

## **Opposing Summary Judgment Motions Brought under the “Open and Obvious Danger” Defense**

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### INTRODUCTION

Generally, the “open and obvious danger” doctrine holds that a landowner has no duty to warn of open and obvious dangers. See, *Tagle v. Jakob*, 97 N.Y.2d 165, 169, 737 N.Y.S.2d 331 (2001). This is because the obviousness of the danger itself is deemed to constitute an adequate warning. *Pinero v. Rite Aid of New York, Inc.*, 294 A.D.2d 251, 252, 743 N.Y.S.2d 21, 23 (1st Dept 2002); *DeMarrais v. Swift*, 283 A.D.2d 540, 724 N.Y.S.2d 766 (2nd Dept 2001); *Rolfe v. Galt*, 102 A.D.2d 983, 984, 477 N.Y.S.2d 790, 791 (3rd Dept 1984); *Olsen v. State of New York*, 30 A.D.2d 759, 759-760, 291 N.Y.S.2d 833, (4th Dept 1968), *affd*, 25 N.Y.2d 665, 306 N.Y.S.2d 474, 254 N.E.2d 774.

Although there is consensus regarding the general rule, there is a split in Appellate Division authority regarding whether a landowner is generally entitled to summary judgment upon a showing that the danger was open and obvious. Further, there appears to be a recent trend in New York towards application of the Restatement rule (Second Restatement of Torts § 343A [1] [1965]) regarding open and obvious dangers.

Plaintiffs’ attorneys have a better chance of surviving summary judgment if they understand (1) the Restatement rule; (2) the general principles of landowner liability set forth in the landmark case of *Basso v. Miller*, *supra* and (3) the split in the appellate divisions regarding the open and obvious danger doctrine.

### THE RESTATEMENT RULE

The Second Restatement of Torts reads, in relevant part:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Comment (f) of this Restatement further explains:

There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Restatement [Second] of Torts § 343A (1) (1965) (emphasis added). Thus, under the Restatement, where the landowner should have anticipated the harm toward plaintiff [i.e., the harm was foreseeable] despite the open and obvious nature of the danger, the landowner's duty toward plaintiff does not vanish. Rather, the openness and obviousness of the danger goes to the issue of comparative negligence.

## BASSO V. MILLER

In the 1976 Court of Appeals seminal case of *Basso v. Miller*, the concurrence opinion cited to this Restatement rule with approval, yet case law applying the Restatement in New York is scarce. (40 NY2d 233, 244-245, 386 N.Y.S.2d 564). The Restatement rule, however, dovetails perfectly with the general principles of landowner liability announced in *Basso*, where the key factor to consider in determining landowner liability is foreseeability in view of all the circumstances.

In *Basso*, the Court of Appeals abandoned the rigid categories of landowner liability based on a plaintiff's status vis-à-vis the landowner (licensee, trespasser or invitee) in favor of a more flexible rule "of reasonable care under the circumstances." (*Basso v. Miller*, supra, at 241). In so doing, the Court "correlat[ed] the duty of care owed plaintiff with the risk of harm reasonably to be perceived, regardless of status" and announced "adherence to the single standard of reasonable care under the circumstances where by foreseeability shall be a measure of liability." *Id.* (emphasis added). The Court held that "[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Id.* This duty to act "reasonably under the circumstances" clearly was to apply both to the duty to warn of danger and to otherwise act to eliminate foreseeable danger to foreseeable plaintiffs. See, *id.*

Since *Basso* was decided, the New York appellate divisions have split, as described below, on whether a showing that the danger was "open and obvious", without more, generally requires dismissal of plaintiff's case. Those Courts that routinely dismiss such cases on summary judgment appear to ignore the flexible approach in determining a landowner's duty announced in *Basso*. In other words, they fail to conduct an analysis of whether, "in view of all the circumstances of the case", the landowner should have foreseen harm to plaintiff.

