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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

08.01.12

"Effectively Unavoidable": No Longer So Effective In Avoiding The Open And Obvious Doctrine

By Drew Broaddus

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

Cases involving snow and ice have frequently been subject to defense motions brought under *Lugo*. *Slaughter v Blarney Castle Oil*, 281 Mich App 474 (2008) noted that generally, "the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter v Blarney Castle Oil,* 281 Mich App 474 (2008). However, *Robertson v Blue Water Oil,* 268 Mich App 588 (2005) found that even an open and obvious ice hazard may be effectively unavoidable (and summary disposition may be denied) if there is no alternative, ice-free route. The Supreme Court touched on these issues in *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010), holding 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.

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Hoffner **confirms that a condition *will not* be a special aspect if the plaintiff can avoid the danger by simply not using that particular business at that particular time. Unpublished Court of Appeals decisions had been in conflict on this point; some opinions had refused to deem a condition avoidable if doing so would negate the plaintiff's purpose for being on the property. This type of reasoning is rejected by *Hoffner***

Lugo **identified two instances where "special aspects" could negate an open and obvious defense: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. *Hoffner* confirms that in either circumstance, the condition must "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided."**

The fact that the plaintiff had paid a membership fee was of no consequence to the *Hoffner* Court in its analysis of whether a tort duty was breached; "[a] general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard...." (Emphasis in *Hoffner*).

Against this backdrop, on July 31, 2012 the Michigan Supreme Court released *Hoffner v Lanctoe,* __ Mich __ (2012). In *Hoffner*, the Court squarely addressed when snow and ice will be deemed effectively unavoidable, and held that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." Under the facts of this case, the snow and ice was held to be avoidable, and the open and obvious doctrine barred the plaintiff's premises liability claim.

In *Hoffner*, the Plaintiff purchased a membership at a fitness center, located in a commercial building owned by Defendant Lanctoe. (The lease made Lanctoe, as owner, responsible for snow and ice removal). There was only one entrance to the fitness center, which was serviced by a sidewalk that ran along the length of the building and connected the building to its parking lot. At around 11:00 a.m. on January 28, 2006, Plaintiff drove to the building, intending to exercise. Although the Defendant had already cleared and salted the parking lot and sidewalk earlier that day, by the time Plaintiff arrived, ice had re-formed at the entrance. Plaintiff admitted that she could "see the ice and the roof was dripping." Notwithstanding her awareness of the conditions, Plaintiff formed the opinion that the ice "didn't look like it would be that bad" and decided to enter the building. Plaintiff explained that "it was only just a few steps," and "I thought that I could make it." Unfortunately, she fell on the ice, injuring her back. A premises liability suit followed, which was met with a motion for summary disposition based on the open and obvious doctrine. The trial court denied the motion, finding that the ice was effectively unavoidable. The trial court placed particular emphasis on the fact that there was only one entrance to the fitness center. The Court of Appeals affirmed in relevant part.

The Supreme Court reversed and remanded, finding that the property owner was entitled to summary disposition. In so holding, the Court emphasized that the "special aspects" exception to the open and obvious doctrine, for hazards that are effectively unavoidable, is a limited exception that applies *only* when a person is subjected to an *unreasonable* risk of harm. The Court defined "[u]navoidability" as "an inability to be avoided, an inescapable result, or the inevitability of a given outcome." Thus, the standard for "effective unavoidability" is that "a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." (Emphasis in *Hoffner*). In short, because the Plaintiff was not *required* to work out at that particular time or at that location, the snow and ice was not effectively unavoidable. She could have simply left, upon seeing the ice.

Chief Justice Young authored the majority opinion, which garnered the votes of Justices Markman, Zahra, and Mary Beth Kelly. Justices Cavanagh and Hathaway authored separate dissents, both of which earned Justice Marilyn Kelly's vote. The gist of the two dissenting opinions was that the majority allegedly deviated from the Second Restatement of Torts, which the Michigan Supreme Court has historically followed. Justice Cavanagh's dissent also expressed lingering disagreement with the reasoning of *Lugo*.

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