Negligence Law Section

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"Premises Liability Law – Time to Rethink?"

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A long time ago, in what seems like a galaxy far, far away, Michigan law actually recognized at least two separate and distinct duties that premises owners owed to invitees :(1) a duty to maintain the property in a reasonably safe condition and (2) a duty to warn of hidden or latent defects. Ackerberg v. Muskegon Osteopathic Hosp., 366 Mich. 596, 599–600, 115 N.W.2d 290 (1962) and Samuelson v. Cleveland Iron Min. Co., 49 Mich. 164, 13 N.W. 499 (1882) If conditions were known to, or discoverable by, the premises owner through the exercise of reasonable care, the premises owner had the obligation to exercise reasonable care to protect the invitee from the danger. The defendant's failure to warn of defects could also indicate a breach of the legal duty owed plaintiff. Quinlivan v Great Atlantic & Pacific Tea Co., Inc. 395 Mich 244, 260-261, 235 NW2d 732 (1975).

In 1992, the Michigan Supreme Court determined that there would no longer be any duty to warn of open and obvious dangers, even where a property owner failed to keep their property in a reasonably safe condition. Riddle v. McLouth Steel Products Corporation, 440 Mich 85,100, 485 NW2d 676 (1992). The "open and obvious" defense was expanded in other cases including Lugo v Ameritech Corporation, Inc., 464 Mich 512, 629 NW2d 384 (2001), Joyce v Rubin 248 249 Mich App 231, 642 NW2d (2002) and Hoffner v Lanctoe. 492 Mich 450, 821 NW2d 88 (2012). As it stands right now, the open and obvious defense is based on an objective standard and depends on whether an average person with ordinary intelligence would have discovered a defect upon casual observation. Joyce, 249 Mich App at 238.

Some would argue that the open and obvious doctrine has led to unjust results. The case of Sidorowicz v Chicken Shack, 2003 WL 140127 (Mich. Ct. App. Jan17, 2003) is commonly referenced in this regard. In Sidorowicz, a blind Plaintiff slipped and fell due to water on the

floor of a restroom. The Court stated, "Plaintiff was unable to see this condition because of his blindness, but this condition would have been open and obvious to an ordinarily prudent person. No evidence has been presented indicating that the 'special aspects' of the unsafe condition would remove this case form the open and obvious doctrine." Id.

Recently, some Judges have begun to take another look. For example, in Deas v Hartman and Tyner, 2019 WL 1879582 (Mich. Ct. App. Apr. 25, 2019), Judge Gleicher wrote a separate concurrence/dissent, in which she specifically described the "deficiencies in the doctrinal approach to premises liability law…," finding that the Court's prior analysis of the open and obvious doctrine has been "misplaced" and that the more appropriate legal question is, "should the landowner have reasonably anticipated that [the plaintiff] would suffer an injury despite the condition's obviousness?" Deas 2019 WL 1879582 at *3.

In Deas, Judge Gleicher detailed the differences between the two separate and distinct duties that used to be recognized under Michigan premises liability law, finding that "(a)n open-and-obvious danger not only eliminates the duty to warn, but sweeps away any duty to protect an invitee from dangerous conditions on the premises. Except in the rarest of circumstances, only the injured plaintiff bears any responsibility to avoid the consequences of an obvious hazard." Deas, 2019 WL 1879582 at *4. Judge Gleicher implicitly recognized that the current law incentivizes property owners to leave dangerous conditions on their properties. The more open and obvious the danger, the less reason for a property owner to redress that danger.

Similarly, in Quinto v Woodward Detroit CVS, LLC, 305 Mich App 73,76, 850 NW2d 642 (2014), Judge Shapiro acknowledged that the original open and obvious defense was meant to only apply to the duty to warn, but that in "subsequent decisions, the Court broadened the scope of the open and obvious doctrine such that it greatly reduced not only the duty to warn, but also the general duty to maintain the premises in a safe condition."

In Quinto, the Court was struggling with the legitimate question of what to do in a self-service store where "the distractions from the displays were continuous, i.e., displays along all the aisleways, and were intentionally created by the defendant to command the customer's attention for a commercial purpose." Id, at 78.Thus, a person's gaze was intentionally being redirected away from the floor by the defendant. Ultimately, Judge Shapiro ruled that he was bound to follow precedent and that the distractions would not affect whether a defect was open and obvious.

It is worth noting that under both the Second and Third Restatements of Torts, a landowner is not excused from remedying a known or obvious danger. Rather, the obviousness

of the danger "bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability." Deas, 2019 WL 1879582 at *4, quoting from the 2 Restatement Torts, 3d, § 51, comment k, p. 251. Instead, the Court is to look at both "(1) whether the landowner should have remediated the danger despite its obviousness, and, (2) whether the invitee failed to use reasonable care in the face of the obvious danger." Id.

In conclusion, Michigan Courts have long recognized that the true purposes of tort law is both to provide compensatory damages to victims of another's wrongful conduct and to encourage tortfeasors to adopt corrective measures. See Penwest Dev. Corp. v Dow Chem. Co., 667 F. Supp 436, 442 (E.D. Mich 1987); Funk v General Motors Corp., 392 Mich 91, 104, 220 NW2d 641 (1974)(overruled in part on other grounds in Hardy v Monsanto Enviro-Chem Sys., Inc., 414 Mich 29, 323 NW2d 270 (1982); Holloway v Gen. Motors Corp. Chevrolet Div. 403 Mich 614, 271 NW2d 777, 783 (1978),and Weymers v Khera, 454 Mich 639, 652, 563 NW2d 647, 653 (1997). To meet both of these purposes, the Courts should rethink the open and obvious defense.

To paraphrase Princess Leia in Star Wars, "Help us Michigan Courts, you're our only hope."

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