question of fact of whether an average user acting under the conditions existing when plaintiff approached the mud room would have been able to discover the drop-off upon casual inspection.
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> Defendants also argue that the drop off or height differential was open and obvious because plaintiff could have turned on a light switch that was located at the entry to the mud room that would have illuminated the mud room. However, this is not a duty question but is instead a question of comparative negligence. The open and obvious doctrine focuses on the condition of the premises and the hazard as they existed at the time the plaintiff encountered them. There is no additional requirement that the plaintiff take reasonable steps to improve the visibility of the alleged hazard. Defendants' argument that plaintiff should have discovered and turned on the light switch is not merely a statement that plaintiff should have looked where she was going but is a statement that she should have altered the premises' condition by turning on the lights. *Blackwell*, ___ Mich App at ___; slip op at 3 (citations omitted).

One judge dissented as follows:

> At the heart of this matter is what constituted the "danger" to plaintiff – the unexceptional 8-inch step or the dark room? At oral argument, plaintiff's attorney conceded that there was absolutely nothing remarkable about the step. Counsel specifically acknowledged that it was a normal 8-inch step that, had the room been properly lit, would have been open and obvious. Plaintiff claims that the step was a danger because it was "unknown." However, it was unknown because plaintiff purposefully entered a dark room to confront unidentified dangers. The danger was not the stairs, but the dark room itself, which could have contained a variety of other unspecified and common-place "dangers," such as laundry baskets or toys. The fact that the

> room was not lit was open and obvious. Plaintiff should have realized the danger entering a dark and unknown room posed. I would affirm summary disposition in defendants' favor.

The third judge on the *Blackwell* panel – who concurred in the majority opinion – wrote separately to respond to the dissent. This opinion claimed that the dissenting judge's points were contrary to precedent.

All three opinions appear to have overlooked *Singerman v Muni Service Bureau*, 455 Mich 135 (1997). In *Singerman*, the plaintiff claimed that poor lighting in a hockey rink prevented him from observing a hockey puck that hit him in the face. *Id.* at 143-144. The Supreme Court held that the hockey puck was open and obvious because there was nothing preventing the plaintiff from realizing that the hockey rink was poorly lit. *Id.* *Singerman* would seem to support the dissenting judge's view that the darkness of the mud room was itself an open and obvious hazard.

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