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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Open and obvious revisited: a condition need not "pose a substantial risk of death or serious injury" in order to be "effectively unavoidable."

By Drew Broaddus

Attorneys who represent 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). *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.

Cases involving snow and ice have frequently been subject to defense motions brought under *Lugo*. For example, *Janson v Sajewski Funeral Home,* 486 Mich 934 (2010) held that the danger of slipping on snow or ice will be open and obvious when there are "indicia of a potentially hazardous condition" present "at the time of the plaintiff's fall." In other words, Michigan residents are deemed to be on notice of the fact that freezing temperatures produce slippery conditions, even if those conditions are not readily apparent. *Janson* did not, however, discuss special aspects in any detail, leaving the door open for recovery in snow and ice cases if the plaintiff could show that the danger was effectively unavoidable.

Further clarification came two years later from *Hoffner v Lanctoe,* 492 Mich 450 (2012), where the Court held that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." In order for a plaintiff to make an "effectively unavoidable" argument, she must first demonstrate that the condition at issue "give[s] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and thus must be differentiated from those risks posed by ordinary

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Attala presented an unusual situation, in that the property owner conceded that the plaintiff had to confront the ice in order to get to her car. This concession appeared to be dispositive in the majority's view. *Attala,* Slip Op at 4 n 1. For this reason, the decision – although published – may be of limited precedential value.

The precise language used by the defense, in framing the issue for appeal, was important. Defendant argued that to be a special aspect, the condition "must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury." *Hoffner* does not actually say this, but it comes *very* close. See *Hoffner, supra* at 456: "[A]n 'effectively unavoidable' condition must be an *inherently dangerous hazard* that a person is inescapably required to confront…." And see *Hoffner, supra* 469 ("[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a *dangerous hazard.*" (Emphasis added to both.)

The difference between an "inherently dangerous hazard," and a hazard that poses "a substantial risk of death or serious injury," may be subtle, but it could have been outcome determinative here. Had the property owner argued that the ice-covered parking lot was unavoidable but not "inherently dangerous," the majority may have had more difficulty rejecting the argument.

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conditions or typical open and obvious hazards." Thus, even an unavoidable condition *will not* be a "special aspect" – and the open and obvious defense *will* apply – if it does not pose a risk that differs from "ordinary conditions." Under *Hoffner,* naturally occurring snow and ice, during a Michigan winter, is not out of the ordinary, nor does it present a uniquely high likelihood of severe harm.

Against this backdrop, the Court of Appeals recently considered whether an open and obvious ice accumulation was "effectively unavoidable" in *Attala v Orcutt,* __ Mich App __ (released August 26, 2014) (case no. 315630, for publication). In *Attala,* the plaintiff's slipped and fell in the parking lot outside of the defendant's apartment complex on January 20, 2010. The parties agreed that the entire parking lot was covered with ice, that the condition was open and obvious and was in fact observed by the plaintiff, and that the plaintiff had to confront the ice in order to get to her car from her apartment. Plaintiff claimed that she had to get to her car in order to make it to a college class on time. The sole question presented on appeal was "whether special aspects existed such that Defendant owned a duty to the Plaintiff despite the open and obvious nature of the hazard." *Attala,* Slip Op at 2. The property owner's sole argument was "that to fall outside the open and obvious doctrine, the condition of the premises must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury." *Id.* at 3 (emphasis added).

The trial court rejected this argument, and the Court of Appeals affirmed. The majority (Judges Shapiro and Murphy) explained that "the *Lugo* Court clearly saw unavoidable situations as distinct from avoidable but substantial risks." *Id.* (quoting the trial court with approval). This distinction was "applied in *Hoffner,* where the Court first found that the plaintiff freely admitted that the danger was avoidable." *Id.* (again quoting the trial court with approval). The *Hoffner* Court *then* – *after* the avoidability of the hazard was confirmed – proceeded to analyze whether the danger hazard posed "an extremely high risk of severe harm." *Attala,* Slip Op at 2.

Judge Riordan dissented. In Judge Riordan's view, the fact that the plaintiff had to confront the ice, to get to her car, did not render the ice-covered parking lot "effectively unavoidable" for all purposes. The plaintiff was not trapped in her apartment; she could walk out of the apartment without confronting the ice, she just could not walk *to her car.* These were not the same things in his view. Moreover, Judge Riordan felt that the majority misapplied *Hoffner* because – although an unavoidable condition need not "pose a substantial risk of death or serious injury" – the unavoidable condition must still be out of the ordinary in some way, in order to be a special aspect. Judge Riordan reiterated *Hoffner's* holding that "the effectively unavoidable exception is a *limited exception* designed to avoid application of the open and obvious doctrine *only* when a person is subjected to an unreasonable risk of harm." (Emphasis added.)

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