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Supreme Court sheds light on slippery premises liability question

By Drew W. Broaddus **April 20, 2017**

The so-called "open and obvious" doctrine has – in the 16 years since *Lugo*, 464 Mich at 512 – 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 decided by 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*. 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 and precipitation produce slippery

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The Supreme Court's reversal of the Court of Appeals in *Ragnoli* underscores that the open and obvious doctrine – which the Supreme Court has described "as an integral part of the definition of" a property owner's duty, *Lugo v Ameritech Corp*, 464 Mich 512, 516 (2001) – continues to be a formidable defense to a wide range of premises liability claims.

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461 (2012).

"[T]he presence of wintery weather conditions and of ice on the ground elsewhere on the premises" rendered the risk of a black ice patch "open and obvious such that a reasonably prudent person would foresee the danger" of slipping and falling in the parking lot." *Ragnoli v North Oakland-North Macomb Imaging*, ___ Mich ___; ___ NW2d ___ (2017) (Docket No. 153763).

Although the Supreme Court decided *Ragnoli* in only a 1-page memorandum order, such an order can be "binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm*, 491 Mich 359, 369-370 (2012).

conditions, even if the snow or ice itself is not readily apparent. The Court underscored that holding in *Cole v Henry Ford Health Sys*, 497 Mich 881 (2014).

Despite these seemingly definitive holdings from the Supreme Court, a three-judge panel of the Court of Appeals unanimously reversed a trial court's finding that "a small patch of black ice" was open and obvious in *Ragnoli v North Oakland-North Macomb Imaging*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2016 (Docket No. 325206). While the panel agreed with the property owner's argument that "the weather conditions presented indicia of a potentially hazardous condition," the panel accepted the Plaintiff's argument "that a lack of lighting in the parking lot prevented [her] from seeing the ice." *Id.*, unpub op at 2. The panel explained:

> Marguerite [the Plaintiff] testified that she did not see the ice before her fall, it was dark outside, and the lights in the parking lot had not come on yet. Other individuals working in the building described the lighting in the parking lot as "dim" and "very low." Marguerite's husband … testified that he observed the parking lot right before Marguerite's fall, and observed that the lights were either not on or extremely dim. Defendant's office manager testified that she did not know what time the parking lot lights came on, and that the lights were controlled by the owner of the building next door. Based on this evidence regarding the inadequate lighting in the parking lot, we agree with plaintiffs that there was a question of fact as to whether Marguerite could have noticed the black ice upon casual inspection. *Id.*

But the Supreme Court, in a 6-1 decision, reversed the Court of Appeals and reinstated the trial court's "order granting summary disposition to the defendant." *Ragnoli v North Oakland-North Macomb Imaging*, ___ Mich ___; ___ NW2d ___ (2017) (Docket No. 153763). In a one-paragraph Order, the Court held:

> The trial court correctly held that, notwithstanding the low lighting in the parking lot, the presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch "open and obvious such that a reasonably prudent person would foresee the danger" of slipping and falling in the parking lot. *Id*. citing *Hoffner*, 492 Mich at 464.

The Court entered this Order "in lieu of granting leave to appeal." Justice Bernstein wrote separately to express his view that leave should have been denied; he did not write a dissenting opinion.

The procedural posture of the case is significant; the Court decided the issue based on the leave application briefs alone, without full briefing or oral argument (or even a "mini-oral argument" on the application). This suggests that the Court saw the issue as rather clear cut under existing law, and intervened only to correct what it perceived to be a clear misapplication of the law by the Court of Appeals.

We welcome your questions -

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