LITIGATION

MICHIGAN SUPREME COURT CLARIFIES THE APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE IN PREMISES LIABILITY CASES INVOLVING ACCUMULATIONS OF SNOW AND ICE.

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On July 31, 2012, the Michigan Supreme Court in *Hoffner v Lanctoe* clarified the proper application of the open and obvious doctrine in premises liability cases where invitees encounter accumulations of snow and ice. Recognizing that there was some confusion surrounding the application of this doctrine to wintry conditions, the Court concluded that an invitee's business interest in entering the premises does not render accumulations of snow and ice "effectively unavoidable" and avoid the open and obvious doctrine.

Under Michigan premises liability law, a landowner owes a duty to use reasonable care to protect invitees (the individuals owed the greatest duty of care) from unreasonable risks of harm posed by dangerous conditions on the owner's land. This duty is breached when the owner knows or should know of a dangerous condition on the premises of which the invitee is unaware and failed to fix the defect, guard against the defect, or warn the invitee of the defect.

However, in *Lugo v. Ameritech Corp*, Inc., 464 Mich 512, 517; 629 NW2d 384 (2001), the Supreme Court held that the possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid. *Lugo* recognized a limited exception to the open and obvious doctrine if "special aspects" of an open and obvious risk would subject the person to an unreasonable risk of harm. *Lugo* discussed two instances where the "special aspects" of an open and obvious hazard could give rise to liability. First, the danger is "unreasonably dangerous" or, second, the danger is "effectively unavoidable." Where there are these "special aspects," the premises owner must take reasonable steps to protect an invitee from the unreasonable risk of harm.

Because Michigan is "prone to winter," as noted in *Hoffner*, litigants frequently invoked the open and obvious doctrine in premises liability cases involving snow and ice accumulations. However, Michigan courts have wrestled with how to apply the doctrine to wintry conditions. Some lower court decisions appeared to carve out specific rules not recognized in *Lugo* for "business invitees." *Hoffner*, therefore, provided the Supreme Court an opportunity to reexamine its analysis in *Lugo* and clarify this confusion.

The facts of *Hoffner* were straightforward. On January 28, 2006, the plaintiff, Charlotte Hoffner, slipped and fell outside the sole entrance to Fitness Xpress, a fitness center in Ironwood, Michigan, where she was a member. There was no factual dispute that Hoffner could see the ice patch at the entrance, but that she decided to enter the building anyway. Hoffner suffered a back injury as a result of the fall. Defendants Richard and Lori Lanctoe owned and operated the building, sidewalk, and parking lot. Fitness Xpress was a tenant in the commercial building and, under the lease agreement, the Lanctoes were responsible for snow removal from the parking lot and sidewalk. Hoffner filed a premises liability suit against the Lanctoes, and Fitness Xpress and its owners and operator seeking to recover damages for her injury.

Based on *Lugo* and the open and obvious doctrine, the defendants sought to dismiss Hoffner's case because the ice was plainly visible to Hoffner before she attempted to enter the building. The trial court denied the defendants' motion to dismiss the suit. The trial court reasoned that there was a question of fact whether the ice patch was "effectively unavoidable" because in order to access the fitness club to exercise her membership Hoffner had to traverse the icy hazard.

The Michigan Court of Appeals affirmed the trial court's decision, except that it dismissed Fitness Xpress and its owners and operator from the suit because they did not have possession and control of the sidewalk where the slip and fall occurred. As to the Lanctoes, the Court of Appeals agreed with the trial court that the icy sidewalk was "effectively unavoidable" to Hoffner, an invitee who had a contractual right to enter the fitness club and no alternate route by which to enter the building. Therefore, it concluded that the open and obvious doctrine did not bar Hoffner's claim.

The Michigan Supreme Court reversed the Michigan Court of Appeals and remanded the case for entry of summary disposition in favor of the Lanctoes. In a 4-3 opinion (authored by Chief Justice Robert P. Young, Jr., and joined by Justices Stephen Markman, Mary Beth Kelly, and Brian Zahra), the majority concluded that "the ice patch on the sidewalk that plaintiff chose to confront was open and obvious, and plaintiff has not provided evidence of special aspects of the condition to justify imposing liability on defendants despite the open and obvious nature of the danger."

Emphasizing the "narrow nature" of the "special aspects" exception, the majority held that there were no "special aspects" that made the icy patch either effectively unavoidable or unreasonably dangerous. It held that the ice patch was not effectively unavoidable because Hoffner "was not forced to confront the risk, as even she admits; she was not 'trapped' in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." According to the majority, Hoffner also "presented no evidence that the risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable, even in light of its open and obvious nature."

In holding that there were no "special aspects" that avoided application of the open and obvious doctrine, the majority expressly rejected the notion that Hoffner's right to enter the fitness center as a member compelled her to confront the ice patch. It unequivocally stated that "[a] general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a 'special aspect' characterized by its *unreasonable risk of harm*." The majority expressly rejected any reasoning in earlier Court of Appeals decisions, including *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), to the contrary.

Justice Michael Cavanagh and Justice Diane Hathaway wrote separate dissents, both of which were joined by Justice Marilyn Kelly. Justice Cavanagh criticized the majority's continued reliance on the open and obvious framework articulated in *Lugo*, and argued that the decision further severely narrowed the "special aspect" exceptions to the open and obvious doctrine. As he had done in previous decisions, Justice Cavanagh argued that the Court should be guided instead by the Restatement of the Law of Torts, which he viewed as more workable and logical because it does not relieve the possessor of land of the duty to protect or warn of known or obvious dangers if "the possessor should anticipate the harm despite such knowledge or obviousness."

Justice Hathaway agreed with Justice Cavanagh's analysis but separately argued that the majority failed to follow the Court's decision in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), which she maintained stood for the proposition that "a premises owner has a duty to take reasonable steps to diminish the hazard of ice and snow, and invitees have a duty to take reasonable actions for their own safety."

The Supreme Court's decision in *Hoffner* is significant for at least two reasons. First, the Court provided some clarity in applying the open and obvious doctrine to a fairly commonplace occurrence in Michigan – slip and fall injuries arising out of snow and ice accumulations – that confront many Michigan business owners. Specifically, the Court rejected the argument that the invitee's business interest in entering the premises compels the invitee to confront the hazard and renders it "effectively unavoidable." In so doing, the Court re-emphasized the narrowness of the "special aspects" exceptions to the open and obvious doctrine.

Second, the Court unequivocally reaffirmed the open and obvious doctrine articulated in *Lugo*. With the changing composition of the Court in recent years, particularly the emergence of a liberal majority in 2008 and the reemergence of a conservative majority in 2010, certain case law has been in a state of flux. *Hoffner* makes it clear that *Lugo* is still the law governing premises liability – although that could change with the upcoming judicial elections in November 2012.

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