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Construction Defendants Lose Critical Defense in Personal Injury Claims

By Brett A. Grossman

For the last few decades, property owners have enjoyed the expanding protection of the "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. Gradually, this defense has been expanded to protect others than property owners.

More recently, the open and obvious defense has found application in construction site injury litigation. Generally, property owners and general contractors cannot be held liable for the negligence of independent contractors working on construction sites. However, exceptions exist to this general rule of non-liability in cases under the doctrines of Common Work Area and Retained Control.

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." Under the Retained Control Doctrine, a property owner may be held liable if the property owner "retains control" over the construction project and if the common work area definition is met. 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 both Doctrines, general contractors and property owners began raising the defense that the alleged danger causing the injury was open and obvious. Further, this defense has also been used by the subcontractors alleged to have created the danger.

Most recently, the applicability of the open and obvious defense in construction site injury litigation was addressed by the Michigan Appellate Courts. In *Ghaffari v. Turner Construction Company,* Turner was hired as the general contractor to build the IMAX

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Although a long time in coming, the *Ghaffari* decision will have an immediate and long lasting adverse impact on the success of defendants in construction site injury litigation. The Michigan Supreme Court has taken from construction defendants an effective tool which limited liability in construction site accident litigation. The *Ghaffari* decision does, however, leave open a few questions that will affect the defense strategy in construction cases. Although the open and obvious defense is not available to premises owners where liability is based on the theory of Retained Control, it is available where liability is based on premises liability principles. Therefore, a premises owner may escape liability by establishing that the area of danger had been turned over to the general contractor as part of the construction project and the owner no longer had possession and control. However, this decrease in exposure to a premises owner would increase exposure to a general contractor who no longer has available the open and obvious defense. Additionally, the uncertainty left by the Michigan Supreme Court as to the applicability of the defense to subcontractor liability may also increase the exposure to general contractors. If a subcontractor is afforded the protection of the open and obvious defense, then the general contractor is left to defend the negligence of that subcontractor, even though the subcontractor is immune from liability. In those cases, the general contractor must look to the subcontractor's indemnity and insurance obligations to allocate that risk.

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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Theatre at Henry Ford Museum. Turner negotiated trade contractor agreements with several subcontractors, including Conti Electric, Inc., which employed Mr. Ghaffari, and with Guideline Mechanical (pipefitter) and Hoyt (plumber). Mr. Ghaffari was injured on the construction site when he tripped on pipes left on the floor of a storage area, which were allegedly owned by one of the defendant subcontractors. Mr. Ghaffari alleged liability against Turner under the Common Work Area Doctrine and also claimed liability against Guideline and Hoyt as the owners of the pipes.

In response, Turner, Guideline and Hoyt argued that they did not have a duty to Mr. Ghaffari as the alleged danger 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 as well as the subcontractors. 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. The Court's analysis also called into question whether the defense can be raised by subcontractors as well.

In reversing the Michigan Court of Appeals, the Michigan Supreme Court held the Common Work Area Doctrine's requirement that the danger be "readily observable" is essentially the same as requiring that the danger 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. Therefore, the Michigan Supreme Court held the Common Work Area and Open and Obvious Doctrines are not compatible.

Thus, in the context of General Contractor liability, 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. Although the Michigan Supreme Court did not expressly reject the application of the defense to Subcontractor liability, the Court's analysis noted distinctions between theories based on premises liability law and those based on construction law; which raises serious doubt that the defense will be available to subcontractors. Therefore, the Michigan Supreme Court has finally laid to rest any question concerning the applicability of the open and obvious defense to construction site cases involving the Common Work Area Doctrine and the Retained Control Doctrine. Given the Court's analysis, it appears that the open and obvious defense is not available to any defendant in construction site injury litigation, except a property owner whose liability is based solely on premises liability principles.

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