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The Final Word: The Open and Obvious Doctrine No Longer Applicable In Personal Injury Construction Cases.

By Brett Grossman

As previously reported by Secrest Wardle, the Michigan Supreme Court handed down a significantly far-reaching decision in the area of Construction Law in July 2005. In *Ghaffari v. Turner Construction Company,* et al., Turner was hired as the general contractor to build the IMAX theatre at Henry Ford Museum. Turner negotiated trade contractor agreements with several subcontractors, including Conti Electric, Inc., which employed Mr. Ghaffari, Guideline Mechanical (pipefitter) and Hoyt (plumber). Mr. Ghaffari was injured on the construction site when he tripped on the pipes left on the floor of a storage area. The pipes were allegedly owned by one of the defendant subcontractors. Mr. Ghaffari alleged liability against Turner under the Common Work Area Doctrine, one of the exceptions to the general rule of non-liability on the part of general contractors for the negligence of independent contractors working on construction sites. He alleged liability against Guideline and Hoyt under general negligence principles.

At the trial court level, Turner, Guideline and Hoyt filed Motions for Summary Disposition on numerous grounds, one of which was the application of the Open and Obvious defense. The trial court granted the Motions and the Court of Appeals affirmed the dismissals, in part, applying the Open and Obvious defense to Turner as the general contractor and to Guideline and Hoyt as subcontractors. However, the Michigan Supreme Court expressly overturned the extension of the Open and Obvious defense to general contractor liability. While the Court did not expressly speak to the applicability of this defense to subcontractor liability, it did remand the case to the Appeals Court to make factual determinations as to the ownership of the pipes by the defendant subcontractors. Although not expressly stated, based on the remand, it could be inferred that the Supreme Court believed that the Open and Obvious defense to the claims against subcontractors was misplaced as well.

SECREST WARDLE NOTES:

Given the *Ghaffari* Court's refusal to extend the open and obvious defense to claims against General Contractors, it is not surprising that the appellate courts have applied this same holding to subcontractor liability as well. Unquestionably, the *Ghaffari* case and its progeny are already having an immediate adverse impact on the success of defendants in construction site injury litigation. Prior to *Ghaffari,* both of the trial courts' decisions would have likely been upheld based on the Open and Obvious defense. In view of *Ghaffari,* Appellate Courts will now remand these types of cases to trial courts for a full analysis under *Fultz.* The Michigan Supreme Court has taken from construction defendants – general contractors and subcontractors alike - an effective tool which limited liability in construction site accident litigation.

On a more positive note, however, even though subcontractors will no longer benefit from the Open and Obvious Doctrine, it is important to remember that general negligence defenses – as specifically referenced in the *Ghaffari* remand decision – can still be utilized to defeat claims. The *Fultz* decision and its analysis will become the focal point of defending these types of claims against subcontractors.

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Two recent Court of Appeals decisions that incorporate the Ghaffari Court's holding have recently been handed down. Whereas the Michigan Supreme Court failed to make a definitive ruling on the Doctrine's application to subcontractor liability, these cases lay to rest any doubt that the Open and Obvious defense is no longer available to subcontractors in construction cases.

First, on October 20, 2005, the Appeals Court handed down its remanded opinion in the *Ghaffari* matter. As directed by the Michigan Supreme Court, the Court of Appeals addressed the general negligence claims against subcontractors Hoyt and Guideline. The Court examined the record to make a factual determination as to the ownership of the pipes and, if necessary, to determine whether either subcontractor owed a duty to the Plaintiff under *Fultz v. Union-Commercial Associates,* 470 Mich 460; 683 NW2d 587 (2004). The Court held that there was no issue of material fact as to whether Guideline owned the pipes and, therefore, the trial court had correctly granted Guideline summary disposition on this ground.

With regard to Hoyt, however, the Court found that a question of fact existed, and therefore looked to the well-settled Michigan law in *Fultz, supra,* to determine whether Plaintiff was owed a duty for purposes of establishing negligence against Hoyt. Unlike its prior decision in *Ghaffari,* the Court expressly addressed the question of duty, as opposed to affirming the trial court's dismissal based on Plaintiff's failure to establish a question of fact as to the ownership of the pipes. The Court's analysis of the duty question, without applying the Open and Obvious defense, strongly suggested that the Open and Obvious defense is no longer available to subcontractors.

Just recently, the Michigan Appellate Court, using the Supreme Court decision in *Ghaffari,* finally made its definitive statement that the Open and Obvious defense is no longer available to any construction defendant. In *Aaron v. Walsh Construction Company of Illinois,* Plaintiff sued Walsh (general contractor) and Rosati (subcontractor) after she tripped and fell over a large ball of yellow caution tape. Rosati filed a Motion for Summary Disposition arguing that the complained of condition – the ball of tape – was open and obvious. Rosati's Motion was granted as the trial court found that the tape was an open and obvious condition. The Court of Appeals expressly reversed the judgment of the trial court as it relates to the application of the Open and Obvious doctrine against Rosati and remanded for further consideration under *Fultz, supra,* as the *Ghaffari* court had done.

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