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From the Co-Editors
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OPEN AND OBVIOUS ISN'T JUST FOR PREMISES OWNERS ANYMORE

Sarah Robertson¹ – Contributor

For several years, it has been the understanding in Michigan that premises owners were the only defendants permitted to use the open and obvious danger doctrine as a defense against premises liability claims. At least one panel of judges has decided to expand the use of the open and obvious danger doctrine, however, allowing contractors and other non-premises owners to benefit from the defense as well.

In *Gross v Hughes Properties, et al*, a recent, unpublished decision by the Court of Appeals, plaintiffs appealed the circuit court's order granting summary disposition in favor of defendants Woodland Villa LLC, Golf Course Construction, Inc., Bruce Sanders and Sanders Associates of Michigan, Inc. (Unpub, COA No. 276617, 3/18/08). Plaintiff was injured when she rode her bicycle on a newly constructed sidewalk. As she traveled across property owned by Woodland, she was unable to navigate a curve and her bicycle left the sidewalk. Grading had not yet been completed around the sidewalk and, as plaintiff attempted to ride back onto the sidewalk, her bicycle tire struck the edge of the concrete and she fell. Golf Course, Sanders and Sanders Associates were each involved with the construction of the allegedly hazardous sidewalk.

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The circuit court granted summary disposition in favor of Golf Course, Sanders and Sanders Associates on the basis that plaintiff could not recover in tort for defendants' alleged failure to perform a contractual duty. Relying on the Michigan Supreme Court's analysis and reasoning set forth in *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004), the Court of Appeals found that Golf Course, Sanders and Sanders Associates took affirmative action in designing and installing the sidewalk on which plaintiff was riding her bicycle and thus, by their conduct, they created a new hazard. Having created that new hazard, defendants could be liable for the injuries suffered by plaintiff.

However, the Court of Appeals did not stop there. Instead, the Court of Appeals further found that summary disposition in favor of the defendants was proper on the alternate grounds that the allegedly dangerous condition of the sidewalk was *open and obvious*. The Court stated that generally, the open and obvious defense is only available in premises liability actions, not in claims based on ordinary negligence. The Court reasoned that in this case, although plaintiff asserted that the cause of action was one sounding in ordinary negligence, in fact it was a claim based on premises liability. Plaintiff's claims arose out of injuries caused by an allegedly defective condition of the land, not out of an affirmative act by the defendants. Therefore, the Court found the claim to be one based on premises liability so that the open and obvious danger doctrine is available to all the defendants - even those which are not premises owners. Based on its analysis of the facts of this particular case, the Court found the condition to be open and obvious and so found that summary disposition in favor of all defendants was proper.

The Court's application of the open and obvious danger doctrine in this case clearly breaks from the well-established case law on this issue. Rather than focusing on the role of the individual defendants in each case, the Court switched the focus to the type of claim being asserted. Rather than allowing only premises owner defendants to use the open and obvious defense, the Court now suggests that all defendants, regardless of their roles, can use the defense if the plaintiff's claim is one of premises liability rather than ordinary negligence. Perhaps even more interesting is the Court's decision to acknowledge liability on the part of the non-premises owning defendants for their act of creating a dangerous condition, and yet absolving them of that liability where the newly created dangerous condition is one that is open and obvious.

It is highly likely that plaintiffs will pursue further appellate review of this matter by the Michigan Supreme Court. We will keep you updated on any further proceedings.

GRAND RAPIDS BREAKFAST SEMINAR

The Firm is pleased to present its Annual Spring Breakfast Seminar on April 24, 2008 at the Frederik Meijer Gardens and Sculpture Park, located at 1000 East Beltline, NE in Grand Rapids [(616) 957-1580]. Comprehensive written materials will be distributed to all program attendees. After the seminar, feel free to enjoy all of the open indoor garden areas as our guest. The agenda for this event is as follows:

- 8:00 - 8:25 a.m. Registration and Continental Breakfast
- 8:25 - 8:30 a.m. Welcome and Introduction
Speaker: David N. Campos
- 8:30 - 9:00 a.m. Northern Michigan Recreational Accidents: An Overview of Civil Liability
* General Liability Principles for Landowners & Participants; Governmental Immunity; Relationship with MVA Laws * Skiing * Off Road Vehicles * Snowmobiling * Hunting * Fishing * Equine Activities * Bicycling
Speaker: Peter B. Worden
- 9:00 - 9:20 a.m. Employment Law in Michigan
*Litigation: Claims, Statutes, The Legal Process * Litigation Prevention: Handbooks, Policies & Record Keeping * Employee Wellness Programs
Speaker: Aaron L. Belville
- 9:20 - 9:40 a.m. Impact of Medicare, Medicaid & SCHIP Extension Act of 2007 on PIP Claims
*Medicare Set-Aside Trusts: What Are They & When Are They Used? *MSAs for Workers Comp, General Liability and No Fault Claims
Speaker: Tara L. Velting
- 9:40 - 10:15 a.m. Michigan Third Party Automobile Liability Update
*Non-Party At Fault Rule * Threshold Requirements * *Kreiner* and Its Progeny * Proposed Legislative Changes * Uninsured Motorist/Underinsured Motorist Coverage
Speaker: Christopher P. Jelinek
- 10:15 - 10:30 a.m. Break
- 10:30 - 11:15 a.m. Michigan Auto No Fault First Party Update
* "Constructive Ownership" & Responsibility to Insure (or not) a Motor Vehicle .3101 * Equitable Estoppel of One Year Statute of Limitations .3145 * No Fault Insurer's Right to IME .3151 & .3159 * Equitable Estoppel with Denial of Coverage Relative to Failure to Disclose .3163 * Tort Liability Exposure above PPI \$1 million .3121 * Business Use Exclusions Enforceable with Auto, B.I. policy, *Bristol West v Butzbach*
Speaker: David N. Campos

11:15 - 11:45 a.m. Demonstration of an Orthopedic Exam
Speaker: Clifford M. Buchman, D.O.

11:45 a.m. - Noon Question and Answer Session

If you are able to attend this complimentary annual event, please register via email to: lbeatty@garanlucow.com or phone Lynn Beatty at (616) 742-5500 or (800) 494-6312 for reservations.

BASIC NO FAULT COURSE AT LTU

The Basic No Fault course will commence on Tuesday, May 13, 2008 and run through July 29, 2008. The classes will be at the Southfield campus of Lawrence Tech University. Please call Tim Meloche at (248) 204-4055 for additional information or to register for the course.

FALL BREAKFAST SEMINAR

The Firm's annual Fall Breakfast Seminar will be offered on Thursday, September 18, 2008 at the Troy Marriott. Please mark your calendar and, if you wish to do so, preregister with Beth Bezenah at bbezenah@garanlucow.com. This seminar will also be available by Webcast.



Go Tigers!