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Elevated Sidewalk Unanimously Found to be Open and Obvious, Despite Obstruction

By Drew Broaddus **February 21, 2017**

The so-called "open and obvious" doctrine has – in the 16 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 decided by a jury. In other words, *Lugo* significantly expanded the class of slip and fall cases that may be dismissed via motion.[1]

SECREST WARDLE NOTES

Metzler underscores that the open and obvious doctrine – which the Supreme Court has described "as an integral part of the definition of" a property owner's duty, *Lugo*, 464 Mich at 516 – continues to be a formidable defense to a wide range of premises liability claims.

"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.

In *Metzler v GSM American and Greenfield Properties*, unpublished opinion per curiam of the Court of Appeals, issued February 2, 2017 (Docket No. 328778), Judges Cynthia Diane Stephens, Henry Saad and Patrick Meter were tasked with deciding whether the open and obvious doctrine barred the claim of a plaintiff who tripped "over an elevated portion of a sidewalk that abutted the store's red brick paver entrance." The incident occurred on a clear day with no snow or ice. The trial court found that the condition was open and obvious. Plaintiff appealed, arguing that "(1) the elevated sidewalk on defendants' property was not viewable upon casual inspection because of its slight increase in elevation, and (2) the fact that the elevated sidewalk was

[1] See *Boundaries*, March 3, 2016, "Living on the Edge: Court of Appeals Divided Over Whether Landscaping Edging is Open and Obvious" by Drew Broaddus.

concealed behind a pillar also raises a genuine issue of material fact regarding whether the hazard was open and obvious." *Id.* at 2.

The Court of Appeals unanimously rejected these arguments, and affirmed the dismissal. The panel first observed that there was "no question that the elevated sidewalk alone was open and obvious." *Id.* A photograph of the area where the incident occurred showed "a distinct difference in elevation where the red brick pavers" met the sidewalk. *Id.* "This elevation would be noticeable upon casual inspection. Indeed, the weather was clear and the coloring of the ground distinguished the red brick paver and concrete surfaces, making it easy for a reasonable person to see the condition upon casual inspection." *Id.*

Plaintiff claimed that she "should not have been expected to notice the elevated sidewalk" in light of testimony from the property owner "that he had never noticed the elevated sidewalk, despite working on the property for over 10 years." *Metzler,* unpub op at 2. The panel found that this testimony was not particularly relevant to the open and obvious inquiry because "the question is not whether the property owner ever saw the hazard, but whether a reasonable person in the plaintiff's position would have seen the hazard upon casual inspection." *Id.* The trial court correctly found "that a reasonable person would have noticed the elevated sidewalk and its contrasting color." *Id.*

Plaintiff further argued that the condition was not open and obvious because the elevated sidewalk was located behind a pillar. *Metzler,* unpub op at 3. This argument was based upon the fact that when the Plaintiff exited the building, "she proceeded around the entrance's pillar and immediately tripped over the elevated sidewalk." *Id.* A photograph showed that the pillar may have "cut off at least some of the sight line between the doorway and the elevated sidewalk, making it more difficult for a person exiting the store to see the hazard until walking around the pillar." *Id.* But again, the panel found no reversible error, finding that "the elevated sidewalk [was] substantially taller than the abutting red brick paver entranceway, and the pillar [did] not entirely impede the visibility of the alleged hazard." *Id.* "Given the pillar's slender design and the longer width of the sidewalk, a reasonable person would quickly see the sidewalk and its difference in elevation. This is particularly apparent given the change in the coloring of the ground from dark red pavers to the lighter grey concrete and the clear visibility on that day." *Id.*

The panel distinguished *Price v Kroger Co,* 284 Mich App 496, 498-502 (2009), where the Court of Appeals had found a question of fact regarding whether a small, one-inch wire, which snagged on the plaintiff's pants and caused her to fall and which was protruding from a candy bin, was open and obvious when the bin had blocked the plaintiff's view of the wire before she fell. In *Price,* the panel observed that because of the wire's "small size, its location at close to floor level, the impediment to visibility posed by the bulk of the candy-filled bin," and the store employee's failure to see the wire, there was a question regarding whether a reasonable person would have been able to see the hazard upon casual inspection. *Id.* at 502. But the hazard in *Metzler* was quite different because, as noted above, the elevated sidewalk was significantly taller than the red brick paver entranceway, and the pillar did not completely block the Plaintiff's view of the alleged hazard. *Metzler,* unpub op at 3.

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