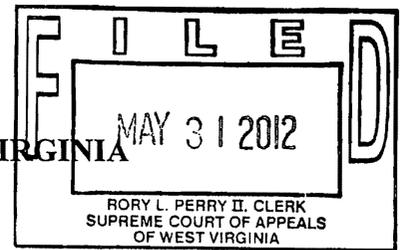


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Docket No. 12-0106

WALTER E. HERSH, et al.,

Petitioners,

vs.

**E-T ENTERPRISES, LIMITED
PARTNERSHIP, et al.,**

Respondents.

Circuit Court of Berkeley County
Civil Action No. 10-C-149

***AMICUS CURIAE* BRIEF SUBMITTED ON BEHALF OF THE DEFENSE
TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF APPELLEES**

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INTRODUCTION

The Defense Trial Counsel of West Virginia (“DTCWV”) respectfully submits this amicus brief to address two aspects of the arguments presented by the Appellants asking this Court to overturn well-established precedent with respect to the “open and obvious” doctrine. The concepts underlying that doctrine - which has its roots in the legal determination of whether one party owes a duty to another - apply in a number of settings beyond premises liability. DTCWV does not believe this case presents the appropriate vehicle for the radical and ultimately unnecessary action requested by Appellants. DTCWV further does not believe the Appellants’ suggestion that this Court should overturn its precedent is warranted on the merits. The consistent and predictable application of West Virginia law is of great interest to DTCWV members. Although the Appellants raise other arguments in support of the reversal of the lower court’s decision, those arguments can be addressed directly by the Appellees. This *amicus* is therefore limited to an analysis of why the radical relief sought by Appellants is inconsistent with the Court’s prior holdings and why DTCWV believes the Court should continue to recognize the viability of the “open and obvious” doctrine.¹

STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil litigation in West Virginia. The Defense Trial Counsel of West Virginia is an affiliate of

¹ No counsel for any party authored this brief in whole or in part, nor did any counsel or party make a monetary contribution (direct or indirect) towards the preparation or submission of this brief. In addition, no other person or entity made any monetary contribution towards the preparation or submission of this brief. Counsel for DTCWV authored the brief solely as part of their service to the organization. All parties have consented to the filing of this amicus brief.

the Defense Research Institute (DRI), a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members also on occasion represent plaintiffs in civil litigation.

Although it does not routinely file amicus briefs, the Defense Trial Counsel of West Virginia is interested in the issue before the Court regarding the continued viability of the “open and obvious” doctrine because of DTCWV’s general position that consistent and predictable application of the law is in the best interest of its members and of the civil justice system. For example, in *McMahon v. Advance Stores Co.*, ___ W.Va. ___, 705 S.E.2d 131 (2010), DTCWV filed an amicus urging the Court to apply W. Va. Code §46A-6-108(a) in a manner consistent with decisions of other courts applying similar statutory provisions. In *State ex rel. Chemtall v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), DTCWV submitted a brief asking the Court to apply West Virginia’s class action rules in a fashion similar to equivalent federal rules. Likewise, in *Hawkins v. Ford Motor Co.*, 211 W. Va. 487; 566 S.E.2d 624 (2002), DTCWV submitted a brief in support of a manufacturer’s assertion that the plain language of West Virginia’s Unfair Trade Practices Act did not apply to self-insured entities. All three positions were ultimately adopted by the Court.

The DTCWV Board of Governors has authorized the filing of an *amicus* brief on behalf of the DTCWV’s membership.

STATEMENT OF EXPERIENCE

DTCWV members are routinely involved in counseling and litigation regarding the legal question of whether one party owes a duty to another. That legal question has for decades – both before and after West Virginia’s adoption of the comparative fault –

included the recognition that certain hazards are sufficiently apparent to all that a party owes no duty to guard against those hazards or to warn others of their existence. Our members' experience is that all parties benefit from consistent and predictable rules of decision, including the legal question of whether a duty is owed in the first instance. In this case, DTCWV believes there is no reason for the Court to overturn decades of precedent with respect to the general application of the "open and obvious" doctrine. It believes the Court should either avoid entirely the question of the doctrine's continued viability² or, if it does reach that issue, should reaffirm its prior holdings in that regard.

