Legal Opinion Letter

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RULINGS STRIP AWAY COMMON-SENSE TORT DEFENSE IN NEW YORK STATE

by
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New York courts have once again made it harder on businesses by favoring the plaintiffs' bar over common sense. For over eighty years, real estate owners, insurance companies and defendants' lawyers could effectively use the defense that a condition was open and obvious and thus, a plaintiff could not recover for a condition that he should have seen and had an opportunity to avoid. Now, all four appellate divisions of the State of New York have decided that the open and obvious defense can no longer be used by itself to support a motion for summary judgment.

On March 9, 2004, the Appellate Division, First Department effectively put an end to the open and obvious defense in the decision of *Westbrook v. W.R. Activities - Cabrera Markets*, Appellate Division, 1st Dept. The defense can no longer be used for a motion for summary judgment but, rather, only if the case actually goes to trial.

The open and obvious defense was based on the premise that the hazard at issue was so easily seen that the plaintiff should have avoided it. The defense was the last vestige of the age of contributory negligence and the assumption of risk doctrine, both of which barred the injured party from recovery. While the bar was in effect, a defendant could seek and obtain summary judgment when an injury occurred because of a hazard that could have been easily observed and avoided, such as a speed bump or a display rack.

The open and obvious defense has been a part of defendants' arsenal since 1917 when it was first used to dismiss a complaint in *Weigand v. United Traction Company*, 221 N.Y. 39 (1917). The dismissal was upheld as part of the underlying understanding that a landowner is not an "insurer of the safety of those whom he invites to visit his property." *See Dibiase v. Ewart & Lake, Inc.*, 228 A.D. 407, 409 *aff'd*, 255 N.Y. 620 (1931) (doctrine applied to a four year old child).

As recently as 1999, all four New York judicial departments upheld the defense of "no duty to prevent or even warn of conditions which can be readily perceived by the use of one's senses." *Cartuccio v. K.C.M.C. Trust*, 280 A.D.2d 831 (3rd Dept. 2000); *Ackermann v. Town of Fishkill*, 201 A.D.2d 441 (2nd Dept. 1994); *Garcia v. New York City Housing Authority*, 234 A.D.2d 102 (1st Dept. 1996); *Schiller v. National Presto Industries, Inc.*, 225 A.D.2d 1053 (4th Dept. 1996). The New York Court or Appeals, the state's highest court, had upheld this defense as recently as 2002. *Bazan v. Rite Aid of New York, Inc.*, 279 A.D.2d 762, *leave denied*, 960 N.Y.2d 709 (2001); *Pinero v. Rite Aide of New York, Inc.*, 294 A.D.2d 251, *aff'd* 99 N.Y.2d 541 (2002).

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In 2000, the defense was eliminated in the Fourth Department in the cases of *William v. Chenango County Agricultural Society, Inc.*, 272 A.D.2d 906 (4th Dept. 2000) and *Holl v. Holl*, 270 A.D.2d 864 (4th Dept. 2000). Both cases specifically held that while the open and obvious defense does relieve the defendant of a duty to warn, it does not entitle the defendant to summary judgment. The court held that the defendant's duty to keep the premises safe remained paramount. Prior to those cases, a defendant could effectively argue that because the condition was so obvious, liability from a failure to maintain was negated because anybody who would happen upon the condition would or should see the condition and be able to avoid it. These rulings effectively severed the argument of the duty to warn from a failure to maintain.

By effectively stating that the duty to warn was only one part of a defendant's duty, and that it was, in fact, distinct and separate from the duty to maintain the premises in a reasonably safe condition, the opening was available for the First Department to follow with the argument that an open and obvious defense merely went to the issue of comparative negligence. *Orellana v. Merola Associates*, 287 A.D.2d 412 (1st Dept. 2001). This effectively created a split in the departments. However, even the First Department decided not to follow its own ruling in *Orellana* immediately. *Pinero v. Rite Aid of New York, Inc.*, 294 A.D.2d 251 (1st Dept. 2002). In *Pinero*, the First Department followed the prior holdings that there was no duty to protect or warn against conditions that are in plain view, open, obvious and readily observable by those employing the reasonable use of their senses. In fact, the Court of Appeals later affirmed the holding of *Pinero. See Pinero v. Rite Aid of New York*, 99 N.Y.2d 541 (2002). The Court of Appeals also previously upheld the open and obvious defense even when applied to children. *Bazan v. Rite Aid of New York, Inc.*, 279 A.D.2d 762, *leave denied* 906 N.Y.2d 709 (2001). To date, the Court of Appeals has not issued a decision to the contrary. However, in 2003, both the Second and Third Departments specifically overturned their prior holdings when they stated that the open and obvious defense is now merely part of comparative negligence because it does not eliminate a landowner's duty to maintain his or her property in a reasonably safe condition. *MacDonald v. City of Schenectady*, 308 A.D.2d 125 (3rd Dept. 2003); *Cupo v. Carfunkel*, 1 A.D.3d 48 (2nd Dept. 2003). Now, along with the holding of *Westbrook v. W.R. Activities - Cabrera Markets*, *supra*, the First Department has definitively stated that it is following this line and affirming its prior holding in *Orellana v. Merola Associates*, that the open and obvious defense merely goes to the duty to warn, but is insufficient to sustain a motion for summary judgment in and of itself. A defendant must also prove that it has satisfied its duty to keep the premises in a reasonably safe condition. However, the effective result of these holdings is to eliminate the defense of an open and obvious condition.

Interestingly, *Westbrook* specifically cites two cases that had been effectively affirmed by the Court of Appeals when it denied leave to appeal on holdings that dismissed the complaint based on the open and obvious defense. *See Sandler v. Patel*, 288 A.D.2d 459 (2nd Dept.), *leave denied*, 99 N.Y.2d 509; *Patrie v. Gorton*, 267 A.D.2d 582 (3rd Dept.), *leave denied*, 94 N.Y.2d 761. It is this aspect that lead to a vigorous concurring opinion in support of the defense by First Department Presiding Justice John T. Buckley.

Justice Buckley opined that while the case was properly decided, the open and obvious defense should still apply when appropriate. Presiding Justice Buckley noted that the law as set forth by the Court of Appeals does not support the elimination of the open and obvious defense. He argued that by eliminating the defense, the courts were effectively making landowners absolute insurers against "every possible harm, no matter how unforeseeable, or unreasonable." To date, the Court of Appeals has not issued a decision to the contrary.

Given Presiding Justice Buckley's vigorous concurring opinion in *Westbrook*, the situation is ripe for a challenge to the Court of Appeals. Because there is a division between the holdings of the Court of Appeals and all four of the Appellate Divisions, an argument can be made that the Court of Appeals should review a case addressing the open and obvious defense in order to determine whether or not it can still be used to dismiss a complaint by a motion for summary judgment. However, with the unanimity of the Appellate Divisions, the chances of success of such a challenge are likely to be minimal.

Therefore, landowners and business owners should anticipate that the open and obvious defense has been relegated to the dustbin of history. Instead, it can only be used as a risky trial strategy to argue that the plaintiff is solely responsible for his own incident. Given that the City of New York is often very friendly to plaintiffs, it is no longer a viable and winnable defense.

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