## APPELLATE DIVISION SPLIT

Here is how the Departments are split:

**FIRST DEPARTMENT:** The First Department rule generally is that an “open and obvious danger does not negate [defendant’s] duty to plaintiff [to keep the premises reasonably safe], but simply raises issues of fact as to her comparative fault”. *Tuttle v. Anne LeConey, Inc.*, 258 A.D.2d 334, 685 N.Y.S.2d 204 (1st Dept 1999); but see, *Pinero v. Rite Aid of New York, Inc.*, 294 A.D.2d 251, 743 N.Y.S.2d 21 (1st Dept 2002) (summary judgment granted to defendant in part because “there is no duty to protect or warn against conditions that are in plain view, open, obvious and readily observable”). In *Orellana v. Merola Associates, Inc.*, 287 A.D.2d 412, 731 N.Y.S.2d 726 (1st Dept 2001), for example, plaintiff was injured when he tripped and fell on warped plywood covering newly cemented steps. In dismissing defendant’s motion for summary judgment, the court held that “even if the dangerous condition were readily observable, such fact would go to the issue of comparative negligence and would not negate defendants’ duty to keep the premises reasonably safe.” In some cases, however, where plaintiff clearly seems to have assumed a known risk, the First Department is willing to dismiss plaintiffs’ cases as a matter of law. For example in *Garcia v. New York City Housing Authority*, 234 A.D.2d 102, 650 N.Y.S.2d 715 (1st Dept 1996) plaintiff entered a fenced-off yard under construction and climbed a mound of snow and ice, left by construction workers, to retrieve a cat, and then slipped and fell from the mound. The court granted summary judgment to defendant, noting that the mound of ice and snow “was open and obvious and . . . could have been avoided by the exercise of reasonable care”.

**FOURTH DEPARTMENT:** Of all the New York jurisdictions, the Fourth Department is the most plaintiff-friendly with regard to the open and obvious danger doctrine. In this jurisdiction, although a landowner has “no duty to warn plaintiff of the open and obvious condition”, the landowner nevertheless has a continuing duty to “keep [the] premises reasonably safe”. *Holl v. Holl*, 270 A.D.2d 864, 705 N.Y.S.2d 783 (4th Dept 2000). The fact that the danger is open and obvious “goes to the issue of comparative negligence and does not negate the duty of defendant to keep [the] premises reasonably safe” (*Holl v. Holl*, supra; see, *Patterson v. Troyer Potato Products, Inc.*, 273 A.D.2d 865, 709 N.Y.S.2d 731 (4th Dept 2000)). For example, in *Patterson v. Troyer Potato Products, Inc.*, supra, plaintiff sustained injuries when her lower right leg struck a shelf protruding into the aisle of a Convenient Food Mart store. Defendant moved for summary judgment based on the open and obvious danger doctrine. The Court denied summary judgment, holding that “even assuming, arguendo, that the protruding shelf was readily observable, we conclude that such fact would go to the issue of comparative negligence and [would] not negate the duty of defendants to keep their premises reasonably safe.” The Fourth Department has fairly consistently applied this rule in a variety of settings, including in snow and ice cases. See, e.g., *Morgan v. Genrich*, 239 A.D.2d 919, 659 N.Y.S.2d 638 (4th Dept 1997) (although icy conditions were readily observable, this went to the issue of plaintiff’s comparative negligence and did not negate defendant’s duty to keep premises reasonably safe); see also, *Reisch v. Amadori Construction Co., Inc.*, 273 A.D.2d 855, 709 N.Y.S.2d 726 (4th Dept 2000); *Waszak v. State*, 275 A.D.2d 916, 713 N.Y.S.2d 397 (4th Dept 2000).

**THIRD DEPARTMENT:** The Third Department rule is decidedly less plaintiff friendly. The rule appears to be that, if the danger is open and obvious as a matter of law, defendant has neither a duty to warn nor to otherwise take steps to correct the defect. For example, in *Russell v. Archer Bldg. Centers Inc.*, 219 A.D.2d 772, 631 N.Y.S.2d 102 (3rd Dept 1995), plaintiff, a shopper in a hardware/lumber store, tripped over the bottom rail of a steel display rack as he stepped back to view a sheet of tile. The Third

Department granted the landowner's motion for summary judgment, holding that, "while a landowner who holds property open to the public has a general duty to maintain the property in a reasonably safe condition to prevent foreseeable injuries, this duty extends only to conditions that are not readily observable. There is no duty to warn of conditions that can be readily observed with the normal use of one's senses." *Russell v. Archer Bldg. Centers Inc.*, supra; See, *Thornhill v. Toys "R" Us NYTEX, Inc.*, 183 A.D.2d 1071, 583 N.Y.S.2d 644 (3rd Dept 1992); *Patrie v. Gorton*, 267 A.D.2d 582, 699 N.Y.S.2d 218 (3rd Dept 1999) (summary judgment granted to landowner where its "broken, uneven and rough" sidewalk, upon which plaintiff tripped and fell, constituted an open and obvious danger). The Third Department appears more forgiving, however, in snow and ice cases. See, *Stern v. Ofori-Okai*, 246 A.D.2d 807, 668 N.Y.S.2d 68 (3rd Dept 1998) (even though plaintiff is "often aware of the presence of a slippery surface, the obviousness of this type of hazard does not necessarily preclude a finding of liability on the part of the property owner").

