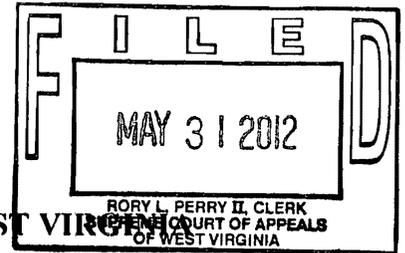


BRIEF FILED
WITH MOTION

NO. 12-0106



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WALTER E. HERSH and MARY L. HERSH,

Petitioners,

v.

E-T ENTERPRISES LIMITED PARTNERSHIP, RALPH L. ECKENRODE, P&H INVESTMENTS, INC., a Virginia Corporation, and TROLLERS ASSOCIATES, LLC, a Virginia limited liability company,

Respondents.

**From the Circuit Court of Berkeley County, West Virginia
Civil Action No. 10-C-149**

**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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I. INTRODUCTION

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the brief filed by Respondents E-T Enterprises Limited Partnership, Ralph L. Eckenrode, P&H Investments, Inc., and Trollers Associates, LLC (collectively, the “Respondents”) because the Order Granting Summary Judgment to Defendants E-T Enterprises Limited Partnership, and Ralph L. Eckenrode (“E-T Order”) and the Order Granting Summary Judgment to Third-Party Defendants P&H Investments, Inc., and Trollers Associates, LLC (“P&H Order”) entered by the Circuit Court of Berkeley County (“the Circuit Court”) on December 15, 2011, (together, “the Orders”), recognize and correctly apply the “open and obvious” doctrine in a trip and fall case, a doctrine that stands for the common sense proposition that a property owner owes no duty to a person who sees, understands, and knows about an “open and obvious” condition of the property, yet nonetheless purposefully exposes himself to the condition, which, in turn causes injury.¹ The “open and obvious” doctrine reflects sound public policy that protects property owners – both those with property insurance and those without – from owing a duty to those who freely and willingly choose to expose themselves to open and obvious property conditions that end up causing personal injury. For the reasons detailed below, therefore, the Federation respectfully urges this Court to affirm the Orders.²

¹ Pursuant to W.Va. R. App. P. 30(b), the Federation provided notice on May 24, 2012, to all parties of its intention to file an *amicus curiae* brief.

² The undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the Revised Rules of Appellate Procedure.

II. PROCEDURAL BACKGROUND

Although the Federation incorporates by reference the factual background outlined by the Respondents in their respective briefs, the Federation highlights those facts that it believes bear on its position.

On October 9, 2009, Walter Hersh drove to a shopping plaza on Winchester Avenue in Martinsburg, West Virginia. E-T Order at 2. He parked his automobile at the bottom of a small embankment near a set of stairs leading from a lower parking lot, where he parked, to an upper parking lot. E-T Order at 2. Notably, Mr. Hersh was on his way to a store called “Second Time Around” that was located on the *upper* parking lot, not the lower parking lot. Despite there being absolutely no evidence that Mr. Hersh could not park in the upper parking lot near the “Second Hand Store,” and no evidence that he was prevented from parking in the upper lot near the “Second Hand Store,” Mr. Hersh nonetheless parked in the lower parking lot and ascended the steps from the lower parking lot to the upper parking lot, where he spent 25 minutes in the store.

Notably, Mr. Hersh ascended the steps even though he acknowledges that the steps did not have a handrail on either side of the steps, as a result of which he specifically used his cane to help him get up the steps. E-T Order at 9-10. In addition, he agreed not only that the lack of handrails was open and obvious, but he was fully aware before he ascended the steps that they were not there. E-T Order at 3. In short, *before* ascending the steps, Mr. Hersh was fully aware that the steps did not have a handrail on either side, and despite this awareness – and instead of simply returning to his vehicle, driving to the upper parking lot, and parking there to enter the store – he used his cane to climb up the steps.

After spending time in the “Second Time Around” store, Mr. Hersh returned to the steps and started to descend them. Again, because he was fully aware that the steps did not have a handrail on either side, he used his cane to aid his descent. E-T Order at 9. While he was descending the steps, Mr. Hersh either “tripped” or “misstepped” and fell down the stairs. E-T-Order at 5-6. Notably, it was not raining on the day of the accident, nor were the steps slippery, whether from moisture or some other source. E-T Order at 5.

