SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

12.18.14

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

By Drew W. Broaddus

The "Open and Obvious Doctrine" has – in the thirteen 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.

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 … is alleging injury by a condition of the land … his claim sounds *exclusively* in premises liability," and he must overcome the open and obvious defense. *Kachudas v Invaders Self Auto Wash, Inc,* 486 Mich 913, 914 (2010).

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.[1]

The Court of Appeals recently applied these principles in *Jahnke v Allen,* __ Mich App __ (2014) (No. 317625, for publication). In *Jahnke*, the plaintiff was socializing with her next door neighbor (the defendant) on his porch. At that time, the defendant was in the middle of a landscaping project which the plaintiff was aware of, and had actually been helping with. It was undisputed that the landscaping project was visible from the porch. After sunset, the defendant became ill and the plaintiff walked him inside. As plaintiff and defendant rounded the corner of defendant's garage, plaintiff's right foot went off the edge of the concrete pavers, where some had been removed as part of the landscaping project, and she fell. Plaintiff fell onto her right shoulder. Defendant fell on top of plaintiff because she pulled him down with her as she fell. The area where plaintiff fell was not illuminated.

Plaintiff sued the defendant, alleging negligence. Defendant filed a motion for summary disposition, asserting that plaintiff's claim was barred by the open and obvious doctrine because – regardless of how it was pled – the case sounded in premises liability. The trial court granted defendant's motion. Plaintiff appealed, arguing that the open and obvious doctrine did not apply because her claim sounded in ordinary negligence.

The Court of Appeals disagreed with the plaintiff's characterization of the claim, and affirmed the trial court's summary disposition ruling. The panel explained:

> Plaintiff argued to the trial court and on appeal that this case sounds in ordinary negligence and should not have been dismissed because defendant was negligent in how he escorted plaintiff across the property. We disagree. Here, plaintiff's injury occurred because of a condition on the land, the removed concrete paver, rather than the defendant's conduct. While defendant may have created the condition on the land, that does not transform the premises liability action into one of ordinary negligence. A plaintiff cannot avoid the open and obvious danger doctrine by claiming ordinary negligence, when the facts only support a premises liability claim, as they do here. Therefore, the action sounded in premises liability and not ordinary negligence, and the trial court did not err in granting defendant's motion for summary disposition because the open and obvious doctrine bars plaintiff's claim. Moreover, the trial court did not err in denying plaintiff the opportunity to amend her complaint, as the proposed amendment was just another futile attempt to classify this case as one of general negligence rather than one of premises liability. *Jahnke*. Slip Op at 2-3 (citation omitted).

In other words, the issue *was not* a defect in the pleadings; rather, there was nothing the plaintiff could plead to "avoid the open and obvious danger doctrine … when the facts only support a premises liability claim...." *Id.* at 3. This flows from the "well settled" principle "that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id.* at 2 (citation omitted). Moreover, "courts are not bound by the labels that parties attach to their claims." *Id.* at 2 (citation omitted).

---

[1]See *Boundaries*, April 18, 2011, "Court of Appeals Reaffirms No Liability Without Duty Even In Tragic Loss Case," by Drew Broaddus.

CONTACT US

Troy
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 100
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at **swsubscriptions@secrestwardle.com** or **248-539-2850**.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability

SECREST SW WARDLE