"Rain, rain, go away": Puddle on retail store floor is open and obvious

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

SECREST WARDLE NOTES

The open and obvious doctrine remains a formidable defense in a variety of premises liability cases, and recent Supreme Court decisions suggest that this will continue for the foreseeable future. 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); *Cole v Henry Ford Health System*, 497 Mich 881 (2014).

In *Labadie*, the panel seems to have imputed knowledge of the puddle to the plaintiff, based upon the surrounding circumstances, similar to the "indicia of a potentially hazardous condition" reasoning that the Supreme Court has applied in snow and ice cases. See *Cole*, 497 Mich at 881; *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934 (2010).

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In the past 15 years, attorneys representing businesses and their insurers have become very familiar with the "Open and Obvious Doctrine" as articulated in *Lugo v Ameritech Corp*, 464 Mich 512 (2001). Recently, the Court of Appeals applied the doctrine to an accumulation of rain water on the floor of a Wal-Mart store, and unanimously held that "the hazard posed by the puddle" was open and obvious. *Labadie v Wal-Mart*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2016 (Docket No. 325636).

Lugo states that a property owner has a duty to protect invitees from "an unreasonable risk of harm caused by a dangerous condition on the land," but the duty *does not* "encompass removal of open and obvious dangers." *Lugo*, 464 Mich at 516. 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 this 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. *Lugo* thereby expanded the class of slip and fall cases that may be dismissed via motion.

In the retail setting, a storekeeper is generally entitled to raise the open and obvious defense when a customer falls inside the store. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710 (2007). There is no "distracted shopper" exception to the open and obvious defense. *Id.*; *Quinto v Woodward Detroit CVS*, 305 Mich App 73 (2014).

Labadie arose out of the plaintiff's slip and fall in the vestibule of a Wal-Mart store. Plaintiff testified that it was "pouring" "like buckets" when her husband dropped her off at the door of the store. When she entered the store she "was looking at the people. Not the floor." When asked whether she noticed the texture of the floor that she slipped on, she answered, "No. … I wasn't looking at the floor as I was walking." Plaintiff testified that after she fell, as she was sitting on a bench, she noticed "[p]uddles" and described "[t]he whole foyer" as "wet." When asked if that was the cause of her fall, she answered, "absolutely," and referred to the puddle that caused her fall as "Probably 5, 6 feet wide." She also testified that there were rugs in the vestibule, but she did not notice them until after she fell.

A non-party witness testified that she witnessed the fall, that it was "[p]ouring rain" at the time, and that she saw several people with umbrellas, as she was waiting in the vestibule for the rain to let up. According to this witness, two or three minutes before plaintiff's fall, "this one lady came in with an umbrella and it just seemed like it was an umbrella that collected rain. She didn't put it down until after she got into the store and it left quite a puddle on the floor." This witness was "startled" by "the amount of water" from the umbrella. This witness further explained that "a few minutes later," the plaintiff "came in and somehow she slipped." This witness noticed water on the floor after the lady with the umbrella entered the store.

Wal-Mart moved for summary disposition, arguing that the water was open and obvious. Plaintiff responded, arguing that the puddle of water was not open and obvious because "there were no wet floor signs down inside the vestibule" and people and merchandise in the vestibule "would have distracted any person of ordinary intelligence away from the door." Plaintiff also pointed to "17 prior falls, most of which apparently were because of water on the tile floor," and argued that this was "a good indication [of] whether the condition [was] objectively open and obvious." Additionally, plaintiff argued that photographs taken of the area supported her position because they "did not show standing water." Plaintiff also contended that the lack of obviousness of the puddle could be inferred from "a flurry of activity by Wal–Mart employees to remedy the wet floor … after the fall."

The trial court rejected the plaintiff's arguments, relying upon evidence of the weather on the day of plaintiff's fall, plaintiff's recollection of puddles in the parking lot, the difference in the surfaces between the rugs and the floor that plaintiff slipped on, the fact that the allegedly hazardous condition could have been avoided, and the aforementioned testimony regarding the presence of the puddle of water. "[O]bjectively," the trial court explained, "your average person, with reasonable intelligence with casual inspection of the floor, as you came in on a rainy, wet day would've seen this, should've been looking for this." *Labadie,* unpub op at 2.

The Court of Appeals affirmed as follows:

> It was indisputably rainy … plaintiff said that it was "pouring" "like buckets" when she entered the store. [The non-party witness] testified that it was "pouring rain" immediately before plaintiff slipped and store patrons had umbrellas at the time. [The same witness also] testified that she could see water on the floor before plaintiff fell. Given the heavy rain, a reasonable person in plaintiff's position would have discerned that the entryway was wet and slippery upon a casual inspection. It was reasonable to assume that, under such weather conditions, water could accumulate in the entryway … particularly considering the store could have a high amount of foot traffic. Moreover, plaintiff indicated that she "wasn't

> looking at the floor as [she] was walking" and that, after her fall, she plainly saw a "[p]robably 5, 6 feet wide" puddle on the floor that "[a]bsolutely" caused her fall. Considering all of the circumstances, there was no question of fact regarding whether a reasonable person would have observed the puddle upon a casual inspection…. *Labadie,* unpub op at 3.

Notably, *Lugo* recognized an exception to the open and obvious doctrine for hazardous conditions that present "special aspects" – meaning, hazards that are "effectively unavoidable" or are "unreasonably dangerous." See *Hoffner v Lanctoe,* 492 Mich 450 (2012). But here, it does not appear that the plaintiff asserted any "special aspects" in responding to Wal-Mart's (C)(10) motion.

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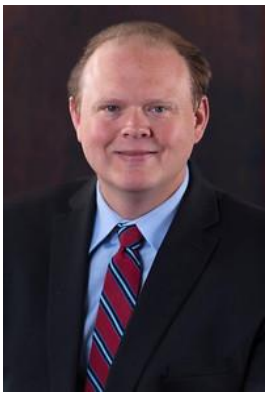

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