The sole “defect” or “condition” of the property that the Hershes claim caused Mr. Hersh’s fall was the lack of a handrail -- the exact condition that Mr. Hersh admitted he knew about before he started to climb the steps, and the exact condition that both Mr. Hersh and his professional engineer expert admitted was open and obvious for all, including Mr. Hersh, to see. E-T Order at 5-7.

The Hershes nonetheless filed a civil action against E-T Enterprises Limited Partnership and Ralph Eckenrode, who owned and controlled the upper parking lot and constructed and maintained the steps. E-T Enterprises and Mr. Eckenrode filed a third-party complaint against P&H Investments and Trollers Associates, who owned and controlled the lower parking lot.³ After discovery, the Circuit Court granted summary judgment to the Respondents on the grounds that, under the “open and obvious” doctrine articulated by this Court in Burdette v. Burdette, 147 W.Va. 313, 127 S.E.2d 249 (1962), the Respondents owed no legal duty to Mr. Hersh because the lack of the handrails were an “open and obvious” condition of which Mr. Hersh was fully aware before his accident. The Hershes appeal that grant of summary judgment.

³ The E-T Order noted that there was some dispute about who exactly owned and controlled the steps on which Mr. Hersh fell, but the basis for the Orders did not require resolution of this factual dispute, nor does this Court need to have this dispute resolved in order to affirm the Orders.

III. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure eight of every ten automobiles, seven of every ten homes, write more than 80% of the workers' compensation policies insuring West Virginia employees in our State, and insure West Virginia's businesses through commercial insurance products. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of the Respondents because the Federation's members must be able to rely upon the long-standing and common sense "open and obvious" doctrine when assessing risk. Eliminating the "open and obvious" doctrine not only expands the legal duties of property owners who buy insurance policies from members of the Federation, but it expands the legal duties of all property owners – whether insured or not – to include unreasonable risk to an individual who knowingly exposed himself to open and obvious conditions that then cause an injury to that individual.

Accordingly, the Federation respectfully urges this Court to consider the far-reaching effect that reversing the Orders and eliminating the "open and obvious" doctrine would have on both insurers and property owners in the State.

IV. ARGUMENT

- A. **The “open and obvious” doctrine as articulated in Burdette represents a logical and common sense limit to the legal duty that a property owner owes to protect against a property condition that is so open and obvious that imposition of a legal duty is unjustified.**

This Court has never required property owners to insure against all risks to a guest, and the “open and obvious” doctrine properly recognizes that some risks simply do not justify requiring a legal duty. “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.” Burdette v. Burdette, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962) (citing 65 C.J.S., Negligence, Section 50). In such situations, “[t]he 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.” Id.

“What this, in effect, says is that an owner of business premises is not legally responsible for every fall which occurs on his premises.” McDonald v. Univ. of W. Va. Bd. of Trustees, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994). “The duty to keep premises safe does not apply to defects or conditions which should be known to the invitee or which would be observed by him in the exercise of ordinary care.” McDonald, 191 W.Va. at 183, 444 S.E.2d at 61. To hold otherwise would make property owners “insurers of their own premises.” Burdette, 147 W. Va. at 320, 127 S.E. 2d at 254 (citing Velte v. Nichols, 211 Md. 353, 356, 127 A.2d 544, 546 (1956)).

This Court’s approach to such cases has been sensible, and it takes into account not only that a fall or an accident occurred, but also whether the property owner had superior knowledge of the condition which caused it, and whether the plaintiff had similar knowledge. Thus, in

Burdette, where the conditions of a ladder “were as apparent to the plaintiff as they could have been to the defendant,” the defendant was not liable to the plaintiff merely because the plaintiff fell from the ladder. Burdette, 147 W. Va. at 319, 127 S.E.2d at 253.⁴ In McDonald, when the plaintiff could not identify exactly what on a lawn caused her fall, and thus could not identify any condition about which the defendant knew and that she was prevented from knowing, the Court refused to hold the defendant liable. McDonald, 191 W. Va. at 182-83, 444 S.E.2d at 60-61.

