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A MONTHLY PUBLICATION FROM CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.

LIFE AFTER LUGO:
DOES PREMISES LIABILITY EXIST UNDER MICHIGAN LAW?

SEPTEMBER, 2003

In *Lugo v Ameritech Corp, Inc.*[1], the Michigan Supreme Court redefined Michigan Premises Liability Law. While examining a classic premises liability scenario- a plaintiff that tripped and fell in a pothole- the Court redefined the Open and Obvious Danger Doctrine so that almost every potential hazard is open and obvious under Michigan law. The *Lugo* Court defined the limited circumstances under which a special aspect could subject a premises owner to liability for an open and obvious condition. The *Lugo* decision also clarified the objective standard that is applied in all premises liability cases. Under *Lugo*, the risk must be analyzed objectively- from the standpoint of the reasonably prudent person not from the standpoint of a particular plaintiff.

This article examines the Supreme Court's decision in *Lugo*, as well as subsequent opinions applying its rulings. Specifically, we address the question: **What is an open and obvious danger under Michigan law and what constitutes a special aspect?**

Lugo v Ameritech Corp, Inc.

The *Lugo* case arises from factually simple circumstances. While walking through a parking lot, the plaintiff stepped into a pothole and fell. The plaintiff was not watching where she was walking, she was concentrating on something else and nothing in the area would have prevented her from seeing the pothole had she been paying attention.

The Trial Court granted summary disposition in favor of the defendant. The Court of Appeals reversed the Trial Court ruling and reinstated the Trial Court's grant of summary disposition that the Open and Obvious Danger Doctrine did not apply in that case finding a genuine issue of fact regarding whether a pedestrian may be distracted by vehicles and therefore failed to notice a pothole in a parking lot. However, the Supreme Court reversed the Court of Appeals' decision.

The *Lugo* Court began its analysis by citing the general duty owed by a premises owner to an invitee "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on land," and clarified that this duty does not require the removal of open and obvious dangers.

Citing its previous ruling in *Riddle v McLouth Steel Products Corp.*, Justice Taylor, writing for the majority, explained that the Open and Obvious Danger Doctrine is not an exception to the duty element of a prima facie case of negligence, but rather "an integral part of the definition of that duty." Although the Open and Obvious Danger Doctrine cuts off liability if the invitee should have discovered the condition and realized its danger, if the risk of harm remains unreasonable despite its open nature, then the circumstances may require the premises owner to take reasonable precautions to protect invitees from that risk.

The Court went on to discuss the special aspects of a condition that would make it unreasonably dangerous and except it from the Open and Obvious Danger Doctrine. Under *Lugo*, a special aspect must make the condition unavoidable or unreasonably dangerous to subject premises owner to potential liability. To illustrate the type of condition that would remove a risk from the Open and Obvious Danger Doctrine, the Court set forth two specific illustrations: (1) A commercial building with only one exit for the general public covered with standing water – open and obvious but unavoidable; and (2) An unguarded 30 foot deep pit in the middle of a parking lot – although avoidable and obvious, it presents a substantial risk of death or serious injury such that reasonable warnings or other remedial measures should be taken.

What is open and obvious under Michigan law?

Since the time of *Lugo's* publication by the Michigan Supreme Court, numerous Court of Appeals' opinions have applied that Court's ruling. The Michigan Court of Appeals has found the following conditions are open and obvious under Michigan law: ice; ice hidden beneath snow; snow; snowbanks; rain soaked grass; water; icy steps; steps; ramps; loading dock platforms; pavement defects; torn up sidewalks; inadequate lighting; store fixtures; crushed berries on grocery store floor; automatic doors; and unattended children.

The Court of Appeals' decision in *Siderowicz v Chicken Shack, Inc.*, demonstrates how closely the Court of Appeals is adhering to the *Lugo* rule. In *Siderowicz*, the plaintiff was a 27-year-old male suffering from multiple sclerosis who was legally blind. While lunching at the Chicken Shack, he slipped on water on the floor at the entrance to the men's restroom. Even though he was legally blind, the Court of Appeals affirmed the Circuit Court's order granting summary disposition in favor of defendant under the Open and Obvious Danger Doctrine because the condition was open and obvious to a reasonably prudent person despite the plaintiff's disability.

Additional courts have found that it is proper to ignore characteristics of the plaintiff, including blindness, when

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determining a condition is open and obvious or unreasonably dangerous.

What constitutes a special aspect under Michigan law?