DISCUSSION

This case arises in the area of premises liability of a private property owner. The lower court correctly held that West Virginia continues to recognize the "open and obvious" doctrine as a component of that body of law. The doctrine arises not from a comparison of the conduct of the parties in causing the injury (such as would be the case in a comparative fault analysis), but rather in the more basic question of whether the property owner owes any legal duty in the first instance to warn of or guard against "open and obvious" hazards. As we discuss below, the question of whether such a duty exists is one for the Court and is separate from the factual issues we call upon juries to resolve. In addition, we believe the continued viability of the "open and obvious" doctrine has implications beyond the premises liability arena into areas such as products liability and the duty to warn. Indeed, two federal judges sitting in diversity have held that West

² As stated above, the primary argument advanced by Appellants is their claim that the violation of the municipal ordinance vitiates the Appellees' ability to rely on the "open and obvious" doctrine. This *amicus* brief does not address that issue. DTCWV suggests the Court should first resolve that issue before reaching the question of the wholesale abrogation of the "open and obvious" doctrine.

Virginia would recognize an “open and obvious” exception to the duty to warn in the product liability context, based in part of its recognition in premises liability cases. *Roney v. Gencorp.*, 654 F.Supp. 2d 501 (S.D.W.Va. 2009); *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F.Supp. 296 (S.D.W.Va. 1997). Consequently, DTCWV believes that the Court should not overturn decades of precedent with respect to the “open and obvious” doctrine. If it reaches the issue at all, the Court should reaffirm its continued viability.

As noted, this *amicus* brief addresses two specific arguments advanced by the Appellants. First, they argue in Section III of their opening brief that the “open and obvious” doctrine does not apply where the resulting injury from the condition was “reasonably foreseeable.” Second, they argue in Section IV that the “open and obvious” doctrine runs counter to this Court’s adoption of comparative assumption of the risk. Both of these arguments are premised on a fundamental misconstruction of the basis for the “open and obvious” doctrine. That doctrine is part of the court’s legal obligation to determine whether a duty is owed in the first instance and not part of a jury’s subsequent factual determination as to whether the defendant is in fact liable. This Court has continued to recognize this distinction even after the adoption of comparative fault.

As Appellants correctly note, West Virginia first adopted comparative fault principles in 1979 with its seminal decision in *Bradley v. Appalachian Power Company*, 163 W.Va. 332, 256 S.E.2d 879 (1979). Ten years later, in *King v. Kayak Manufacturing Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989), West Virginia added comparative assumption of the risk to the comparative fault analysis. Since those decisions were handed down, however, West Virginia has continued to maintain a clear distinction

between the threshold legal question of whether the defendant owed a duty in the first instance and the distinct factual question of whether that duty was breached. Indeed, as Judge Haden observed in *Wilson v. Brown & Williamson Tobacco Corp.*, 968 F.Supp. 296 (S.D.W.Va. 1997), there is a fundamental difference between the assertion of defenses such as assumption of the risk and the more fundamental legal question of whether a legal duty exists in the first instance. 968 F.Supp. at 301 (stating that West Virginia law does not require a defendant to warn of open and obvious dangers). It is this fundamental distinction that rebuts the arguments advanced in Sections III and IV of the Appellants' brief.

I. THE "OPEN AND OBVIOUS" DOCTRINE IS PART OF THE COURT'S LEGAL ANALYSIS FOR DETERMINING WHETHER THE DEFENDANT OWES A DUTY IN THE FIRST INSTANCE.

This Court has long recognized that "the determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." *Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 612; 567 S.E.2d 619, 622 (2002); *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000) syllabus point 5 (quoting *Jack v. Fritts*, 193 W. Va. 494, 495, 457 S.E.2d 431, 432 (1995)).³ Prior to the adoption of comparative fault, this Court recognized that the question of whether a given hazard was "open and obvious" presented a legal question as part of the duty analysis:

³ As the Court stated in *Aikens*, "[o]nly the related questions of negligence, due care, proximate cause, and concurrent negligence" present jury issues." 208 W. Va. at 490; 541 S.E.2d at 580. "The initial determination of the existence of a duty, however, continues to be an issue resolved by the trial court." 208 W.Va. at 490-491; 541 S.E.2d at 580-581.

The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers.

Burdette v. Burdette, 147 W. Va. 313, 318; 127 S.E.2d 249, 252 (1962) *overruled on other grounds Mallett v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999) (abolishing distinction between duties owed to licensees and invitees).

This Court's post-comparative fault decisions have continued to recognize that the threshold question of the scope of the duty owed remains one of law for the court and those holdings have extended to the "open and obvious" doctrine. As explained in *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994):

The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers. . . . There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.

