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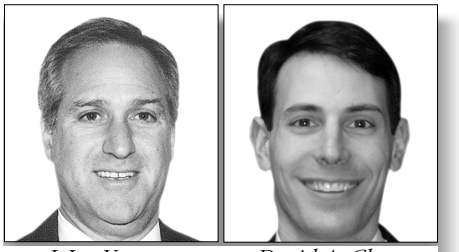
The End of the 'Open and Obvious' Defense

The liability defense bar, property owners and insurance companies in New York have lost one of their more effective tools: the "open and obvious" defense. For more than 80 years, this tool has been used successfully to defend slip, trip and fall cases. But with the March 9, 2004, ruling of the Appellate Division, First Department, in *Westbrook v. W.R. Activities-Cabrera Markets*, all four of the state's appellate divisions are now united in eliminating the defense as a complete bar to recovery.

The open and obvious defense was based on the premise that the defective or dangerous condition complained of was so easily seen that it should have been avoided. In essence, the defense was the last vestige of the contributory negligence age and the assumption of risk doctrine, both of which barred an injured party's recovery. The bar was in effect, and summary judgment in defendant's favor was within grasp, where the injury occurred due to a hazard that could have been easily observed and avoided, such as a speed bump or a display rack.[1]

The open and obvious defense has been part of the defense attorney's



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arsenal since as early as 1917, when it was used to dismiss a complaint in the case of *Weigand v. United Traction Company*, 221 N.Y. 39. 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), which applied the doctrine to a 4-year-old child.

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The Demise

As recently as 1999, all four appellate divisions upheld the defense that there is "no duty to prevent or even warn of conditions which can be readily perceived by the use of one's senses."[2] The doctrine had been upheld by the Court of Appeals on prior occasions as well. See *Bazan v. Rite Aid of New York, Inc.*, 279 A.D.2d 762, lv denied, 960 N.Y.2d 709 (2001) and *Pinero v. Rite Aid of New York, Inc.*, 294 A.D.2d 251, affirmed 99 N.Y.2d 541 (2002).

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

The Fourth Departments ruling in *Williams* that the duty to warn was, in fact, separate and distinct

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from the duty to maintain the premises in a reasonably safe condition, opened the door to testing of the defense in the other departments. In 2001, the First Department followed suit in *Orellana v. Merola Associates*, 287 A.D.2d 412, holding that the open and obvious defense merely went to the issue of comparative negligence. However, one year after *Orellana*, the First Department, in *Pinero v. Rite Aid of New York, Inc.*, 294 A.D.2d 251, followed the prior holdings that "there is 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." The holding of *Pinero* was then later affirmed by the Court of Appeals.[3]

'Westbrook'

While the First Department was a bit unsettled, the stage was set for the loss of the open and obvious defense as a means to dismissal. Now, with the recent holding of *Westbrook v. W.R. Activities-Cabrera Markets*, the First Department has definitively stated that it is affirming its prior holding in *Orellana* 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 in favor of a defendant.

In 2003, both the Second and Third departments specifically overturned their prior holdings and have stated that the open and obvious defense is now merely part of comparative negligence as it does not eliminate a landowner's duty to maintain his or her property in a reasonably safe condition.[4] The effective result of these holdings is to eliminate the open and obvious defense as the basis for summary judgment in favor of the defendant.

Interestingly, *Westbrook* specifically references two cases that were 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, and *Patrie v. Gorton*, 267 A.D.2d 582 (3rd Dept.), leave denied 94 N.Y.2d 761.

It is this aspect that leads to a vigorous concurring opinion in support of the open and obvious defense by First Department Presiding Justice John T. Buckley.

He opined that while the case was correctly decided, the open and obvious doctrine should still apply and warrant dismissal when appropriate. Presiding Justice Buckley noted that the law as set forth by the Court of Appeals still upholds the doctrine of the open and obvious condition. He argued that by eliminating the defense, the courts have effectively made landowners absolute insurers against "every possible harm, no matter how unforeseeable or unreasonable."

The Court of Appeals has upheld the open and obvious defense as recently as 2001 in *Bazan v. Rite Aid of New York, Inc.*, 279 A.D.2d 762, lv denied 906 N.Y.2d 709. To date, the Court has not issued a decision to the contrary.

Conclusion

Given Presiding Justice Buckley's vigorous concurring opinion in *Westbrook*, we may not have seen the last of the open and obvious defect defense. Faced with the opposing opinions between the Court of Appeals and the four appellate divisions, it appears that the issue is ripe for clarification by the state's highest court. While there is hope that the Court of Appeals will resurrect the defense, one should not count on it.

From a practical standpoint, if the Appellate Division positions prevail, the defense bar will still be able to continue to use the open and obvious defense. However, it will be left to the trier of fact, rather than the trier of law, to determine whether the condition was so apparent as to place 100 percent comparative negligence on the plaintiff. This would create considerable difficulty for the defense bar at trial for it is a risky trial strategy, indeed, to concede that a hazardous condition existed, but argue that it was not a substantial factor in causing plaintiff's injuries.

While we fully expect clarification from the Court of Appeals on these important issues, until it rules, the open and obvious defect defense, as it stands, merely eliminates the duty to warn. For all intents and purposes, it has been relegated to an element of the plaintiff's comparative negligence.

1. *Bastone v. 1144 Yonkers Avenue, Inc.*, 266 A.D.2d 327 (2nd Dept. 1999); *Russell v. Archer Building Centers, Inc.*, 219 A.D.2d 772 (3rd Dept. 1995).

2. *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).

3. *Pinero v. Rite Aid of New York*, 99 N.Y.2d 541 (2002).

4. *MacDonald v. City of Schenectady*, 308 A.D.2d 125 (3rd Dept. 2003); *Cupo v. Carfunkel*, 1 A.D.3d 48 (2nd Dept. 2003).