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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Slip Sliding Away? Court of Appeals Holds That "Open and Obvious" Doctrine Bars Another Slip & Fall Case Involving Ice

By Drew W. 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, Inc*, 464 Mich 512, 516 (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. 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:

Walder **reflects a trend: recent Court of Appeals panels have viewed slip and fall claims involving snow and ice with a critical eye. The "Open and Obvious" Doctrine is a powerful defense to such claims.**

Plaintiffs can still get their snow and ice cases before a jury, but it is becoming less frequent. There must be something truly unusual about the snowy or icy condition to avoid the open and obvious defense.

Walder **also shows that courts will look carefully when a plaintiff asserts that a condition was effectively unavoidable. If there is any evidence that the plaintiff could have conducted his or her business without confronting the hazard, an "effectively unavoidable" argument will usually fail.**

Cases involving snow and ice are, in particular, frequently subject to defense motions brought under *Lugo*.[1] "Michigan courts have generally held that 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 Co,* 281 Mich App 474, 481 (2008). However, the *Slaughter* opinion also indicated that certain snowy or icy conditions, such as "black ice," may not be open and obvious. Also, *Robertson v Blue Water Oil Co,* 268 Mich App 588 (2005) found that even an open and obvious ice hazard may be effectively avoidable (and summary disposition may be denied) if there is no alternative, ice-free route. More recently, the Supreme Court held in *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010) 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, such as black ice and snow covered ice, even if those conditions are not readily apparent. Recovery is still possible, however, if the plaintiff can show that the danger was effectively unavoidable, or that there was some other "special aspect."

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[1] See *Boundaries*, 12/23/10, "Abundant Snow Present When Plaintiff Fell Renders Danger of Ice 'Open and Obvious'" by Drew Broaddus.

The Court of Appeals recently considered these principles in *Walder v Saint John the Evangelist Parish*, released September 27, 2011, case no. 298178. In *Walder,* the plaintiff was on her way to help run a church bingo game when she slipped and fell in the defendant church's parking lot. Her ankle was broken and surgery was required. The trial court granted defendant's motion for summary disposition on the basis of the "Open and Obvious" Doctrine. Plaintiff appealed, arguing that the trial court ignored "special aspects" that made the icy condition of the parking lot effectively unavoidable. Plaintiff argued that, although there was an alternative entrance, in order to reach the alternative rear entrance, she would still have had to cross the icy parking lot from her handicap parking spot; the alternative rear-entrance area and alternative parking lot were also ice-covered; and she was scheduled to work and thus had to cross the ice in order to enter the building.

Plaintiff did not dispute that the icy condition of defendant's parking lot was an open and obvious danger, but she contended that special aspects of the condition created an unreasonable risk of harm. Even when a condition is open and obvious, there can still be liability under *Lugo* if there is a "special aspect" that makes the condition unreasonably dangerous.

The Court of Appeals rejected this argument and affirmed the trial court's decision. The Court of Appeals noted that "[t]his case merely involved a slippery parking lot in winter." Although plaintiff claimed that she had no choice but to cross the slippery parking lot to enter the building, she presented no evidence that the condition and surrounding circumstances gave rise to a uniquely high likelihood of harm or that it was an unavoidable risk. The Court of Appeals pointed out that plaintiff could have parked in a different spot and used a different entrance, as other bingo helpers and participants had parked in the rear parking lot and used the rear entrance. Also, the record indicated that the rear entrance area was not completely ice covered, as plaintiff claimed. Additionally, the Court of Appeals found it significant that, after plaintiff fell, she got up and walked into the building, evidently avoiding any other slippery spots. For these reasons, the Court of Appeals distinguished *Robertson*; the ice here was not effectively unavoidable.

Judges Stephen L. Borrello and Patrick M. Meter signed the majority opinion. Judge Douglas Shapiro dissented, finding that the icy condition may have been effectively unavoidable, and that the issue should have been decided by a jury.

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