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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Court Of Appeals Underscores That, In Snow And Ice Cases, "Effectively Unavoidable" Arguments Are No Longer Effective Post-*Hoffner*

By Drew Broaddus

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

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Hoffner sets a high hurdle for premises liability cases involving snow and ice.

As a *Parker-Dupree* panel's analysis underscores, under *Hoffner* an "effectively unavoidable" argument does not even get off the ground unless the plaintiff can first show that the condition "gives rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided."

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

The *Parker-Dupree* panel's analysis further underscores that under *Hoffner*, 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 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.

Further clarification came two years later from *Hoffner v Lanctoe,* 492 Mich 450 (2012), where the Court held that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." In order for a plaintiff to make an "effectively unavoidable" argument, she must first demonstrate that the condition at issue "give[s] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards." Thus, even an unavoidable condition *will not* be a "special aspect" – and the open and obvious defense *will* apply – if it does not pose a risk that differs from "ordinary conditions." Under *Hoffner*, naturally occurring snow and ice, during a Michigan winter, is not out of the ordinary, nor does it present a uniquely high likelihood of severe harm.

Against this backdrop, the Court of Appeals recently considered whether a defense motion for summary disposition was properly granted in *Parker-Dupree v Raleigh,* unpublished opinion per curiam, rel'd 6/18/13 (No. 310013). In *Parker-Dupree,* the plaintiff was a mail carrier, who was delivering mail to the defendant's residence, when she slipped and fell. Plaintiff was aware that it had snowed periodically that day and that snow had accumulated. Weather records showed that ice had formed two days before plaintiff's fall, and it was later covered with snow. When plaintiff arrived at defendant's residence, she parked her mail truck, walked up to the house, and delivered the mail. Using the same pathway she used on her way to deliver the mail, plaintiff was leaving when she slipped and fell on the snow covered pathway leading away from the front door. Plaintiff acknowledged that if she had noticed the slippery condition, she could have stepped off of the path, although the snow would have been deep. She also acknowledged that she could have taken an alternative route, her usual route up the driveway, which she generally used when there was no snow.

Based upon this record, the *Parker-Dupree* panel affirmed, holding that the condition was open and obvious, and did not present any special aspects. The panel explained:

> The touchstone of the "special aspects" analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an "unreasonably dangerous" hazard must be just that – not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an "effectively unavoidable" condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. [quoting *Hoffner, supra* at 455-456.]
>
> …[P]laintiff argues that the trial court erred in granting … summary disposition because the snow and ice on the sidewalk was effectively unavoidable. The evidence presented in the lower court contradicts such an assertion.
>
> Plaintiff knew that there was snow on the ground and that it could be covering ice. She also navigated the pathway safely when she delivered the mail, avoiding any slippery areas that would cause a person to fall. Moreover, if plaintiff felt that the pathway she used was too dangerous, she could have notified her supervisor or simply stepped off the pathway. Even more significant is that plaintiff admitted that she could have taken an alternate route, using the walkway leading to the driveway. Thus, plaintiff has not established a genuine issue of material fact that the snowy condition on the walkway was effectively unavoidable….

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