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Premises Liability: The Disappearance of the Open and Obvious Doctrine

Smith v. Wal-Mart Stores, Inc.1

I. INTRODUCTION

In the past, landowners were sovereign over their land, and they were immune from liability for accidents that occurred on their land.2 One doctrine that reflects this limited liability is the open and obvious rule, which states that landowners have no duty of care to protect someone on their premises from an open and obvious condition.3

The traditional rule has recently been modified in many jurisdictions to disallow a landowner from asserting an open and obvious condition as a complete defense.4 The modified version holds occupiers liable if they reasonably could have anticipated that the invitee would encounter the danger despite the fact that it was open and obvious.

Smith v. Wal-Mart Stores, Inc. is consistent with Missouri’s modified rule that an open and obvious condition is not a complete defense to a landowner’s liability if the landowner could have anticipated that the invitee would still encounter the danger. However, the court in Smith failed to limit this rule to the narrow application intended by the Missouri Supreme Court.5

II. FACTS AND HOLDING

Elizabeth Smith brought a lawsuit against Wal-Mart Stores, Inc. for personal injuries under a premises liability theory.6 On July 18, 1994, Elizabeth Smith was entering Wal-Mart with her son, Andrew, when she slipped in a puddle of water that had accumulated in the vestibule entrance.7 The puddle resulted from Wal-Mart employees watering plants and shrubs in front of the store.8 The water ran across the parking lot, forcing customers to walk through the water and then track the water inside the store.9 Smith did not realize the

1. 967 S.W.2d 198 (Mo. Ct. App. 1998).
2. See infra note 26 and accompanying text.
3. See Ingram, infra note 26, at 241.
4. See discussion infra Part IIIB.
5. See discussion infra Part V.
7. Id. at 202-03. She was there to buy cleats for Andrew’s football practice which began at 6:00 p.m. The accident occurred about an hour before the practice time. Id.
8. Id. at 203.
9. Id. at 203. Andrew tried to jump over the water but did not quite make it.

Published by University of Missouri School of Law Scholarship Repository, 1999
floor was wet until after she fell, when her shorts and legs were wet. 10 Her son helped her up, and she informed the "greeter" and assistant manager of the accident and filled out an incident report. 11

Smith's back began to hurt the day of the incident. 12 The next day, July 19, she had x-rays taken and medication prescribed by Dr. Cornett at Mercy Medical Center. 13 She eventually saw Dr. Samson, an orthopedic surgeon, who initially recommended that she stay off work and limit her activity, but when her condition did not improve, he ordered a CAT scan. 14 He discovered that Smith had a herniated disc which necessitated surgery. 15

The jury found Wal-Mart one hundred percent at fault and returned a verdict for Smith, awarding her three hundred thousand dollars. 16 Wal-Mart moved for a directed verdict in the trial, and the motion was denied. 17 Wal-Mart then moved for judgment notwithstanding the verdict, and again, the motion was denied. 18 Wal-Mart appealed, arguing that the trial court erred in not granting its motions. 19 Wal-Mart argued that Smith had no case because the water that she slipped on was an "open and obvious" condition. 20 According to Wal-Mart, since an open and obvious condition presents a defense to a premises liability claim, Wal-Mart should not have been held liable for Smith's injuries. 21

The Missouri Court of Appeals for the Eastern District of Missouri upheld the verdict in favor of Smith. 22 It stated that an open and obvious condition does not automatically bar recovery and release a defendant from all liability. 23 The court held that a defendant can be found liable if it should have anticipated that harm might occur to its invitees, despite the open and obvious condition. 24

Elizabeth walked on her tippy toes through the shallower parts of the stream. Id.
10. Id. There was testimony that no sunlight entered the area which could have reflected on the floor, making the puddle noticeable. Id. at 204.
11. Id. at 203. They then bought the cleats and went to Andrew's football practice.

