SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

10.24.14

Supreme Court underscores that snow and ice are open and obvious when there are "indicia of a potentially hazardous condition."

By Drew W. Broaddus

Attorneys who represent businesses and their insurers have, in the past thirteen years, 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." *Id.* 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.

SECREST WARDLE NOTES:

Lugo and *Janson* set a high hurdle for premises liability cases involving snow and ice.

Prior to *Janson,* Plaintiffs often relied upon *Slaughter v Blarney Castle*, 281 Mich App 474 (2008) in trying to avoid the open and obvious defense in snow and ice cases. However, *Cole* illustrates that the term "black ice" is not a mere pleading tool. Even "invisible" ice, naturally occurring in the wintertime, should be open and obvious in all but the most unusual cases.

Although the Supreme Court decided *Cole* in only a 1-page memorandum order, such orders are published and can carry the weight of precedent. *DeFrain v State Farm*, 491 Mich 359, 369-370 (2012). Such an order "is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *Id.*

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 and precipitation produce slippery conditions, even if the snow or ice itself is not readily apparent.

Against this backdrop, the Michigan Supreme Court recently decided *Cole v Henry Ford Health System,* __ Mich __ (2014) (No. 149580). In *Cole*, the plaintiff allegedly slipped and fell on invisible "black ice." The trial court and the Court of Appeals both accepted the plaintiff's characterization of the condition as invisible and therefore not open and obvious. However, the Supreme Court reversed as follows:

> Here, the so-called "black ice" was detected by four other witnesses who viewed the premises after the plaintiff's accident. There were several patches of ice evident in the area where the plaintiff fell. In addition, there were numerous indicia of a potentially hazardous condition being present … including seven inches of

> snow on the ground, some precipitation the previous day, and a recent thaw followed by consistent temperatures below freezing. A reasonably prudent person would foresee the danger of icy conditions on the mid-winter night the plaintiff's accident occurred. *Id.*

The case was therefore remanded to the trial court "for entry of an order granting summary disposition to the defendant," as the Supreme Court had deemed the ice patch "an open and obvious danger that an average user of ordinary intelligence would discover on casual inspection." *Id.* This was in stark contrast to the Court of Appeals' finding (now reversed) that a fact question precluded summary disposition on the basis of the open and obvious doctrine:

> …[A]lthough the weather analysis indicates that there were seven inches of snow on the ground in the Detroit area, there was no precipitation that day, and there were only trace amounts of precipitation the day prior. Based on the weather analysis, the most recent thaw would have occurred two days before the accident. But since then, temperatures remained below freezing. The witnesses offered by both parties also confirmed that it was very cold. Additionally, two witnesses observed some salt on the pavement, but they did not state how much and its exact location in relation to where plaintiff fell. Most of the witnesses indicated that they were only able to see the ice because they were looking for it after being alerted to plaintiff's fall. There was no conflicting evidence that the ice would have been visible upon casual inspection before plaintiff fell. Further, the evidence was conflicting as to whether there was enough light in the area to see the ice. Although every witness admitted that there was at least some light in the area, the evidence is unclear as to exactly how much was present. The maintenance worker and security guard claimed that the area was well-lit and that they could see patches of ice on the pavement. Plaintiff's supervisor, however, claimed that the area was poorly lit and that it was difficult to see the ice unless you knew to look for it. Given that a cold winter day is not enough to render black ice open and obvious, and that there was no precipitation that day, there is no indication that the weather conditions would have put an average person of ordinary intelligence on notice that there was a potential for icy conditions. … Thus, viewing the evidence in a light most favorable to plaintiff, we conclude that there is a question of fact whether the ice was visible upon casual inspection.

Cole v Henry Ford Health System, unpublished opinion per curiam of the Court of Appeals, rel'd 5/22/14 (Docket No. 313824), *rev'd* __ Mich __ (2014) (No. 149580).

CONTACT US

Troy
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 100
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at **swsubscriptions@secrestwardle.com** or **248-539-2850**.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability

SECREST WARDLE