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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Mound of Dirt was Open and Obvious with No "Special Aspects"

By Gillian Yee

In *Jody Lunsford v. Williamsburg Village Apartments LLC,* an unpublished opinion of the Michigan Court of Appeals, decided on March 8, 2007, the Court affirmed the trial court's ruling that a mound of dirt on the premises of an apartment complex was open and obvious with no "special aspects."

Plaintiff sued Williamsburg Village Apartments when she tipped on a mound of dirt. She testified that she did not see what caused her fall and merely relied on her cousin's observations that she fell on a mound of dirt. She admitted that she never saw the condition because of the lighting, and did not know the size of the alleged pile. The Court went on to note that if Plaintiff claimed that she fell because of the lighting, then that condition alone would have been considered an open and obvious condition which she may have been reasonably expected to discover.

On the other hand, the maintenance man for the apartment complex testified that he saw piles of dirt where the parking lot and grass met, which were created when the parking lot was plowed, moving snow and asphalt to the side. Plaintiff did not present any admissible evidence to rebut the maintenance man's claim regarding the visibility of the alleged hazardous condition.

The trial court granted Defendant's motion for summary disposition, holding that the condition was open and obvious with no "special aspects" because the mound of dirt was not effectively unavoidable – Plaintiff could have chosen another path – and the danger posed by the pile of dirt was not comparable to that of an unguarded 30 foot pit, as detailed in *Lugo v. Ameritech Corp., Inc.*, 464 Mich 512 (2001).

SECREST WARDLE NOTES:

The Court of Appeals has made it clear that a plaintiff must present admissible evidence to rebut a defendant's contention that a condition was open and obvious – she cannot merely rely on speculation. Furthermore, for a hazard to constitute a "special aspect" exception to the open and obvious defense, it must be unavoidable or unreasonably dangerous, as set forth in *Lugo v. Ameritech Corp., Inc.,* 464 Mich 512 (2001).

Once again, the best defense for property owners and managers is to act reasonably in inspecting, maintaining and repairing their property. You can never predict which evidence will be admissible (or inadmissible) in court, nor how a judge or jury may react to it.

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The Court further held that a claim based on Defendant's statutory duty to maintain common areas in a condition fit for the use intended, MCL 554.139(1)(a), was not viable because the evidence presented by Plaintiff failed to show that this duty was breached. Because Plaintiff did not address the basis for the trial court's decision regarding this issue – the fact that Plaintiff had not shown that the lawn was not fit for its intended use she was not entitled to relief by the Court of Appeals.

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We welcome your questions and comments.

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