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OPEN AND OBVIOUS: NOT SO OBVIOUS ANYMORE

Shannon P. Smith, Esq.
William M. Swann, Esq.
Kay Casto & Chaney PLLC

Goodbye, adios, adieu, arrivederci, and sayonara to the open and obvious doctrine (and all hope for summary judgment). The Supreme Court of Appeals of West Virginia's recent decision in Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013), dramatically altered the landscape of premises liability law in West Virginia. In Hersh, the plaintiff fell down "a staircase in a commercial parking lot that lacked handrails" and alleged that the property owners "were *prima facie* negligent because a local ordinance legally required the installation of at least one handrail." Hersh, 752 S.E.2d at 339. The defendants countered that the missing handrail was open and obvious. Id. The circuit court agreed and granted the defendants summary judgment. Id.

Briefly explaining the open and obvious doctrine, which had been the law in West Virginia for more than one hundred years, the Court said,

> [u]nder this common-law doctrine, if a plaintiff is injured by a hazard on another's land that was 'open and obvious' such that it was or could have been known to the reasonable plaintiff, then the plaintiff is barred as a matter of law from recovering any damages from the premises owner or possessor. Under the doctrine, the premises owner or possessor owes no duty of care to eliminate open and obvious hazards; instead, he or she only has a duty to correct hidden dangers.

Id. Reversing summary judgment, the Court found that the owners, by local ordinance, had a duty of care that included placing handrails on the stairs. The Court could have stopped there. However, the plaintiff argued on appeal that the open and obvious doctrine should be completely abolished, and the Court complied, turning the issue into one of foreseeability of injury and overruling Sesler v. Rolfe Coal & Coke Co., 51 W. Va. 318, 41 S.E. 216 (1902), and Burdette v. Burdette, 147 W. Va. 313, 127 S.E.2d 249 (1962). Id. at Syl. Pt. 6.

The Court's decision on the obviousness of a danger created four new Syllabus Points of importance to anyone who touches premises liability cases (the fourth being the explicit

abolishment of the doctrine):

> 5. In the ordinary premises liability case against the owner or possessor of the premises, if it is foreseeable that an open and obvious hazard may cause harm to others despite the fact it is open and obvious, then there is a duty of care upon the owner or possessor to remedy the risk posed by the hazard. Whether the actions employed by the owner or possessor to remedy the hazard were reasonable is a question for the jury.
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> 7. In the ordinary premises liability case against the owner or possessor of the premises, the finder of fact may consider whether a plaintiff failed to exercise reasonable self-protective care when encountering an open and obvious hazard on the premises. The plaintiff's confrontation of an open and obvious hazard is merely an element to be considered by the jury in apportioning the relative fault of the parties.
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> 8. The owner or the possessor of premises is not an insurer of the safety of every person present on the premises. If the owner or possessor is not guilty of negligence or willful or wanton misconduct and no nuisance exists, then he or she is not liable for injuries sustained by a person on the premises.

Id. at Syl. Pts. 5, 7, 8.

The Court reasoned that the open and obvious doctrine was introduced and subsequently evolved during West Virginia's use of contributory negligence. Id., 752 S.E.2d at 346. As a result, the Court determined that, because of the adoption of comparative negligence and the elimination of contributory negligence in Bradley v. Appalachian Power, 163 W. Va. 332, 256 S.E.2d 879 (1979), the open and obvious doctrine cannot be justified. Id.

The contributory versus comparative analysis makes sense. But wait. The Court completely disregards the myriad of cases in which the open and obvious doctrine has been applied since Bradley: McDonald v. University of West Virginia Board of Trustees, 191 W. Va. 179, 444 S.E.2d 57 (1994); Estate of Helmick by Fox v. Martin, 192 W. Va. 501, 453 S.E.2d 335 (1994); Stevens v. West Virginia Inst. of Tech., 207 W. Va. 370, 532 S.E.2d 639 (1999); Senkus

v. Moore, 207 W. Va. 659, 535 S.E.2d 724 (2000); Hawkins v. U.S. Sports Ass'n, Inc., 219 W. Va. 275, 633 S.E.2d 31 (2006).

