



Trucking & Transportation Practice Group

June 20, 2008

COURT RULES 'OPEN AND OBVIOUS' DOCTRINE DOES NOT APPLY TO THIRD PARTY AUTO NEGLIGENCE ACTIONS

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The Michigan Court of Appeals recently held that the open and obvious danger doctrine applies only to premises liability actions and certain product liability cases involving failure to warn, but it has specifically been held not to apply to claims of ordinary negligence.

In a recent unpublished opinion, *Jackson-Ruffin v Metro Cars, Inc.*, 2008 WL 2151720, (Mich.App., May 22, 2008), the Michigan Court of Appeals has held that the open and obvious danger doctrine is not applicable to a third party automotive negligence case. The court also held that the plaintiff had suffered a serious impairment of body function, which affected her general ability to lead her normal life.

The plaintiff in *Jackson-Ruffin*, was a passenger on a shuttle bus operated by the defendant. Upon exiting from the bus, the plaintiff slipped on the snow-covered bus steps and suffered serious injuries to her left foot and ankle. These injuries included a severely comminuted fracture of the heel bone and permanent nerve damage. Due to the injuries the plaintiff suffered, her foot is permanently misaligned and she experiences pain while walking. The plaintiff also retired early from her job as a court clerk and became a greeter at a retail establishment.

At the trial court level, the jury awarded the plaintiff \$600,000 in non-economic damages. The jury found the plaintiff to have been 25 percent comparatively negligent. The defendant moved for a Judgment Notwithstanding the Verdict (JNOV) and a new trial. The trial court denied both motions and the defendant appealed.

On appeal, the defendant argued that the trial court erred in denying its motion for a new trial because the trial court failed to instruct the jury concerning the open and obvious danger doctrine. The appellate court disagreed, stating that the open and obvious danger doctrine applies only to premises liability and products liability cases that involve a failure to warn. Because the present action was a third party ordinary negligence claim, the court held that the open and obvious danger doctrine did not apply and the defendant was obligated to its passengers to exercise due care in the maintenance of vehicles, which included ensuring safe access and egress to the shuttle bus.

Even if one were to apply the open and obvious danger doctrine to dangerous conditions involving

passenger vehicles, the dangerous condition in this case was effectively unavoidable and would, therefore, form a basis for liability. It is undisputed that in order to exit the shuttle, the plaintiff had to traverse the steps on which she slipped, which were located at the shuttle's only exit door. See *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001) (stating that standing water in a commercial building is effectively unavoidable when it blocks the building's only exit).

Because the open and obvious danger doctrine is inapplicable to this case, the trial court properly denied defendant's motion for a new trial.

The court's majority also held that the trial court did not err in denying the defendant's motion for JNOV because the plaintiff had established that she suffered a serious impairment of body function. The majority noted that neither party on appeal disputed that the plaintiff suffered an objectively manifested impairment of an important body function, but rather that the injury had not affected the plaintiff's general ability to lead her normal life.

The court held that after considering the non-exhaustive *Kreiner* factors, including the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment and the prognosis for eventual recovery, the evidence presented at trial established that the plaintiff's injuries had affected her general ability to lead her normal life. The court noted that the plaintiff retired seven years earlier than she had intended from her position as a court clerk.

Furthermore, the court stated that the plaintiff's claim that she suffered pain while walking was supported by expert medical testimony. The court noted that the plaintiff could no longer enjoy activities such as running and dancing. Furthermore, the court stated that expert testimony was presented to prove that the plaintiff would not fully recover from the injuries and that her condition would continue to deteriorate.

The dissent argued that the plaintiff had not suffered a serious impairment of body function. The dissent maintained that a proper analysis under *Kreiner* focuses on the function of the body and how physician imposed restrictions impact an individual's ability to lead a normal life. The dissent noted that the plaintiff's early retirement was voluntary and not the result of physician advice.

In addition, the dissent maintained that although the plaintiff had difficulty with running and taking long walks, such impairments were insufficient as a matter of law to affect the course or trajectory of the plaintiff's normal life. Furthermore, the dissent maintained that any limitations on activity were self-imposed. Therefore, the dissent stated that the plaintiff's general ability to lead her normal life had not been affected by the injuries.