Recently, the Third Department has begun to apply the Restatement rule in some cases. This has softened its otherwise harsh rule. It first did so in *Comeau v. Wray*, (241 A.D.2d 602, 603, 659 N.Y.S.2d 347 [3rd Dept 1998]), where an on-the-job plaintiff, who had frequently delivered supplies to defendant's home, fell on defendant's cellar stairway. The Court held that, since the landowner "should have had reason to expect that [plaintiff] would find it necessary to encounter the obvious danger", the landowner "owe[d] a duty of reasonable care to either warn [him] of the danger or to take other reasonable steps to protect [him] from it . . . even though the danger was open and obvious". *Comeau v. Wray*, supra, at 603, citing, Second Restatement of Torts § 343 A (1), Comment f. In other words, since plaintiff had little choice but to descend the stairs in order to perform his job duties, and defendant knew or should have known this, an issue of fact existed as to whether defendant acted reasonably in failing to correct the defect or otherwise prevent the injury.

The Third Department again relied on the Restatement rule regarding open and obvious dangers in *Spannagel v. State*, \_\_\_ A.D.2d \_\_\_, 748 N.Y.S.2d 421, 2002 WL 31320063 (3rd Dept 2002). In that case, the plaintiff was working as a nurse's aide in a medical unit at a correctional facility. A bell sounded, indicating that a patient needed attention. She saw a red light indicating the possibility of an emergency. She did not look at the floor as she rushed through the lounge, which an inmate, in view, was mopping. The inmate had failed to set up wet floor cones properly, which resulted in plaintiff's inability to see them as she entered the lounge. She slipped and fell. The Court of Claims dismissed the claim, holding that, regardless of the safety cone placement, the wet floor was an open and obvious hazard and, as such, defendant had no duty to warn claimant of the danger. The Third Department reversed, holding that "the duty to warn against known or obvious dangers arises where the landowner has reason to expect or anticipate that a person's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it" *Spannagel v. State*, supra, quoting, Restatement [Second] of Torts § 343A, (1), comment (f). The Court noted that the accident took place "in the medical unit of the facility where . . . emergency calls from persons in distress were a common occurrence and quick responses were expected and called for by claimant's training." Given this proof, the Court held that "defendant did have a duty to warn as a matter of law".

**SECOND DEPARTMENT:** The Second Department is perhaps the worst jurisdiction for a plaintiff faced with an "open and obvious" danger defense. The general rule there is that "liability . . . will not attach [i.e., there is neither a duty to warn nor to otherwise act to eliminate the danger] when the dangerous condition complained of was open and obvious, particularly where the plaintiff was actually

aware of the condition”. *Sandler v. Patel*, 288 A.D.2d 459, 733 N.Y.S.2d 131 (2nd Dept 2001); See, *Cruz v. Deno’s Wonder Wheel Park*, \_\_\_ A.D.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_, 2002 WL 31087092 (2nd Dept 2002) (defendant granted summary judgment because the shallow depression in the defendant’s pavement was both a trivial defect and an open and obvious one); *Stasiak v. Sears, Roebuck and Co.*, 281 A.D.2d 533, 722 N.Y.S.2d 251 (2nd Dept 2001); *Gonzalez v. Fastflex, Inc.*, 270 A.D.2d 229, 704 N.Y.S.2d 515 (2nd Dept 2000); *Rose v. A. Servidone, Inc.*, 268 A.D.2d 516 , 702 N.Y.S.2d 603 (2nd Dept 2000).

