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Does the Open and Obvious Defense Apply to Contractors? The Debate Rages On

By Mark Masters

For over a year, several panels of the Michigan Court of Appeals have wrestled with the issue of whether or not the open and obvious defense applies to contractors who lack possession and control of the property. Unsurprisingly, the different panels have ruled differently.

Plaintiffs traditionally argue that a contractor is not a traditional "premises liability" defendant (a property owner, possessor or manager), and is therefore not entitled to premises liability defenses, such as the open and obvious defense. Defendant contractors argue that a traditional premises liability defendant has high duties to maintain, inspect, repair and make safe the premises for business guests. Therefore, if a traditional premises liability defendant has such high duties (in fact, greater duties than those owed by a contractor to a plaintiff) and the open and obvious defense is a complete defense to these higher duties, then the defense should also apply to the lower duties owed by a contractor.

The Court of Appeals has again spoken on this issue in the case of *Heider v. Barley Trucking & Excavating*. In *Heider,* Plaintiff tripped and fell over a piece of asphalt when she was traversing a parking lot which was being resurfaced. Defendant Comfort Menominee Associates owned the premises, and

SECREST WARDLE NOTES:

This case is the latest word in whether or not the open and obvious defense is available to contractors who lack possession and control of the property. This case was decided in favor of contractors, but other recent decisions have gone the other way. Strangely, this issue was ruled upon in December of 2003 in a published decision of he Court of Appeals. Because that decision was published, it has been binding on all subsequent panels of the Court of Appeals and the trial courts. However, the decision has been ignored by several recent panels of the Court of Appeals which have ruled against contractors on this issue. None of the rulings against contractors have been published.

There is hope. The Michigan Supreme Court has a case before it involving this very issue and a decision is expected this summer. The Supreme Court is expected to clarify and resolve this issue once and for all. Secrest Wardle will report the holding to you immediately upon its release.

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Defendant Barley Trucking & Excavating, Inc. was the general contractor of the project. The paving subcontractor was not named as a party.

Plaintiff testified that the piece of asphalt was about four inches thick and size of a dinner plate in diameter. She also testified she knew she was in an area under construction. Although Plaintiff stated that the piece of asphalt was black, matching the pavement underneath, her fall occurred in the daytime, and there was nothing preventing Plaintiff from noticing the large piece of debris in her path. The trial court ruled that the piece of asphalt was open and obvious and Plaintiff did not present any facts that established there were "special aspects" of the piece of asphalt which made it unusually dangerous or unavoidable.

On appeal, the Court of Appeals affirmed the trial court's dismissal of the case. The Court of Appeals cited the prior published (and therefore precedental) decision of *Ghaffari v Turner Construction Company,* which has been often ignored by other panels of the Court of Appeals in these cases. Following *Turner,* the *Heider* Court held "the open and obvious defense, which extends to claims against general contractors, shields a defendant from liability where an average pedestrian of ordinary intelligence should have discovered the offending item on casual inspection."

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We welcome your questions and comments.

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