These cases strike a fair balance between holding property owners liable for injuries that occur on their premises and requiring those who enter the property to exercise due care for their own safety and well-being. If the condition that causes an injury was as readily apparent to the injured individual, there is little reason to impose a duty of care on the property owner, because the injured person knew or should have known exactly what the property owner knew before the person was injured and should exercise the appropriate care. Imposing a duty of care is appropriate, though, where a hidden condition or a condition about which the property owner has superior knowledge causes the injury because the injured person cannot properly assess the risk of an injury and exercise the appropriate care.

This case demonstrates that principle precisely. Mr. Hersh knew before he ascended the steps that no handrail was present. Despite that, he ascended the steps and, after spending time in a store, descended the steps. There is no evidence that any “hidden” condition caused his fall, and it is uncontested that the only cause of his fall was the condition that he know about before he ascended the steps in the first place – the lack of handrails. As between Mr. Hersh and the

⁴ The fact that Burdette involved a ladder, which was placed by the defendant and secured by the defendant demonstrates also that this Court has not only applied the ‘open and obvious’ doctrine to strictly natural conditions. It applies whenever the condition is as apparent to the plaintiff as it is to the defendant or when the condition should be apparent to the plaintiff in the exercise of ordinary care, even if the defendant created the condition in the first place.

defendants, only Mr. Hersh could possibly know how reliant on a handrail he would be; yet, he decided to expose himself to that condition – the absence of handrails -- when he climbed the steps. In addition, Mr. Hersh did not even need to expose himself to the open and obvious condition as, once he saw the lack of handrails, he could have simply driven himself to the upper parking lot. For reasons known only to himself, he did not. Instead, despite his knowledge that the stairs lacked handrails, he chose to ascend and descend them, and in doing so, he absolved the defendants from any duty of care that they may have owed to him for such condition.

To find otherwise in this matter would significantly, and unfairly, broaden the duty of care that property owners owe to invitees to the point that property owners would become exactly what this Court has repeatedly said they are not -- insurers of their own property.

For these reasons, the ‘open and obvious’ doctrine strikes an appropriate balance between a property owner’s duty of care to others and the invitee’s duty of care for his or her own safety, and the doctrine should not be discarded.

B. The “open and obvious” doctrine addresses a property owner’s duty of care - not the property owner’s comparative negligence.

The Notice of Appeal presents as an “issue” the false dichotomy between the “open and obvious” doctrine and “the doctrine of comparative assumption of the risk established in King v. Kayak Mfg. Corp., 182 W.Va. 276, 387 S.E.2d 511, 517 (1989).” Notice of Appeal at 2. In fact, however, the doctrine has nothing to do with negligence, comparative or otherwise, and simply speaks to the legal duty that a property owner owes in the first place to protect against a condition that is open and obvious to a person.

While the Hershes cite to Tharp v. Bunge Corp., 641 So.2d 20 (Miss. 1994), and Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), as cases “abolishing the known or obvious danger defense in favor of comparative negligence[,]” those cases simply

do not address this Court's application of the doctrine to an analysis of a property owner's legal duty. The distinction between application of the doctrine to an analysis of a property owner's legal duty as opposed to an invitee's comparative negligence was clearly articulated by the Ohio Supreme Court in Armstrong v. Best Buy Co., 788 N.E.2d 1088, 1090-1091 (Ohio 2003) (citations omitted):

The open-and-obvious doctrine . . . concerns the first element of negligence law, the existence of a duty

We are cognizant of the fact that some courts have abolished the open-and-obvious rule in favor of a comparative-negligence approach. These courts . . . look at obviousness of the hazard as one factor to be taken into account in determining a plaintiff's comparative negligence. . . . Other courts have adopted Restatement of the Law 2d (Torts) (1965), Section 343A, which finds liability when the landowner should have anticipated harm caused by obvious dangers.

However, we decline to follow these cases because we believe that the focus in these decisions is misdirected. The courts analyzing the open-and-obvious nature of the hazard as an element of comparative negligence focus on whether the plaintiff's negligence in confronting an open-and-obvious danger exceeds any negligence attributable to the defendant. Under this approach, the open-and-obvious rule does not act as an absolute defense. Rather, it triggers a weighing of the parties' negligence.