Recently, the Second Department appears to have applied its rule inconsistently. In *Avedo v. Camac*, 293 A.D.2d 430, 740 N.Y.S.2d 380 (2nd Dept 2002) the Court held that “the fact that the puddle of water was open and obvious did not negate the defendant’s duty to maintain her premises in a reasonably safe condition; rather, it goes to the issue of the injured plaintiff’s comparative negligence.” Within the same week, a different Third Department panel dismissed a plaintiff’s complaint on summary judgment, where the plaintiff slipped on a moss-covered incline on the shoreline near defendant’s dock, citing its own long-standing rule that “liability under common-law negligence will not attach when the allegedly dangerous condition complained of was open and obvious, particularly where the injured plaintiff was aware of it”. *Nardi v. Crowley Marine Assocs., Inc.*, 292 A.D.2d 577, 741 N.Y.S.2d 246 (2nd Dept 2002).

#### SUMMARY OF THE SPLIT

In sum, in the Second and Third Departments, a finding that the danger was open and obvious almost always sounds the death knell of plaintiff’s case. By contrast, in the First and Fourth Departments, even if such a finding is made, the plaintiff generally gets to the jury.

#### THE SECOND CIRCUIT WEIGHS IN

A few years ago, the Second Circuit stepped into the ring. In the case of *Michalski v. The Home Depot, Inc.*, 225 F.3d 113 (2 Cir. 2000), plaintiff, a shopper at a building supply store, was injured when she tripped over a four-inch pallet resting on the forks of a forklift. Defendant moved for summary judgment alleging an open and obvious danger. Plaintiff countered that she did not see the pallet because the body of the forklift blocked it from her sight.

The Second Circuit took note of the split among the appellate divisions the New York State Appellate Divisions. The Court also noted that, absent controlling law from a state’s highest court, the duty of a federal court in resolving a diversity case was to predict how the state’s highest court would resolve the conflict.

In resolving the conflict, the Court applied both *Basso* and the Restatement rule. It held that applying the open and obvious danger doctrine to defeat a plaintiff’s case as a matter of law in all instances “is inconsistent with the essence of the New York rule of premises liability that requires reasonable care in view of all the circumstances”. *Michalski v. The Home Depot, Inc.*, *supra*, citing, *Basso v. Miller*, *supra*. The prediction of the Second Circuit was as follows:

[W]e think the New York Court of Appeals would adopt the reasoning of the Restatement (Second) of Torts, § 343A as the majority of other jurisdictions, which hold that the open and obvious nature of a dangerous condition on its property does not relieve a landowner from a duty of care where the landowner has reason to know that the visitor might not expect or be distracted from observing the hazard.

*Michalski v. The Home Depot, Inc.*, *supra*, at 121 (emphasis added). The court therefore denied

defendant's motion for summary judgment dismissing the complaint, finding that there were issues as to whether the plaintiff, as a shopper, might not expect or might be distracted from observing the open and obvious danger.

In sum, the Second Circuit dispelled the fog of confusing and conflicting appellate division law, resurrected the Court of Appeals' Basso case (as it applies to the open and obvious danger doctrine), and blew new life into the Restatement rule.

## THE COURT OF APPEALS TAGLE V. JAKOB DECISION

Was the Second Circuit's prediction right? Will the Court of Appeals embrace the Restatement rule? After the Michalski decision, in *Tagle v. Jakob*, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001), the Court of Appeals had the opportunity to address the open and obvious danger doctrine. The facts of that case, however, did not give the Court an opportunity to apply the Restatement rule. In dictum however, the Court indicated that, if the right facts were presented, it might do so.

In *Tagle*, a landlord defendant's backyard was subject to an easement by co-defendant NYSEG, who maintained uninsulated overhead electric wires running through a single pine tree growing in the landlord's yard. Plaintiff, tenant's 16-year old invitee, climbed the tree, touched a wire and was injured. Plaintiff sued both the landlord and NYSEG, alleging failure to warn and to keep the premises safe (plaintiff argued, among other things, that the tree should have been trimmed). The landlord moved for summary judgment. The Court granted the summary judgment as to the landlord because, even if the wires passing through the tree constituted a dangerous condition in NYSEG's easement, NYSEG had exclusive control of the easement, which absolved the landlord of liability. As for the landlord's duty to warn, the Court repeated the well-established rule that "a landowner has no duty to warn of an open and obvious danger." *Tagle v. Jakob*, supra, at 169.

In dictum, however, the Court echoed the Restatement rule:

It is unimaginable that an observer could see the wires entering and leaving the tree and not know that the wires passed through it. In short, there is nothing that [the landlord] knew or should have known that was not readily obvious to the tenant. We conclude that, as a matter of law, [the landlord] had no reason to expect that the tenant would not observe the hazard or any conceivable risk associated with it. We therefore hold that Jakob had no duty to warn the tenant of that hazard.