Nevertheless, in its analysis, the Court continues by explaining that "risk of harm to others from an open and obvious danger can sometimes be foreseeable to an owner or possessor, thereby creating a duty to exercise care to alleviate the danger." Id. at 347. However, rather than simply rejecting the Sesler exception to common law negligence in regard to premises liability claims, the Court necessarily makes foreseeability a (sub?)element of duty, relying upon former decisions in Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988), and Mallet v. Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999) for support. Id. All former students of Tom Cady should know that duty comes first; where there is no duty, there is no liability. The result here, however, is that a part of the causation element jumps to the head of the line and becomes a part of the duty element, indirectly invalidating duty as a matter of law in this context. Consequently, foreseeability of injury is now just another element for the jury's consideration in our comparative negligence state.

The practical effect of Hersh for those on the other side of the "v." is the complete loss of summary judgment. No more can open and obvious be argued to defeat duty of care. Hersh fundamentally alters the analysis that West Virginia courts will apply in premises liability cases. Foreseeability of injury is now the touchstone for establishing the duty element of negligence. The practical effect of this new approach is to remove a judge's ability to dispose of unmeritorious slip and fall claims and to put them in the hands of a jury instead.

The best way to illustrate Hersh's impact is to put it in the context of a common slip and fall scenario. Consider this: A young man wakes up in his apartment complex on a cold December morning. He gets ready for work and heads out the door. He recognizes that snow is

still on the ground from a previous storm and further recognizes that the ground appears to be wet. In exiting his complex, he must cross a wooden platform. Recognizing that the platform is slick, he holds on to a handrail as he crosses. He lets go of the handrail and steps off of the wooden platform onto a patch of concrete sidewalk that he admittedly sees is covered in snow and ice. He slips, falls, and hits the ground in an instant.

Under the old slip and fall rubric from Sesler, and as confirmed in Burdette, a premises owner had no duty of care to correct a dangerous condition if that dangerous condition was known to a person injured on the premises. See Syl. Pt. 1, Sesler, 51 W. Va. 318, 41 S.E. 216; Burdette, 147 W. Va. at 318, 127 S.E.2d at 252. Therefore, if a plaintiff saw there was a patch of snow and ice on the ground, the plaintiff was expected not to step in the patch of snow and ice and instead to step over it, or around it, or next to it.

Under Sesler, our hypothetical slip and fall plaintiff recovers nothing because of his knowledge of the snow and ice that made him fall. A judge presiding over this situation would have the ability to dispose of the case at the summary judgment stage because the uncontroverted facts indicate that the plaintiff knew about the condition and must therefore lose as a matter of law. Hersh brings about an entirely different result, and makes what should be a clear-cut case far more convoluted.

Under Hersh, the property owner's failure to monitor every inch of that sidewalk at all hours of the day in order to treat it immediately upon snowfall or freezing temperatures would now be actionable and likely get to a jury. The fact that our hypothetical plaintiff saw the snow and ice, yet chose to encounter the conditions anyway, nonetheless creates an issue for the jury to decide.

Perhaps the best analysis of the Hersh decision lies in Justice Loughry's dissent:

> It is decisions like this that have given this state the unfortunate reputation of being a "judicial hellhole." The majority has saddled property owners with the impossible burden of making their premises "injury proof" for persons who either refuse or are inexplicably incapable of taking personal responsibility for their own safety. More troubling, however, is the fact that ordinary homeowners will pay the highest price for the majority's pandering to persons who ignore the risk associated with open and obvious hazards that ordinary, hard-working citizens encounter every day and invariably utilize their common sense and good judgment to avoid. This decision is a radical departure from our well-established law, and, therefore, I dissent.

Id., 752 S.E.2d at 350 (Loughry, J., dissenting). Complete carelessness on behalf of plaintiffs will now get them to a jury. The duty of care of property owners is now broadened to potentially make property owners insurers of the safety of every person present on the premises, in spite of the Court's repeated assertions (and new Syllabus Point) that they are not. This new legal duty will categorically increase the risk and cost of owning property.

A judge's ability to apply common sense and dispose of clearly unmeritorious litigation pursuant to Rule 56 of the West Virginia Rules of Civil Procedure is all but eliminated as a result of Hersh, a troubling fact for not only the Defense Bar in West Virginia but for every property owner in West Virginia. The options for defense have been limited: settle early or hope to convince a jury of the plaintiff's folly.