"A rose by any other name….": Court of Appeals illustrates that the open and obvious doctrine cannot be avoided by simply labeling a premises liability claim one for "ordinary negligence."

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SECREST WARDLE NOTES

When a plaintiff claims to have been hurt by a condition of the land, the claim sounds *exclusively* in premises liability, and he or she must overcome the open and obvious defense.

The Supreme Court has described the open and obvious defense "as an integral part of the definition of" a property owner's duty, *Lugo,* 464 Mich at 516. Therefore, it makes sense that courts will not allow plaintiffs to avoid the defense through mere pleading maneuvers.

Plaintiffs will often try to mix and match doctrines, arguing ordinary negligence to avoid the open and obvious defense, while relying on premises liability concepts to establish duty. If defense counsel can keep the focus on duty, this tactic will often fail. This is because, if the plaintiff is going to disavow premises liability principles, then he or she must establish that a duty otherwise exists under a statute or the common law. *Kosinski,* unpub op at 6-7.

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The so-called "open and obvious" doctrine has – in the fifteen years since *Lugo v Ameritech Corp,* 464 Mich 512 (2001) – become integral to the defense of seemingly every premises liability suit. *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. In particular, cases involving snow and ice have frequently been subject to defense motions brought under *Lugo.*[1]

However, the open and obvious defense is a premises liability concept; it does not apply to claims of ordinary negligence. *Laier v Kitchen,* 266 Mich App 482, 494 (2005). On the other hand, the Supreme Court has clarified that when the plaintiff was allegedly injured by a condition of the land, his claim sounds *exclusively* in premises liability, and he must overcome the open and obvious defense. *Compau v Pioneer Res Co, LLC,* 871 NW2d 210 (2015).

The Court of Appeals recently applied these principles in *Kosinski v Crosswinds Condominium Assoc and W&D Landscaping & Snowplowing*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2016 (No. 323494). In *Kosinski,* the plaintiff exited the front door of his condominium in Clinton Township on January 19, 2011, at approximately 6:40 a.m. He was walking to his car in order to drive to work. It was still dark outside and there were no functioning lights illuminating the area where he walked. Plaintiff saw blowing snow and ice crystals being picked up by the wind. As he was walking on the sidewalk toward his car, he stepped on a large patch of ice and immediately slipped and fell on it, breaking multiple bones in his left leg and ankle. He did not see the patch of ice before the fall. However, plaintiff was able to see and touch the ice after he fell on it, and he believed that the patch of ice was approximately 20 to 25 feet long. Plaintiff immediately called his girlfriend, Amy Haugh, who was still inside of the condominium, to let her know that he had fallen. Ms. Haugh came to plaintiff's aid; she testified that she saw the patch of ice and noticed that there was a light coating of snow over it. After plaintiff was taken to the hospital, Haugh and her son walked on the grass next to the sidewalk on which plaintiff fell in order to avoid the ice. In the days leading up to plaintiff's fall, it had not snowed and there was no ice on the sidewalk on which plaintiff fell. However, Haugh testified in her deposition that it was raining at approximately 10:00 p.m. or 10:30 p.m. on the night before plaintiff's fall.

Plaintiff sued the owner of the condominium association as well as its snow removal contractor, W&D. The condominium association moved for summary disposition based, *inter alia,* on the open and obvious doctrine. W&D filed a concurrence on the open and obvious issue. The trial court granted the motion, dismissing plaintiff's suit against both defendants. On reconsideration, plaintiff asserted for the first time that his claim against W&D was really based on general negligence principles and was not one for premises liability. *Kosinski,* unpub op at 5. The trial court denied the motion for reconsideration and plaintiff appealed by right.

The Court of Appeals unanimously affirmed in all respects. The panel found that the patch of ice was open and obvious because, despite plaintiff's assertion that it was invisible, the plaintiff had observed (or should have observed) sufficient "indicia of a potentially hazardous condition." *Id.* at 4. Specifically, "plaintiff testified that, before his fall, it was cold outside, and he observed wind blowing snow and ice crystals." *Id.* Also, Ms. Haugh "testified that it had been raining into the evening hours the night before plaintiff's fall." *Id.* The panel found that the "presence of rain just hours before the fall, the freezing temperatures, and the blowing snow demonstrate[d] that there were other indicia of a potentially hazardous condition." *Id.* While

[1] See *Boundaries*, October 24, 2014, "Supreme Court underscores that snow and ice are open and obvious when there are indicia of a potentially hazardous condition," by Drew Broaddus.

plaintiff also argued that the lighting was poor, the panel saw "evidence that the black ice would have been visible on casual inspection before the fall," as Ms. Haugh had "testified that after plaintiff's fall, she was able to clearly observe the patch of ice on which plaintiff fell." *Id.* "Plaintiff also testified that he was able to see the patch of ice after his fall. Furthermore, Haugh testified that she was able to see the ice because snow had been blown onto it. … Thus, the patch of ice was an open and obvious dangerous condition." *Id.*

The panel further held that the condition did not present any special aspects. Rejecting plaintiff's assertion that the condition was effectively unavoidable, the Court of Appeals noted Ms. Haugh's testimony "that both she and her son were able to walk around the slippery path." *Kosinski,* unpub op at 5. "Unlike the example set forth in *Lugo,* they were not forced to walk on the ice in order to enter and exit the condo." *Id.*

Finally, the panel rejected plaintiff's attempt to re-frame her claim against W&D as one for ordinary negligence, rather than premises liability. This argument failed because (1) plaintiff did not allege it in his complaint, (2) plaintiff failed to preserve the argument in the trial court (having raised it for the first time on reconsideration, *after* summary disposition has been granted), (3) the claim arose out of an allegedly defective condition of the land and therefore, per Supreme Court precedent, sounded *exclusively* in premises liability, and (4) Plaintiff's averments regarding W&D's allegedly negligent snow plowing were entirely speculative. *Id.* at 5-7.

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