Despite the clear language of the *Lugo* opinion – that the special aspect must belong to the condition and that everyday occurrences do not constitute special aspects – plaintiffs have attempted to find unreasonable risks and dangers in everything from their own state of mind to wet grass on a golf course. Consequently, the Court of Appeals has found that when there is nothing unusual about an everyday condition, or the purported risk is heightened due to characteristics of the plaintiff, there is no special aspect that would subject the premises owner to potential liability.

The Court of Appeals has found that numerous conditions that may appear dangerous do not constitute a special aspect under Michigan law. For example, a narrow and obstructed four foot high stairway, which had loose carpet and no handrail, was found not to constitute a special aspect by the Court of Appeals in *Liang v Liase* because it was not unreasonably dangerous.

Ordinary steps, common pavement defects and even steps covered with ice do not possess special aspects that impose a duty on the premises owner. In *Odisher v Snow Snake Mountain, Inc.*, the Court of Appeals found that the rain-soaked grass of a ninth hole fairway possessed nothing unusual so as to remove it from the Open and Obvious Danger Doctrine.

In *Golembiewski v Thomas Jarembowski Funeral Home, Inc.*, the Court of Appeals found that the "attire worn by funeral home patrons and the state of mind of those patrons were not special aspects of the condition ... itself." Likewise, a company policy requiring tenants to close dumpster lids was not a special aspect of an accumulation of snow behind the dumpster rendering it unavoidable and dangerous.

In *Brousseau v Daykin Electric Corp.* the Court of Appeals found a special aspect existed in a case factually similar to one of the examples in *Lugo*. In *Brousseau*, the plaintiff attempted to back his truck over a two to three foot high, hard-packed mound of snow that spanned the entire length of the defendant's loading dock. The mound was open and obvious, however, the Court of Appeals found that it contained special aspects such that a reasonable juror could conclude it constituted an unreasonable danger. The mound blocked the only entrance to defendant's commercial loading dock where truckers make deliveries. The Court found the mound of snow was unavoidable, since the plaintiff had no reasonable alternative to make his delivery.

Conclusion

The Open and Obvious Danger Doctrine continues to protect premises owners from liability for conditions on their land. As long as a reasonably prudent person would notice and appreciate the risk associated with the condition, the doctrine applies. And, as interpreted, unless something is obstructing the plaintiff's view of the condition it will likely be found open and obvious.

Although a special aspect of the condition may remove it from the Open and Obvious Danger Doctrine, the *Lugo* Court set such high standards for such special aspects that they will be rarely encountered. If the risk is one that the plaintiff can turn and walk away from, no special aspect will be found to exist.

The *Lugo* case continues to provide defendants in premises liability actions protection from liability for everyday property conditions that may cause injury to the inattentive plaintiff. The Supreme Court's opinion provides the basis of a strong defense to premises liability claims and, as of this date, continues to be consistently applied by the lower courts.

[1] *Lugo v Ameritech Corp, Inc.*, 464 Mich 512 (2001).

Christopher K. Cooke and Donna A. Heiser

PLAINTIFF MUST REIMBURSE CITY FOR COST OF LITIGATION

In a recent case handled by Richard Winslow, a partner in our Grand Rapids office, a Springfield, Michigan arrest that resulted in a finding of guilt for two counts of resisting and obstructing a police officer and two counts of possession of illegal drugs, also resulted in a verdict in favor of the arresting officers in the Federal Civil Suit for damages against the officers.

Kevin Welch, the plaintiff, testified that he was "kicked like a football" by one of the Springfield officers, which broke his ribs. He continued to claim that both officers then kneed him in the back and shoulder when they caught him after a two minute foot chase. One officer testified that Welch stopped and started to get down onto the ground, just as the officer pushed him flat on the ground and pinned him with his knee.

The officer testified that he did not kick Welch, and that Welch appeared to continue to resist during the handcuffing. A second officer assisted holding Welch on the ground with his knee so he could be handcuffed. An ambulance was called and Welch was taken for medical attention before being jailed. The City investigated and concluded its officers had acted properly.

A training officer with the Kalamazoo Department of Public Safety studied the investigation report and heard all of the testimony, before testifying that the officers' conduct was appropriate under those circumstances. He also agreed that kicking in the ribs, as blamed by Welch, would not have been permissible. Mr. Winslow pointed out that several medical reports that contained Mr. Welch's description of how he was injured did not mention his claim that he had been kicked. Doctors testified that the absence of bruising accompanying the rib fractures was more consistent with the ribs being broken from pressure than from being struck.

