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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Unavoidable Means Unavoidable

By Sante Fratarcangeli

In *Garces v La Providencia, L.L.C.,* unpublished, Plaintiff suffered injuries when he slipped and fell on snow-covered ice in Defendant's grocery store parking lot. The Court of Appeals upheld the trial court's decision to grant Defendant's motion for summary disposition, finding that the danger was open and obvious as a matter of law and did not have any special aspects.

The Court found Plaintiff's claims that he was not negligent (that he used care when parking in a spot away from the visible ice, was wearing work boots, and was watching where he was walking) unpersuasive. Instead, the Court focused on the *objective* nature of the condition of the danger, not on the *subjective* degree of care used by Plaintiff. The Court agreed with the trial court that the snow-covered ice constituted an open and obvious danger. Absent special circumstances, Michigan courts have generally held that 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.

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Hoffner confirms that a condition *will not* be a special aspect if plaintiff can avoid the danger by simply not using that particular business at that particular time. Unpublished Court of Appeals decisions had been in conflict on this point; some opinions had refused to deem a condition avoidable if doing so would negate plaintiff's purpose for being on the property. This type of reasoning is rejected by *Hoffner*.

Lugo identified two instances where "special aspects" could negate an open and obvious defense: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. *Hoffner* confirms that in either circumstance, the condition must "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided."

The Court next considered whether the snow-covered ice in Defendant's parking lot was *effectively unavoidable*. Michigan's Supreme Court has held that an effectively unavoidable hazard must truly be, for all practical purposes, one that a person is *required to confront* under the circumstances. Plaintiff argued that the snow-covered icy parking lot was unavoidable. Plaintiff could have avoided the hazard by choosing to go to a different store where the parking lot had been plowed, or by deciding to shop some other time. Furthermore, Plaintiff failed to allege or provide evidence that it was necessary to cross the visible patch of ice on which he fell in order to enter Defendant's store. Essentially, the Court found that Plaintiff was not required or compelled to confront the dangerous hazard.

CONTINUED...

Under the recent Supreme Court ruling in *Hoffner v Lanctoe,* 492 Mich 450 (2012), situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable. The special aspects exception to the open and obvious doctrine for hazards that are *effectively unavoidable* is a limited exception. It is designed to avoid application of the open and obvious doctrine when a person is subject to an unreasonable risk of harm. Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome. Given the present facts, a general interest in grocery shopping simply does not require one to confront a hazard and does not rise to the level of a *special aspect* characterized by its unreasonable risk of harm.

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