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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Open and Obvious Remains a "Fourmidable" Defense, Even Where Statutory Duty is Alleged

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, Inc,* 464 Mich 512, 516 (2001). *Lugo* states that although a property owner has a duty to protect invitees from "an unreasonable risk of harm caused by a dangerous condition on the land," the duty *does not* "encompass removal of open and obvious dangers." *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 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 usually only related to the plaintiff's contributory or comparative negligence before – something typically argued before a jury. *Lugo* thereby expanded the class of trip and fall cases that may be dismissed via motion.

Cases involving stairs are particularly susceptible to defense motions brought under *Lugo*. This is because, even before *Lugo*, the Michigan Supreme Court held in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614 (1995) that "the danger of tripping and falling on a step is generally open and obvious." Indeed, "steps and differing floor levels in buildings are so common that a premises owner does not owe a duty to make ordinary steps accident proof, or to protect invitees from any harm they present, unless special aspects render the steps … unreasonably dangerous." *Id.*

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The *Martin* panel's finding that MCL 554.139 does not apply, when the parties do not have a contract between them, is consistent with *Mullen v Zerfas* 480 Mich 989 (2007), where the Court held that "[b]y the terms of the statute, the duties exist [only] between the contracting parties."

The *Martin* panel's observation that any protection arising under § 139 "is purely contractual" is significant because plaintiffs frequently cite that provision in support of a tort duty. *Martin* suggests that such argument may not be supported by the statutory language.

The *Martin* panel's observation about the "purely contractual" nature of § 139 is also significant because the type of damages available in breach of contract suits are more limited than in tort. For example, pain and suffering are generally not available in breach actions.

In residential tenant claims, plaintiffs frequently try to avoid the open and obvious defense by arguing that the defendant owed a statutory duty, often under the Landlord-Tenant Act, MCL 554.139(1). Such arguments are often premised upon the Supreme Court's statement in *Allison v AEW Capital Mgmt,* 481 Mich. 419, 426 (2008) that "a defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises…." The Court of Appeals recently considered such an argument in *Martin v The Fourmidable Group, Inc,* released December 15, 2011, Case No. 299701.

In *Martin*, Plaintiff alleged that she was injured by tripping over defective floor tiling at the top of a flight of stairs in her rental apartment. The defective floor tiling allegedly caused her to fall down the stairs. She alleged that Defendant was negligent under the common law, under the Michigan Housing Law, MCL 125.401 *et seq*., and under MCL 554.139. Defendant was not, however, the property owner. Rather, Defendant was a company hired by the owner of the property (the Royal Oak Housing Commission) to maintain it. The trial court granted Defendant's motion for summary disposition, finding that Defendant owed no statutory duty to Plaintiff and, that under the common law, the defective tiling was open and obvious.

In affirming, the Court of Appeals analyzed the language of MCL 554.139 and found that "[a]ny protection that arises from this statute is purely contractual in nature. … Thus, any negligence or premises liability claims are unaffected since any remedy under the statute would consist exclusively of a contract remedy." *Martin, supra* at *3, citing *Allison*, *supra.* Because this was a tort claim and there was no contract between Plaintiff and Defendant, the panel determined that § 139 had "no effect in this appeal." *Id.* The Court also analyzed various provisions of the Michigan Housing Law and found that "nearly all of the specific sections cited by plaintiff solely refer to the duties of an 'owner.'" *Id.* Any remaining ambiguity was resolved, in the eyes of the *Martin* panel, by MCL 125.533(1): "[t]he *owner* of premises regulated by this act shall comply with all applicable provisions of the act." *Id.* (emphasis in *Martin*).[1]

Once the panel found that Plaintiff had no statutory claim, it seemed to have little trouble determining that the defective floor tiling was open and obvious, and did not present a special aspect. "This Court has found hazardous conditions associated with steps to be open and obvious when a reasonable plaintiff, in fact, notes the condition and the danger it represents." *Martin*, *supra* at *4. "Although Plaintiff was required to traverse the *steps* several times a day, the *hazard* was not effectively unavoidable. …[I]t is clear that the 'hazard' is located on the left side of the stairway opening, leaving approximately 75 percent of the width free of any hazard. Thus, the hazard was not effectively unavoidable." *Id.* (emphasis in *Martin*). The Court found it particularly important that Plaintiff admitted to regularly using the stairs several times per day, without tripping, for over two years. Additionally, the hazard presented by the defective floor tiling was not unreasonably dangerous; it was not "virtually guaranteed" to result in "severe injury," in contrast to the often cited "an unguarded 30-foot deep pit" example from *Lugo, supra* at 518. The panel found that it was quite possible for someone to use these stairs without tripping on the defective tiling, and that even if someone were to trip on that defect, it was not particularly likely to result in serious injury. *Martin, supra* at *4.

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[1] Although not explained in the opinion, the property owner was not a party likely because the Royal Oak Housing Commission would have been entitled to governmental immunity.

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