OADC OUTLOOK

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OADC Outlook

Page 1
President's Message

Page 2
OSC Pronounces Significant Change

Page 4
Redriver Shootout CLE
October 10, 2014
Frisco, TX

Important Dates

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President's Message

by Jennifer R. Annis

Over Labor Day weekend, Jeromy Brown, Angela Ailles-Bahm and I attended the DRI Southwest Regional meeting in Austin, Texas. One of the topics of discussion at that meeting was a status update on the National Foundation for Judicial Excellence (NFJE). DRI formed the NFJE ten years ago and the purpose was to join bar associations, law schools, think tanks and other non-profit organizations that strive to strengthen and preserve the civil justice system. NFJE's mission is to address important legal policy issues affecting the law and civil justice system by providing meaningful support and education to the judiciary, by publishing scholarly works and by engaging in other efforts to continually enhance and ensure judicial excellence and fairness for all engaged in the judicial process.

To carry out that mission, NFJE hosts an Annual Judicial Symposium each summer, which is provided to members of the judiciary free of charge. Donations from legal organizations, law firms, and also from individuals make that possible. OADC has been a long-time sponsor of NFJE and is fully supportive of its mission.

With each passing year, participation and attendance at the Annual Judicial Symposium has increased significantly. This year 140 members of the judiciary across the U.S. attended the most recent Symposium, including five judges from the Oklahoma Court of Criminal Appeals, the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court. Because the Symposium is supported by private donations, only a limited number of judges can attend. Demand was so high that NFJE had to maintain a wait list and ultimately thirty-nine judges were not able to attend, including two from Oklahoma.

I would urge you to consider making a donation to NFJE in an effort to continue supporting this very worthwhile cause. For more information, please see their website at www.nfje.net or visit www.DRI.org.

Jennifer R. Annis

OSC Pronounces Significant Change in Open and Obvious Defense in Slip and Fall Cases

by: Jake Pipinich
Pierce Couch Hendrickson Baysinger & Green (Tulsa)

On July 16, 2014 the Oklahoma Supreme Court by a 5-4 vote decided *Wood v. Mercedes-Benz of Oklahoma City*, 2014 OK 68. This decision effectively eliminated the Open and Obvious defense to a premises liability suit where the condition was not natural, placing a remedial duty on a premises owner to remove conditions that could foreseeably cause injury, despite a Plaintiff's familiarity with the given hazard.

The facts in Wood are as follows. Erica Wood was employed by a catering company and reported to an Oklahoma City Mercedez-Benz dealership in March of 2008 to assist in a catering event at said dealership. Upon arriving at the facility Wood drove around the dealership's parking lot looking for a place to park her vehicle. Wood testified that upon arrival she noticed that the whole building was covered in ice, all the way around and on all of the sidewalks. Important was the fact that although it had dropped to freezing the night before, the ice accumulation was caused by a sprinkler system at the dealership that had been serviced the day before, which activated overnight, causing ice to cover various surfaces throughout the property. Wood parked her car and entered the dealership which caused her to walk across a sidewalk coated with ice. Wood testified that she was careful upon her initial entrance into the dealership. However, upon entry into the dealership she was unable to locate her supervisor and returned to her vehicle to retrieve her cell phone and call her supervisor. Wood testified that she was aware of an incline on the east side of the dealership and knew that it would be important to be careful. Further, Wood testified that she had observed ice covering the entire area around the entrance and that she was as careful as she could be while traversing the ice. Unfortunately on her way back outside, Wood slipped and fell causing injury. Wood also testified that she discussed the accident with an employee of the dealership who indicated that he should have put salt down upon arrival.

The trial court granted the dealership's Motion for Summary Judgment. The Court of Civil Appeals affirmed Summary Judgment, holding that no legal duty existed because Wood acknowledged that the ice in question presented a known danger. The Oklahoma Supreme Court granted certiorari to address the propriety of Summary Judgment.