What these courts fail to recognize is 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. By failing to recognize the distinction between duty and proximate cause, we believe these courts have prematurely reached the issues of fault and causation. The Illinois Supreme Court recognized this distinction in Bucheleres v. Chicago Park Dist. (1996), 171 Ill. 2d 435, 216 Ill. Dec 568, 665 N.E.2d 826, a decision upholding the viability of the open-and-obvious doctrine in that state. The court stated: "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. The characterization of the open and obvious doctrine as a 'defense' that should be submitted to a 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.

The Ohio Supreme Court found in Armstrong that “the ‘open-and-obvious’ doctrine remains viable even after the enactment of our comparative negligence statute. Further, we [have] warned courts about the danger of confusing the concept of duty and proximate cause.” Armstrong, 788 N.E.2d at 1091 (citation omitted). Finding the doctrine still valid in Ohio, the court stated:

In reaching this conclusion, we reiterate that when the courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff’s conduct in encountering it. The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff.

Armstrong, 788 N.E.2d at 1091.

Not only is the Armstrong analysis sound, but it reflects this Court’s own view of the open and obvious doctrine as articulated in Burdette, where this Court spoke in terms of the “duty” of a property owner -- not the negligence of an invitee. This Court should not, therefore, be seduced by the Hershes attempt to eliminate the doctrine in the name of “comparative fault” or “comparative assumption of the risk” as such attempt sets up a false dichotomy that fails to reflect the true common-sense rationale for the doctrine.

C. Eliminating the “open and obvious” doctrine significantly increases both the risk and costs associated with owning property and directly contradicts sound public policy.

Elimination of the open and obvious doctrine will necessarily expand a landowner’s legal duty to cover every condition on the property, regardless of how open and obvious the condition may be, and in essence makes a property owner the insurer of his property.

The ditches on both sides of the driveway that are patently obvious to the person who walks into one? The tree in the middle of the yard that has been there for 30 years before the person ran into it while chasing a frisbee? The stone fence that lines property boundaries and that was built 50 years before somebody tried to jump over it? In each of those situations, the “condition” of the property was open, it was obvious, and it was as well-known to anybody on the property as it was to the landowner. Elimination of the open and obvious doctrine, however, would mean that, in each of those examples, the property owner would owe a legal duty of care to all invitees to protect against the dangers presented by that condition -- and that makes no sense.

Not only would elimination of the doctrine significantly expand a property owner’s risk, it would necessarily result in a higher cost of owning property to protect against all risks, whether open and obvious or not, either through extensive mitigation or through increasingly expensive insurance.

Finally, elimination of the open and obvious doctrine violates sound public policy. Property owners should have a legal duty to protect against unknown or difficult-to-discern risks on their property that expose unsuspecting invitees to harm. This clearly makes sense because it encourages property owners to mitigate dangers that are unknown to an invitee or difficult to discern. This same common sense, however, does not extend to conditions that are open and

obvious, because to eliminate the doctrine would be to place a legal duty on the property owner to protect against a condition that the invitee knows about, and yet to which he nevertheless exposes himself. Public policy ought to encourage individuals to look out for their own well-being and the open and obvious doctrine does just that.

V. CONCLUSION

Eliminating the “open and obvious” doctrine essentially removes any prospect of summary judgment in property liability cases, even where the clear and undisputed evidence establishes that the plaintiff’s failure to look out for himself was the proximate cause of the injuries. In addition, eliminating the doctrine essentially abdicates any duty on the part of an invitee to look out for himself, as he can simply ignore any open and obvious danger that may cause him harm, knowing that, at a minimum, he will be able to bring a lawsuit against the property owner despite his own failure to look out for himself.

This Court got it right in Burdette when it first articulated the “open and obvious” doctrine, and it has gotten it right in the 50 years since then in every case that has reiterated the doctrine. The Federation urges the Court, for the reasons above and in the briefs filed by the Respondents, to affirm the Circuit Court’s Orders and confirm that the “open and obvious” doctrine is still a fundamental part of the property law of this State.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Brief of the West Virginia Insurance Federation as Amicus Curiae in Support of Respondents* upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

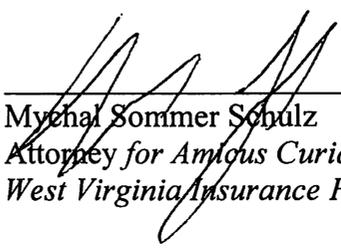
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