After two days of testimony, the jury deliberated less than two hours and announced its unanimous verdict that the injuries occurred as the result of reasonable force.

Welch's attorney had requested $800,000.00 from the jury, claiming that his client had been maimed, disfigured and will suffer shortness of breath for the rest of his life. Having lost the trial, Mr. Welch is now responsible to reimburse the City of Springfield for some of its cost of litigation.

Timothy Young, Executive Committee

PARTNER WINS CASES FOR METROPOLITAN DETROIT MUNICIPALITIES

Edward Salah recently won three cases for metropolitan Detroit municipalities

City Dismissed from Defective Highway/Nuisance Lawsuit

In a recent case defended by Edward Salah on behalf of a metropolitan Detroit city, the city was dismissed from a lawsuit filed by an injured motorist whose car drove into a sink hole filled with water. The area in question was in a driveway approach between the sidewalk and roadway. The city had previously repaired a water main break in the area, but after the repair, another break occurred, washing away the backfill, and filling the hole with water. The following morning, while the plaintiff was pulling into the parking lot of his business, his car plunged into the water filled hole.

The plaintiff's theory against the city was that the city failed to maintain a public highway in a manner reasonably safe for public travel, and that the condition constituted a nuisance. Edward Salah filed a motion for summary disposition arguing to the court that the plaintiff's claim was barred by governmental immunity. Prior to the hearing on the motion, the plaintiff's attorney, having reviewed the motion for summary disposition filed by Edward Salah, voluntarily dismissed the lawsuit.

City and Building Department Not Liable for Wrongful Issuance of Certificate of Occupancy

In another case handled by Edward Salah, a metropolitan Detroit city was sued by the purchaser of a home, claiming that the city and building department were liable for the wrongful issuance of a certificate of occupancy. The plaintiff alleged that after entering into the purchase agreement to purchase the home, the plaintiff's inspector found structural defects in the home, and that the city wrongfully issued a certificate of occupancy, which was a condition precedent to the sale. Because the city did issue the certificate of occupancy, the seller refused to back out of the sale, and the plaintiff filed suit against the seller and the city and building department. In addition to claiming that the city wrongfully issued the certificate of occupancy, the plaintiff alleged that the city conspired with the seller to wrongfully issue the certificate of occupancy.

Edward Salah filed a motion for summary disposition on behalf of the city and building department, arguing that the facts did not support the plaintiff's claims of conspiracy, and further, that the plaintiff's claims were barred by governmental immunity. After oral arguments at the hearing on the motion for summary disposition, the court agreed with Mr. Salah's arguments, and granted the motion for summary disposition on behalf of the city and the building department.

Ordinance Officer Not Liable for the Arrest of Plaintiff

In a recent case handled by Edward Salah on behalf of a city ordinance officer, the ordinance officer was sued by the plaintiff after the plaintiff was arrested for failing to appear in court regarding a violation for improperly parking a commercial vehicle in a residential district. The ordinance officer had issued the violation to the plaintiff, for improperly parking a commercial vehicle in a residential district. The plaintiff failed to appear in court for the hearing on the violation, and as a result a bench warrant was issued for the arrest of the plaintiff. The plaintiff was arrested, on the outstanding warrant, and was released on bond.

At a subsequent hearing in district court, the prosecutor discovered that the wrong ordinance section had been cited, and that the plaintiff should have been cited for improperly parking a commercial vehicle in an office district. The violation was dismissed without prejudice and a new violation was issued to the plaintiff under the correct ordinance section.

The plaintiff filed suit against the ordinance officer claiming a violation of his constitutional rights for the arrest and detention of the plaintiff arising from the original complaint for parking the commercial vehicle in a residential district. The plaintiff claimed further that the district court notice was sent to the wrong address, and the ordinance officer knew the plaintiff's correct address for purposes of sending any court notices.

Edward Salah filed a motion to dismiss and/or for summary judgment. At a hearing in federal court, the federal judge agreed with the arguments set forth in the brief filed by Edward Salah, finding that the ordinance officer was not liable for the arrest of the plaintiff. The court found that the plaintiff was arrested by the police department, pursuant to a bench warrant issued by the court for the plaintiff's failure to appear in court. The court further found that the ordinance officer was not responsible for any mistake made by the court in sending the notice of hearing to the wrong address, and further, that the ordinance officer was entitled to qualified immunity as to the claims set forth in the plaintiff's complaint.

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ON LAW is a monthly publication from Cummings, McClorey, Davis & Acho, P.L.C.

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