Id.
12. Id.
13. Id. The following day she went to Salem Hospital for more x-rays and was told she needed to stay in bed for a week. She again visited Dr. Cornett who recommended that she see an orthopedic surgeon. Id.
14. Id.
15. Id. Dr. Samson found that Elizabeth still had pain and numbness in her leg and pain in her back one month after the surgery. Id.
16. Id. at 202. Her husband was awarded an additional $25,000. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 203.
21. Id. at 203.
22. Id. at 209.
23. Id. at 204.
24. Id.

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III. LEGAL BACKGROUND

Traditionally, landowners have enjoyed a special status under the law of negligence. Originally, they were not held to the same standard because they were viewed as sovereign over their land, with the right to use it as they chose. However, there was a conflict between the landowner’s historical immunity and normal principles of negligence. This resulted in courts compromising and establishing three classifications of entrants on the land—trespassers, licensees, and invitees—with the landowner owing each class a different duty of care. “Invitee” is the most difficult classification to define. One approach, the benefit test, focuses on the economic benefit to the landowner or occupier from the invitee’s presence on the land. The notion is that the landowner must keep his premises safe in exchange for the economic benefit he receives or might receive from the invitee. The other approach emphasizes the invitation aspect. The theory is that when the landowner opens his premises to the public, he is

26. “[T]he King’s law stopped at the boundary of the owner’s sovereign territory except in felonies and trespass actions.” Glenn Avann McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45, 45 (1936). This view originated in England during the time of feudalism, when the landowning class controlled much of the law. See Lucinda S. Ingram, Missouri Retreats From the Known or Obvious Danger Rule in Premises Liability, 54 Mo. L. Rev. 241, 243 (1989).
27. See Harper et al., supra note 25, at 129; McCleary, supra note 26, at 45.
28. See Harper et al., supra note 25, at 129. This Note’s focus is on invitees; however, it is helpful to understand the definitions of the other two classifications and the duty of care owed to each. A trespasser is one who enters another’s land without the owner’s permission, and generally, the landowner owes no duty of care to the entrant other than to refrain from wanton and willful conduct. See Harper et al., supra note 25, at 129; see also Restatement (Second) of Torts § 329 (1965). “A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” Restatement (Second) of Torts § 330 (1965). The landowner only owes a duty to warn of hidden dangers about which he knows. See Harper et al., supra note 25, at 129-30. However, some jurisdictions have abolished the rigid classifications and impose on landowners a general duty of reasonable care to all entrants. See infra note 77.
29. See W. Page Keeton et al., Prosser & Keeton On Torts § 61, at 420 (5th ed. 1984) (hereinafter Prosser & Keeton) (stating that “an important conflict of opinion as to the definition of an invitee, as well as to whether certain visitors are to be included in this category”); Harper et al., supra note 25, at 218 (recognizing that “considerable controversy surrounds the matter”).
30. This is the test that has been historically used in Missouri to define “invitee.” However, courts have sometimes used terms such as “invited” and “permitted,” which are associated with the invitation test. See Glaser v. Rothschild, 120 S.W. 1, 3 (Mo. 1909); Ingram, supra note 26, at 248; McCleary, supra note 26, at 59.
31. See Prosser & Keeton, supra note 29, at 420.
representing to the public that his premises are safe.\textsuperscript{32} Both tests usually result in the same entrants being classified as invitees; however, there are certain situations in which the results may vary.\textsuperscript{33} The Second Restatement of Torts solved this problem by including both tests in its definition.\textsuperscript{34} 

Of all classifications, the invitee is owed the highest degree of reasonable care.\textsuperscript{35} However, the landowner still does not owe a complete duty of care as he is "not an insurer of the safety of the invitees."\textsuperscript{36} The landowner has a duty to exercise reasonable care in protecting invitees from dangerous conditions about which he knows or should know, and that he does not expect the entrant will discover or understand.\textsuperscript{37}

