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Supreme Court Speaks: No Duty of Land Owner to Protect Employee of Subcontractor from Hazards of Construction Site

By Mark F. Masters

In *Young v. Delcor Associates*, __ Mich __ (2006), Plaintiff was an employee of RPA Construction, which had contracted with Michigan Wall Panel to provide rough carpentry labor on a house owned and being built by Delcor Associates. Plaintiff's co-worker laid a wall panel about one-third over the second floor stairwell with no stairs when he went to get more building materials. Plaintiff stepped on the hanging wall panel, which broke. Plaintiff fell over twenty feet from the second floor to the basement through the first and second floor stairwells. Neither stairwell was covered or barricaded.

Plaintiff sued Delcor under premises liability and contractor liability theories. The trial court dismissed the premises liability claims based on the open and obvious defense, and dismissed the contractor liability claims based on lack of a common work area and lack of a high degree of risk to a significant number of workers. The Court of Appeals upheld the dismissal of the contractor liability claims, but reversed the dismissal of the premises liability claims. If there were "special aspects" of an otherwise open and obvious condition, then the open and obvious defense did not apply. Such special aspects would have included a condition which was "effectively unavoidable" (*i.e.*, a puddle of water blocking the only known exit to a store) or "unreasonably dangerous" (*i.e.*, a 30-foot deep pit). The Court of Appeals held that there was a question of fact for a jury to decide in regard to whether the partially covered stairwell with no stairs had the "special aspect" of being "unreasonably dangerous," and therefore immune from the open and obvious defense.

Without a hearing, the Michigan Supreme Court reinstated the trial court's dismissal of the premises

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The Supreme Court upheld dismissal on three separate theories: (1) no duty owed to the independent contractor for construction site hazards, (2) the open and obvious defense, and (3) lack of notice.

Most importantly, the Supreme Court has refined the "unreasonably dangerous" special aspects exception to the open and obvious defense in *Young*. Previously, the Supreme Court had given the example of a 30-foot deep pit as being "unreasonably dangerous." The Court has now explained that the analysis of whether a condition is unreasonably dangerous must be put in context. Here, the 20-foot fall risk was not unreasonably dangerous since it was not out of context with a residential construction project. Therefore, the open and obvious defense remained viable.

In the future, you must examine your claims in light of what dangers are or are not "in context" with the premises and the activities taking place there. While a 20-foot fall risk is not unreasonably dangerous in a residential construction project, it may be from an apartment balcony or rooftop.

liability claims. The Supreme Court held:

> The defendant premises owner did not have a duty to protect the plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the construction site hazardous condition that contributed to the plaintiff's injury. *Perkoviq v. Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 18-20 (2002). Moreover, the temporary hazardous condition was created by the independent contractor, the defendant premises owner had no notice of the condition, and the condition was not unreasonably dangerous in the context of a residential construction project. *Id.*

Therefore, all of Plaintiff's claims against Delcor were dismissed.

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We welcome your questions and comments.

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