The Oklahoma Supreme Court set out its analysis discussing the traditional 3-part classification for assessing a landowner's duty between a trespasser, licensee or invitee. Generally a landowner must "exercise reasonable care to keep the premises in a reasonably safe condition and to warn [an invitee] of conditions which [are] in the nature of hidden dangers, traps, snares or pitfalls." *Martin v. Aramark Services, Inc*., 2004 OK 38, ¶ 5, 92 P.3d 96, 97. However, Oklahoma Law did not place upon landowner's a duty to protect third-parties from "dangers so 'open and obvious' as to reasonably expect others to detect them for themselves." *Williams v. Tulsa Motels*, 1998 OK 42, ¶ 6, 958 P.2d 1282, 1284.[1]

The Oklahoma Supreme Court however noted that "the open and obvious doctrine is not absolute under out case law." *Wood*, 2014 OK 68, ¶ 7. The Court reasoned that relevant inquiry for assessing the existence of a duty in negligence cases was foreseeability. The Court noted that a landowner "does have a duty to

exercise ordinary care to prevent injury to another whenever the circumstances are such that the owner, as an ordinary prudent person, could reasonably foresee that another will be in danger of injury as a probable consequence of the ***owner's actions***." *Wood*, 2014 OK 68, ¶ 7 (citing *Brown v. Alliance Real Estate Group*, 1999 OK 7, ¶ 6, 976 P.2d 1043, 1045 (emphasis added).

Applying the standard, the Court noted that it has previously rejected the open and obvious defense for to the accumulation of ice caused or enhanced by the landowner. Citing to *Krokowski v. Henderson Nat. Corp*., 1996 OK 57, ¶¶ 7-8, 917 P.2d 8, 11, the court noted that if evidence was presented showing that the condition causing injury may have resulted from the property owners increase of a natural hazard a fact question remained. As such, the Court concluded that "Mercedez-Benz owed a duty to take remedial measures to protect her from the icy conditions surrounding the entry to the facility . . . [as] the accumulation of ice . . . was caused by the activation of the dealership's sprinkler system during freezing temperatures; not by a natural condition." *Wood*, 2014 OK 68, ¶ 9.

The opinion drew a dissent from several justices who urged inter alia that the result reached by the majority was far reaching and could have some absurd results such as an invitee repeatedly walking over a pile of bananas left in an isle until they finally fell down.

The implications of this opinion for the Defense Bar could be significant, in that those unnatural conditions on the premises, even if observed and appreciated by the entrant may now present fact questions with regard to Summary Judgment. Although the repeated walk over bananas is unlikely, accumulations of water, imperfections on walkways, the bright orange extension cord or the like, even if observed by the Plaintiff may now present "foreseeable" dangers such to abrogate the traditional open and obvious defense to a premises liability claim.

So, what do you do if encountered by a case where the condition was open and obvious? It would appear that although Summary Judgment will be more difficult, it may not be impossible. Justice Combs' dissenting opinion sets out an in-depth analysis of the *Buck v. Del City Apartments, Inc*., 1967 OK 81, 431 P.2d 360 case, that served as the base for the opinions relied upon by the majority to reach their result. The Oklahoma Supreme Court in *Buck* held that the Plaintiff "knew or should have known of the general weather conditions. The dangers from them are universally known and were equally as apparent to her as they were to the [Defendant]." *Buck*, 1967 OK 81, ¶ 22. The majority did not state or imply that they were overruling *Buck* or its holding. As such, discovery and depositions should target the Plaintiff's knowledge of the allegedly offending condition, familiarity with same as well as the landowner's lack of knowledge (or lack of cause) of the allegedly offending defect. The thrust of subsequent motion practice should include *inter-alia* that it is not foreseeable for a person to injure themselves on an open and obvious condition.

(Footnotes)

[1] Wet floor constituted open and obvious danger where invitee slipped on wet floor where invitee admitted he had noticed maid mopping floor immediately before walking on floor.

Register today!

Friday, October 10
7:30am - 1:00pm

followed by golf

The Westin Stonebriar

Frisco, Texas

RED RIVER SHOOTOUT CLE

Joint Meeting of the OADC and TADC

for Registration go to: www.OADC.org

Save the Dates....

OADC Winter Meeting

January 30th, 2015 - Vast Restaurant
50th Floor Devon Tower

VAST

OADC Summer Meeting

June 4 - 6, 2015 - Gaylord Texan Resort
Grapevine, Texas

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