SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Open? Obvious? So What?

By Michael D. Crow

For the last few decades, property owners enjoyed the expanding protection of the developing "open and obvious" defense. In short, possessors of land are not liable to individuals injured by "open and obvious" defects. A defect is open and obvious if it is known to the injured individual or so obvious the individual might reasonably be expected to discover the danger upon casual inspection. As most defects on property are visible upon casual inspection, the open and obvious defense created quasi-immunity for property owners.

More recently, the open and obvious defense was argued to apply in cases outside the premises liability context. The public policy behind the open and obvious defense is forcing individuals to take responsibility for their own safety. Certainly, this policy argument should apply beyond the realm of premises liability.

For instance, the open and obvious defense was often argued in construction site injury cases. Generally, property owners and general contractors cannot be held liable for the negligence of independent contractors working on construction sites. However, an exception exists to this general rule of non-liability in cases under the Common Work Area Doctrine.

Under the Common Work Area Doctrine, a general contractor may be held liable if he fails to guard against "readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." Likewise, a property owner can be liable under the Doctrine if the property owner "retains control" over the construction project. In other words, if the property owner retains sufficient control over the construction project, the owner "steps into the shoes of the general contractor" and is held to the same degree of care as the general contractor. In response to claims under the Common Work Area Doctrine, defendants began arguing the alleged defect causing the injury was open and obvious.

Most recently, Turner Construction Company (Turner) attempted

SECREST WARDLE NOTES:

For those who attended Secrest Wardle's Premises Liability Seminar in June, 2005, the recent *Ghaffari* opinion from the Supreme Court should come as no surprise. Secrest Wardle predicted the Michigan Supreme Court's reversal of the Michigan Court of Appeals and its refusal to apply the Open and Obvious Defense to construction site injuries.

The *Ghaffari* decision continues a rather disturbing trend. Recently, Michigan courts have refused to apply the open and obvious defense to cases involving landlords and tenants. Governmental entities were also refused the open and obvious defense. Now, the open and obvious defense does not apply to construction sites.

Seemingly, the public policy behind the open and obvious defense, forcing individuals to take responsibility for their own safety, applies beyond the premises liability context. For example, historically the open and obvious defense was routinely applied in product liability cases. In *Ghaffari,* however, the Michigan Supreme Court cited *Lugo v. Ameritech Corp.* for the authority, "the open and obvious doctrine is *specifically* applicable to a premises possessor." Will the Open and Obvious Doctrine ever apply outside the premises liability or product liability context? Based on the current trend, the answer is no.

Secrest Wardle predicts Michigan courts will continue to limit the application of the Open and Obvious defense. The *Ghaffari* decision negates a significant defense previously available to general contractors and property owners acting as general contractors. Potentially, the defense will no longer be available to anyone, except possessors of land sued under theories of premises liability.

On a more positive note, however, the comparative negligence defense is still available to all defendants. Presumably, an individual injured by an otherwise open and obvious defect will be determined comparatively negligent, at least in part, in causing his own injuries. This defense will mitigate to some extent the *Ghaffari* decision.

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to utilize the open and obvious defense in a lawsuit arising from a construction project. In *Ghaffari v. Turner Construction Company,* 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. Mr. Ghaffari was injured on the construction site when he tripped on pipes left on the floor of a storage area, which allegedly served as a passageway. The pipes were owned by another subcontractor. In filing his complaint against Turner, among others, Mr. Ghaffari claimed the common work area exception extended liability to Turner for the negligent acts of its independent contractors.

In response, Turner argued it did not have a duty to Mr. Ghaffari as the alleged defect was open and obvious. The Michigan Court of Appeals, in a published opinion, affirmed the trial court's application of the open and obvious defense in dismissing Turner. However, on July 12, 2005, the Michigan Supreme Court reversed the Michigan Court of Appeals and held the open and obvious defense does not apply to cases involving the Common Work Area Doctrine.

In reversing the Michigan Court of Appeals, the Michigan Supreme Court held the Common Work Area Doctrine's requirement the defect be "readily observable" is essentially the same as requiring the defect be "open and obvious". Thus, one doctrine (the Common Work Area) imposes an affirmative duty to protect against hazards that are open and obvious, while the other (open and obvious) asserts no duty exists if the hazards are open and obvious. The Michigan Supreme Court held the Common Work Area and Open and Obvious Doctrines are not compatible.

Thus, the Michigan Supreme Court refused to apply the open and obvious defense to construction site accidents involving the Common Work Area Doctrine. Essentially, the public policy to keep work sites safe is greater than the policy to keep private properties safe. So, subcontractors injured on construction sites will not be caught in the Catch-22 of proving the defect causing their injury was "readily observable," triggering the Common Work Area Doctrine, but not "apparent upon casual observation," avoiding the open and obvious defense, a distinction Michigan's Supreme Court found impossible. For once and for all, Michigan courts have rejected the application of the open and obvious defense to construction cases alleging the Common Work Area Doctrine.

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