192 W. Va. at 505; 453 S.E.2d at 339. *See also, McDonald v. University of W. Va. Bd. of Trustees*, 191 W. Va. 179, 182-183; 444 S.E.2d 57, 59-60 (1994); *White v. Home Depot U.S.A., Inc.*, 2011 U.S. Dist. Lexis 78672 (S.D.W.Va. July 19, 2011) (stating that West Virginia law continued to recognize there is no duty to warn of obvious dangers); *Roney v. Gencorp.*, 654 F.Supp. 501, 502 (S.D.W.Va. 2009) (stating that the "open and obvious" exception to the duty to warn is well-established in West Virginia law). Because the legal determination of whether a duty exists in the first instance is a question

of law for the court, there is no inconsistency – as Judge Haden recognized in *Wilson* – between the continued viability of the “open and obvious” doctrine and West Virginia’s adoption of comparative assumption of the risk.

DTCWV believes that continuing to apply the same rules of decision that have been in place even after the adoption of comparative fault is fully consistent with its members’ interest in providing accurate and timely advice to their clients. In addition, DTCWV believes that consistent application of the rules supports DTCWV’s interest in furthering the civil justice system in West Virginia. This Court should not overturn that precedent

II. THE COMPETING AUTHORITIES FROM OTHER JURISDICTIONS OFFER NO BASIS FOR CONCLUDING WEST VIRGINIA SHOULD ABANDON THE “OPEN AND OBVIOUS” DOCTRINE.

Appellants cite to cases from a handful of jurisdictions to argue that the “open and obvious” doctrine is being abrogated across the country. Even if that were so, it is not necessarily a basis for West Virginia to overturn decades of precedent. More to the point, however, the courts which have abrogated the “open and obvious” doctrine have done so on the basis of an analysis which, contrary to West Virginia law, does not treat the doctrine as part of the court’s determination of whether a duty exists in the first instance. On the other hand, states which have considered the question in that light have continued to recognize the ongoing viability of the doctrine. *See, e.g., Scott v. Archon Group, L.P.*, 191 P.3d 1207, 1209 (Okla. 2008) (no legal duty to protect or warn where condition was open and obvious); *Ghaffari v. Turner Constr. Co.*, 699 N.W.2d 687, 691 (Mich. 2005) (open and obvious doctrine should not be viewed as some type of exception to the duty generally owed invitees, but rather viewed as an integral part of the definition of that

duty); *Groleau v. Bjornson Oil Co.*, 676 N.W.2d 763, 769-72 (N.D. 2004); *Armstrong v. Best Buy Co.*, 788 N.E.2d 1088 (2003) (discussing continued viability of the open and obvious doctrine); *O'Sullivan v. Shaw*, 726 N.E.2d 951 (Mass. 2000) (stating that “open and obvious” rule meant pool owner owed no duty to warn of dangers of diving into shallow end of pool).⁴ DTCWV submits that the analysis used in these cases is more consonant with established West Virginia law.

As other courts have stated, the rationale underlying the doctrine is “that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.” *Simmers v. Bentley Constr. Co.*, 597 N.E.2d 504 (1992). The Court in *Armstrong* noted that courts which have abrogated the doctrine have failed to recognize “that the open-and-obvious doctrine is not concerned with causation but rather stems from the landowner's duty to persons injured on his or her property.” 788 N.E.2d at 1091. The Illinois Supreme Court has stated that, “the existence of a defendant's legal duty is separate and distinct from the issue of a plaintiff's contributory negligence and the parties' comparative fault.” *Buchelares v. Chicago Park Dist.*, 665 N.E.2d 826, 832 (1996). Thus, submission of the “open and obvious” question to the jury as “part of the comparison of the relative fault of the parties overlooks the simple truism that where there is no duty there is no liability, and therefore no fault to be compared.” *Id.* DTCWV submits that these authorities comport more directly with this Court's analysis of the “open and obvious” doctrine than the cases cited by Appellants and should be followed.

⁴ See also, *Rodriquez v. Winiker*, 2004 Mass.App.Div. 191, 2004 Mass.App.Div.Lexis 53 (Mass. App. December 3, 2004) (whether “a danger is open and obvious has to do with the duty of the defendant, not the negligence of the plaintiff”).

CONCLUSION

This Court has long held that the question of whether one party owes a duty to another is a question of law for the court. It has also long held that the open and obvious doctrine relates to this threshold question of duty. DTCWV believes these holdings should be reaffirmed here. The invitation of the petitioners to abrogate wholesale the open and obvious doctrine should be rejected.

Dated this 31st day of May, 2012.

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CERTIFICATE OF SERVICE

Service of the foregoing *AMICUS CURIAE* BRIEF OF THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF APPELLEES was had upon the parties herein by mailing true copies thereof, by regular United States mail, postage prepaid, to the following at their last known addresses as follows, on this 31st day of May, 2012.

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