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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Lugo + *Fultz* = No Claim for Slip & Fall on Ice and Snow

By Drew Broaddus

For attorneys who represent businesses and their insurers, the "Open and Obvious" Doctrine – as articulated in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001) – and *Fultz v Union-Commerce Assoc,* 470 Mich 460 (2004) are two very familiar defenses. The "Open and Obvious" Doctrine 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." *Lugo, supra* at 516. Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover, upon casual inspection. Under the *Fultz* defense – which also relates to duty – a party to a contract may not be sued by a third-party for performing contractual duties negligently. Although the two defenses have been discussed extensively in numerous appellate decisions, they rarely appear in the same opinion. They are both discussed in detail, however, in *Campbell v Kroger, Inc.,* unpublished Court of Appeals opinion, decided March 15, 2011 (No.s 295376 & 296309).

SECREST WARDLE NOTES:

Campbell **reaffirms that both the "Open and Obvious" Doctrine and *Fultz* continue to be formidable defenses.**

The Court of Appeals has been reluctant to find "special aspects" or that hazards are "effectively unavoidable." Such arguments would successfully avoid *Lugo* only in truly unusual cases.

Similarly, the Court has rarely applied the "third-party beneficiary" and "separate duty" exceptions to *Fultz*. The *Fultz* exceptions have typically been limited to extreme cases such as where the contractor physically damages the property.

In *Campbell,* the plaintiff slipped and fell on an icy/snowy sidewalk leading to a Kroger store in December 2008, incurring injuries. Plaintiff brought suit against the owner/possessor of the Kroger store, the owners/possessors of the plaza in which the store was located, and Turf Tenders Landscaping and Fertilizing, Inc. ("Turf Tenders"), the snow removal contractor for the property. Plaintiff alleged premises liability, negligence, and various code violations on defendants' part.

The property owners moved for summary disposition, arguing that the danger of slipping on snow or ice in December is open and obvious. Turf Tenders moved for summary disposition under *Fultz,* arguing that it owed no duty to the plaintiff. Turf Tenders contended that its duties arose solely out of its contract with the property owner, and that the plaintiff was not a third-party beneficiary to that contract. Both motions for summary disposition were denied, and both defendants appealed. The two appeals were consolidated.

The Court of Appeals reversed, finding that both defendants were entitled to summary disposition. The Court began its discussion with Turf Tenders' appeal (Docket No. 295376), the earlier filed of the two. The three-judge appellate panel (Judges Mark J. Cavanagh, Kathleen Jansen, and Deborah A. Servitto) noted that "[t]his case presents the same scenario" as *Fultz.* Turf Tenders owed the property owner a contractual duty to remove snow and ice from the sidewalk area. Although the plaintiff was not a party to the contract, she claimed that she was injured by Turf Tenders' failure to perform its duties under the contract. Such a claim failed under *Fultz*; Turf Tenders owed her no duty, independent of its snow removal contract with the property owner.

Plaintiff attempted to distinguish *Fultz* by arguing that she was a third-party beneficiary of the snow removal contract. The Court rejected this argument. Citing *Schmalfeldt v North Pointe Ins Co,* 469 Mich 422, 428 (2003), the court observed that a person is a third-party beneficiary of a contract *only* when that contract establishes that a promisor has undertaken a promise *directly* to or for that person. When a contract is primarily for the benefit of the parties, a third person's incidental benefit from the contract does not accord that person third-party beneficiary status. There must be an express promise to act to the benefit of the third-party; incidental third-party beneficiaries may

not sue under *Fultz*. The snow removal contract between Turf Tenders and the property owner did not contain an express promise directly benefiting the plaintiff, or a particular class of persons that included the plaintiff.

The Court of Appeals similarly rejected the argument that Turf Tenders breached a separate and distinct duty by allegedly violating the building code. The panel found that, even if Turf Tenders assumed a duty to abide by the code when it entered into the contract, "plaintiff failed to show that Turf Tenders owed her a duty separate and distinct from the contract. Indeed, plaintiff's argument that Turf Tenders acquired the duties by executing the contract belies her claim that it owed her duties independent of the contract." *Campbell, supra* at * 4.

The Court then addressed the property owner's appeal (Docket No. 296309). Finding that the danger at issue was open and obvious, the panel cited *Ververis v Hartfield Lanes (On Remand),* 271 Mich App 61, 67 (2006) for the proposition that "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." Although the trial court denied the property owner's motion for summary disposition on the basis that there was no snow covering the ice, the record did not support the trial court's reasoning. Plaintiff testified that she was unable to see the pavement markings because snow covered the ground and she felt the ice under the snow only after she fell. She further testified that a photograph of the area did not accurately depict the condition that existed at the time of her fall because there was not enough snow in the photo. Thus, the plaintiff's reliance upon *Slaughter v Blarney Castle Oil Co,* 281 Mich App 474 (2008) was misplaced. *Slaughter* involved black ice that was not covered with snow. Here, the plaintiff fell on snow-covered ice, and the danger was therefore open and obvious as a matter of law.

Additionally, the plaintiff again pointed to alleged code violations to avoid summary disposition. However, the Court of Appeals found that a building code violation does not necessarily avoid *Lugo*. There must still be a "special aspect" that renders the otherwise open and obvious condition "unreasonably dangerous." *Kennedy v Great Atlantic & Pacific Tea Co,* 274 Mich App 710, 720 (2007). The panel found that, even assuming that the snow-covered ice violated the relevant code, the plaintiff failed to show that there was an unusual aspect of the condition that gave rise to an unreasonable risk of harm.

Finally, the plaintiff argued that *Lugo* should not apply because the danger was effectively unavoidable. Plaintiff argued that she took the closest and most direct route to the store entrance, and the only other entrance was farther away and equally hazardous. In rejecting this argument, the Court of Appeals explained: "In *Lugo,* … our Supreme Court opined that an unavoidable risk may exist, for example, where the floor of the sole exit of a commercial building is covered with standing water, requiring persons to enter and exit through the water. Here, plaintiff was not effectively trapped inside a building so that she must encounter the open and obvious condition in order to get out. … Moreover, nothing in the record indicates that plaintiff could not have patronized the Kroger store on a different day when the weather had improved." *Campbell, supra* at * 6 (Citations omitted).

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