

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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A Pothole in the Dark is Not Open and Obvious

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In *Gallagher v Trinity Health-Michigan, d/b/a St. Joseph Mercy Oakland*, a recently unpublished decision, the Court of Appeals upheld the trial court's denial of Defendant's Motion for Summary Disposition based on the open and obvious defense. The Court held that "a condition normally discoverable by an average user of ordinary intelligence upon casual inspection may not be open and obvious if the hazard is not discoverable on casual inspection because of darkness."

Plaintiff and her teenage granddaughter were returning to their vehicle after receiving treatment at Defendant's hospital. Upon their return to the vehicle, Plaintiff stepped into a pothole she could not see. Plaintiff fell and sustained injuries requiring treatment. Both Plaintiff and her granddaughter testified that the parking lot was dark and that there were shadows from the surrounding hospital buildings. Although they were looking where they were walking, they could not see the surface of the parking lot because it was too dark. Plaintiff's granddaughter testified that she could only see the pothole after getting down on the ground to look. Defendant did not rebut the testimonial evidence given by the Plaintiff and her granddaughter.

The Court believed that the issue in this case was "whether the absence of natural light and illumination from other lighting sources can cause an otherwise open and obvious condition to be hidden for purposes of premises liability." The Court reasoned that in this case, Plaintiff presented evidence of a large, deep pothole in Defendant's parking lot. Plaintiff also presented evidence that even though she looked where she was walking, she could not see the pothole because there was not adequate light at the time of her fall. The Court held that even though a pothole is typically open and obvious, Plaintiff presented a question of fact

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Evidence of adequate lighting at the time would have supported Defendant's position for dismissal. It is always important to document lighting conditions, replacement of bulbs, and inspection of parking lot lights on a regular basis to evidence working lights. With the proper documentation and possibly an expert, property owners and possessors have a better chance of success on a claim where inadequate lighting is claimed.

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as to whether the pothole was open and obvious because of the testimony of the poor lighting conditions at the time of the fall and no rebuttal of that fact by the Defendant.

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