

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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You Win Some, You Lose Some: Third-Party Contractors and the Open and Obvious Defense

By Michael D. Crow

In *Henderson v. PKT, Inc.*, an unpublished opinion from Michigan's Court of Appeals, Plaintiff attended a concert at an outdoor music theater. Water "trickled" from a beverage stand, and ran down a paved and inclined walkway and into a drain. Plaintiff allegedly slipped and fell on the trail of water on the walkway and injured herself.

Because the water was readily observable to Plaintiff's companions, the trial court held the defect was open and obvious. The trial court also held the trail of water did not give rise to a "uniquely high likelihood of harm" nor was it an "unavoidable risk." Thus, the trial court granted Defendant property owner's motion for summary disposition. In doing so, the trial court also dismissed the independent concessions contractor, which was named as a Third Party Defendant.

On appeal, the Michigan Court of Appeals affirmed the dismissal of the independent concessions contractor, concluding that the Third Party Defendant was entitled to invoke the open and obvious defense. Because the concessions contractor was the music theater's exclusive concessions provider, and its employees operated all of the relevant beverage stands,

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Michigan law has long held a possessor of land has no duty to an individual injured by an open and obvious defect absent "special aspects." Initial attempts to expand the open and obvious defense beyond "possessors" in premises liability cases were met by Michigan's appellate courts with great success. However, there has been a recent trend by Michigan's appellate courts limiting the application of the open and obvious defense.

Michigan's appellate courts now routinely reject the application of the open and obvious defense to many claims involving governmental entities and landlords because they have statutory duties to maintain the property. In *Ghaffari v. Turner Construction Company*, the Michigan Supreme Court recently rejected the application of the open and obvious defense to construction site cases, restricting the defense to premises possessors. Whether the open and obvious defense applies to third party contractors remains uncertain.

In *Henderson*, the Michigan Court of Appeals applied the open and obvious defense to a third party contractor. However, the third party contractor was not sued directly by Plaintiff, but only added as a third party defendant. It is unclear why the dismissal of the underlying complaint against the property owner did not extinguish the third party complaint. Regardless, the Court of Appeals reasoned the third party contractor was a possessor of the premises and, as such, entitled to the open and obvious defense.

In dismissing the *Henderson* case, the Court of Appeals differentiated Plaintiff's premises liability claim from a general negligence claim, which Plaintiff apparently did

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the Court recognized both the concessions contractor and the property owner as “possessors” of the land. As a “possessor” of land in a premises liability case, the concessions contractor was entitled to the open and obvious defense. Therefore, the Court of Appeals upheld the trial court’s dismissal of the concessions contractor based on the open and obvious defense.

not plead. Presumably, the open and obvious defense would not apply to a general negligence claim that involves the breach of a duty distinct from those which are owed by a possessor of the premises.

At first blush, *Henderson* seems to expand the open and obvious defense to third party contractors. Upon closer inspection, the Court of Appeals seems to have limited its holding to premise liability claims against third party defendants and, presumably, all third party contractors, which were also “possessors” of the property. This logic is consistent with the Supreme Court’s recent decision in *Ghaffari*, and likely applies to property managers and cleaning crews, which have been historically defined by Michigan Courts as possessors of the property

Given the trend in the appellate courts, it is unlikely the open and obvious defense will apply to claims of negligence or for the benefit of third party contractors. These contractors (such as snow removal contractors, landscapers and miscellaneous repairmen) are not usually defined as “possessors.” Until the law is more clearly defined in this area, you must consider arguing whether a contractor in your case was a “possessor” of the property at the time of the accident and, therefore, entitled to the open and obvious defense.

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