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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Snow-Covered Curb Is Open And Obvious With No Special Aspects

By Drew Broaddus

Attorneys who represent businesses and their insurers have become very familiar with the "Open and Obvious Doctrine," as articulated in *Lugo v Ameritech Corp*, 464 Mich 512 (2001). *Lugo* held 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." 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 a 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:

Hoffner and *Janson* set a high hurdle for premises liability cases involving snow and ice.

Snow and ice rarely meet *Hoffner's* "risk of severe harm" threshold, and therefore even snow and ice which cannot be avoided are often be deemed open and obvious.

The *Patterson* panel's analysis further underscores that a condition *will not* be considered "effectively unavoidable" if there was any conceivable way for the plaintiff to have avoided it.

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 the snow or ice itself is not readily apparent. Two years later, *Hoffner v Lanctoe,* 492 Mich 450 (2012) held, in another snow and ice case, that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances."

Against this backdrop, the Court of Appeals recently considered whether a defense motion for summary disposition was properly granted in *Patterson v Knollwood Village,* unpublished opinion per curiam, rel'd 7/1/14 (No. 314806). In *Patterson*, Plaintiff slipped and fell in the parking lot outside of Defendant's apartment complex on January 1, 2009. Plaintiff was visiting her daughter, a tenant in Defendant's complex. Plaintiff initially alleged that she "was caused to suddenly and unexpectedly slip and fall on black ice which had been allowed to accumulate on the pathway which had been created by Defendant." When deposed, however, she told a slightly different story, describing a slip and fall that allegedly occurred when she stepped on a snow-covered curb. Defendant (represented by Secrest Wardle) filed a motion for summary disposition, arguing that regardless of which story Plaintiff advanced at trial, the condition was open and obvious. The trial court agreed, and Plaintiff appealed by right.

The Court of Appeals affirmed, noting that the analysis "must begin with plaintiff's admitted familiarity with the weather conditions in Michigan during the winter months." *Patterson, supra* at *2. Having grown up in Michigan, the panel found that Plaintiff knew that snow and ice is slippery and therefore "should have anticipated that ice frequently forms beneath snow during snowy January nights." *Id.* at *2-3. Although there were no overhead lights in the parking lot, the light of the full moon was adequate to illuminate the snow so she

could see it. Moreover, Plaintiff's testimony confirmed that she saw mounds of snow prior to falling, and was aware that there was a curb underneath the snow in the general vicinity of where she was stepping. *Id.* at *3. After quoting this testimony, the panel noted that "[b]y its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Id.*

The panel further noted that the "plaintiff observed the weather conditions on the night of the incident" and, "[a]lthough she knew of the potential hazards presented by a visibly snowy and perhaps icy parking lot and surrounding area, she chose to ignore them…." *Patterson, supra* at *3. Plaintiff "put her foot onto what she thought was the snow-covered curb, intending to 'step outside where the path was shoveled as far as I could reach.' As she did so, plaintiff instead stepped on the 'slant of th[e] curb.' A reasonable person in plaintiff's position would have foreseen the danger and made a different decision…." *Id.*

In addition to her general awareness of the winter weather, the panel took note of testimony that "plaintiff was familiar with the apartment building and environs, having been to it 'once or twice a month' during the previous year to visit." *Patterson, supra* at *3. "Although plaintiff and her husband usually parked on a particular side of the building, on the evening of her injury, they chose to park on the other, unfamiliar, side of the building because they wanted to save their daughter the trouble of coming down the stairs to let them inside." *Id.* "A hazard is effectively unavoidable if a person, for all practical purposes, is required to confront the hazard. … Here, when confronted with the snowy parking lot, plaintiff could have asked her husband to park in another location. She could have asked to be dropped off at a different spot or any number of alternatives to avoid the open and obvious conditions she observed…." *Id.* Because the condition was avoidable, there were no special aspects.

Plaintiff attempted to "refine" her argument on appeal by contending that the hazard that caused her fall was a parking lot curb, "hidden" within a snow bank, and not, as pleaded in her complaint and argued in the trial court, "black ice" and "mounds" or accumulation of snow and ice. *Id.* The panel found that this "refinement" did not change the analysis because "plaintiff knew of the existence of the curb and, more importantly, testified that she believed there was ice on it also." *Id.* "A reasonable person, having casually inspected the area, would have perceived the mounds of snow and would have anticipated the underlying ice before disregarding the danger and stepping into it. *Id.* at *4.

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We welcome your questions and comments.

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