*Tagle v. Jakob*, supra, at 169 (emphasis added). The highlighted language mirrors the Michalski Court's language as well as that of the Restatement (liability should be imposed where the landowner has "reason to expect" . . . that an invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it"). In other words, the Court's language implies that the landowner might have had a duty to warn, despite the openness and obviousness of the danger, had there been reason for the landlord to expect the tenant to fail to observe or appreciate the otherwise open and obvious danger.

## USING BASSO AND THE RESTATEMENT TO DEFEAT SUMMARY JUDGMENT MOTIONS

## BROUGHT UNDER THE OPEN AND OBVIOUS DANGER DEFENSE

Plaintiffs' lawyers should be prepared to use the Restatement and the general principles of a landowner's duty announced in *Basso* in opposing summary judgment motions brought under the open and obvious danger defense.

Here are some arguments for a plaintiff seeking to defeat such a motion:

The danger is NOT "open and obvious" (or there are triable issues of fact in this regard). Applying *Basso*, the Court should consider whether the danger is open and obvious in view of all the circumstances. For example, in *Tiriro v. Westland South Shore Mall, LP.*, 291 A.D.2d 489, 739 N.Y.S.2d 393 (2nd Dept 2002), the Court found an issue of fact as to whether hazardous condition of a platform supporting children's rides was open and obvious in light of the fact that the mall was crowded at time of accident.

Even if the condition was "open and obvious", the danger was not (or there are triable issues of fact in this regard). Here the Restatement definition of "Obvious" can help: "Both the condition and the risk [i.e., danger] are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement [Second] of Torts § 343A, comment (b).

A very recent Fourth Department case illustrates this point. In *Andrews v. County of Onondaga*, \_\_\_ A.D.2d \_\_\_, 747 N.Y.S.2d 631 (4th Dept 2002), plaintiff was injured when she struck a tree while tube-sledding at defendant's park. Before sledding, she observed trees at the bottom of the hill, but also observed others sledding without incident. According to her deposition testimony, no person sledding came closer than approximately 50 feet to the trees. She had no such luck; instead she crashed into a tree at the bottom of the hill. Plaintiff alleged that defendant was negligent in, inter alia, designing, constructing, maintaining, operating, and supervising the hill, "so that it presented an unreasonable risk of harm to persons who were sledding thereon." Defendant moved for summary judgment, arguing that the trees presented an open and obvious danger. The Fourth Department denied the motion, holding that, although defendant established that the trees were an "open and obvious condition", there was an issue of fact whether plaintiff made "an informed estimate of the risk involved." In other words, although the trees were open and obvious, they did not necessarily present an open and obvious danger or risk.

Even if the danger was open and obvious, the landowner should have anticipated the harm for other good reasons (or there are triable issues of fact in this regard). Restatement [Second] of Torts § 343A(1). The Restatement gives the following two examples (but a creative lawyer can surely think of more):

1. The landowner had reason to expect that the plaintiff would proceed to encounter the obvious danger because the advantages of doing so would outweigh the apparent risk. Restatement [Second] of Torts § 343A, Commentary (f). This is clearly the case, for example, where the plaintiff has no choice but to confront the danger as part of her job. The Third Department applied this principle in *Comeau v. Wray*, discussed supra.
2. The landowner has reason to expect that the plaintiff's attention might be distracted, so that he

would not discover what is obvious, or would forget what he has discovered, or fail to protect himself against it. Restatement [Second] of Torts § 343A, Commentary (f). The Third Department applied this principle in *Spannagel v. State*, discussed *supra*, as did the Second Circuit in *Michalski v. The Home Depot, Inc.*, discussed *supra*. In shopper cases, it can be argued that the storeowner should have known that its customers might be distracted, as they were looking at merchandise, from observing the open and obvious dangers.

Plaintiffs' arguments can also be fashioned from the flexible approach of establishing a landowner's duty announced in *Basso v. Miller*. Examine your case for facts showing that, despite the open and obvious nature of the danger, it would be reasonable for the landowner to either provide warnings or take steps to eliminate the danger because of a strong likelihood of injury to others, or a strong likelihood that such an injury would be serious, or because the burden on the landowner of taking additional steps to eliminate the risk would be minimal. See, *Basso v. Miller*, *supra*, at 241.