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Court Of Appeals Demonstrates That, In Snow And Ice Cases, "Effectively Unavoidable" Arguments Can Still Be Effective Post-*Hoffner*

By Drew Broaddus

The Michigan Court of Appeals was once again called upon to apply the open and obvious doctrine, in a slip and fall case involving snow and ice, in *Sabatos v Cherrywood Lodge, Inc,* unpublished opinion per curiam, rel'd 7/9/13 (No. 302644). This time, however, the outcome was a bit surprising.

Attorneys who represent businesses and their insurers have, in the past twelve 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.

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The key fact, which seems to have distinguished Sabatos from other snow and ice cases that did not survive summary disposition, is that the icy condition apparently formed during the plaintiff's shift. In other words, she did not confront the condition when she arrived at work 8-9 hours before her fall. Once she was in the lodge, the landowner had a duty to make sure she could safely leave.

Had there been evidence that the snow and ice was present when plaintiff first arrived at her shift, it likely would have changed the outcome.

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 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 *Sabatos* panel recently considered (for a second time) whether a defense motion for summary disposition was properly granted. In *Sabatos,* the plaintiff was an employee of the defendant lodge. She began her shift between 3:00 and 4:00 p.m. on a March afternoon. Her shift ended between 10:30 and 11:00 p.m. She decided not to leave immediately after her shift ended but rather, stayed and socialized with co-workers for around two hours. While walking back to her car, she slipped and fell on ice, breaking her leg and ankle.

The lodge moved for summary disposition based on the open and obvious doctrine. The trial court granted the motion, but the Court of Appeals reversed in an August 9, 2012 opinion, finding that the icy condition of the parking lot was unavoidable. However, around the same time, the Michigan Supreme Court released *Hoffner*. The *Sabatos* panel had not considered *Hoffner.* Ultimately the Supreme Court remanded the case to the Court of Appeals, with instructions to reconsider its August 9, 2012 opinion in light of *Hoffner.*

On remand, the Court of Appeals again held that the icy parking lot was unavoidable under the facts of this case, and therefore the open and obvious defense did not apply. The panel explained:

> …[T]the evidence showed that Sabatos was effectively trapped within the Lodge's premises, which was the precise circumstance given by … *Hoffner* … as an example of an effectively unavoidable condition. … Moreover, we again reject the notion that Sabatos could have avoided the icy condition by clearing it herself or arranging for alternative transportation. … *Hoffner* … did not state that whenever an invitee has a choice to encounter a hazard, however extreme the options might be, the existence of that choice renders the hazard avoidable as a matter of law. Instead, it stated that the hazard must be unavoidable for all *practical purposes*. … In this case, the evidence showed there was no practical way for a visitor to leave [the lodge] without encountering the icy parking lot….

The *Sabatos* panel's opinion on remand may not be entirely consistent with *Hoffner,* and it is quite possible that the Supreme Court will be asked to review the case a second time. Under *Hoffner* an "effectively unavoidable" argument does not even get off the ground unless the plaintiff can first show that the condition "gives rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." Moreover, *Hoffner* strongly suggests that snow and ice almost never meet the "risk of severe harm" threshold, and therefore even some snowy and icy conditions that *cannot be avoided* will be deemed open and obvious. The most recent *Sabatos* opinion focuses upon whether the condition was avoidable, but does not consider whether the ice presented "a uniquely high likelihood of harm or severity of harm."

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