\textbf{A. The Traditional Open and Obvious Defense}

Traditionally, if a danger is open and obvious to an invitee, the landowner owes no duty to warn or protect the entrant.\textsuperscript{38} This limitation on an occupier's

\begin{itemize}
  \item \textsuperscript{32} See Prosser & Keeton, supra note 29, at 422.
  \item \textsuperscript{33} See Harper ET AL., supra note 25, § 27.12, at 218; Fleming James, Jr., Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees, 63 Yale L. Rev. 605, 612 (1954). For instance, those attending free public lectures, church services, or free public entertainment have been classified as invitees by the invitation test, but it would be difficult to include them under the benefit test. See Harper ET AL., supra note 25, at 228; James, supra, at 617-18. On the other hand, independent contractors or delivery men have not necessarily been extended a public invitation, and their classification as invitees is better explained under the benefit test. See Harper ET AL., supra note 25, at 223; James, supra, at 615.
  \item \textsuperscript{34} The Second Restatement of Torts defines an "invitee" as:
    \begin{enumerate}
      \item An invitee is either a public invitee or a business visitor.
      \item A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
      \item A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.
    \end{enumerate}
  \end{itemize}

Restatement (Second) of Torts § 332 (1965). The second subsection refers to the invitation test, and the third subsection refers to the benefit test.

\begin{itemize}
  \item \textsuperscript{35} See Harper ET AL., supra note 25, § 27.12, at 218.
  \item \textsuperscript{36} See Prosser & Keeton, supra note 29, at 425.
  \item \textsuperscript{37} See Restatement (Second) of Torts § 343 (1965).
  \item \textsuperscript{38} Until recently, it was well settled in Missouri that an open and obvious condition served as a defense to a landowner's liability. See Bohler v. National Food Stores, Inc., 425 S.W.2d 956, 958-59 (Mo. 1968) (finding that plaintiff knew of defective condition of sidewalk and therefore could not recover because the danger was as well known to her as it was to the store); Sellens v. Christman, 418 S.W.2d 6, 9 (Mo. 1967) (holding that when neighbor knew that tree was lodged high in another tree after being cut, there was no duty on defendant to warn); Harbourn v. Katz Drug Co., 318 S.W.2d 226, 229-30 (Mo. 1958) (stating that the "principal question is whether the dangerous
liability reflects the historical aspect of a landowner’s immunity regarding accidents which occur on his premises.\textsuperscript{39} The rule also protects the possessor from being an insurer of safety. The rule is sometimes referred to as the “open and obvious” rule, the “no duty” doctrine, or the “traditional” or “orthodox” rule.\textsuperscript{40} It serves to deny an invitee recovery for injuries resulting from a dangerous condition which was known or should have been known by the invitee.\textsuperscript{41} It originally focused on the landowner’s duty and did not consider the conduct of the invitee.\textsuperscript{42} The First Restatement of Torts reflected the common law standard:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
(c) invites or permits them to remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm.\textsuperscript{43}

The possessor of land, therefore, was under no duty to protect invitees from dangerous conditions about which the invitee knew or which were so obvious that the landowner could reasonably expect that the invitee would realize the danger and take reasonable care for his own safety.\textsuperscript{44} The Restatement intended

\begin{itemize}
\item[39.] See Ingram, supra note 26, at 241.
\item[40.] See Ingram, supra note 26, at 249; 62 AM. JUR. 2d Premises Liability § 146 (1990).
\item[41.] See Ingram, supra note 26, at 249.
\item[42.] The First Restatement of Torts presents the landowner’s duty to invitees. See infra note 43.
\item[43.] RESTATEMENT (FIRST) OF TORTS § 343 (1934) (emphasis added).
\item[44.] See Keeton, supra note 38, at 642.
\end{itemize}
this to be an objective test, focusing on the occupier’s expectations, and not a subjective test of whether the invitee was justified in his conduct.\textsuperscript{45}

Various rationales support the open and obvious doctrine. The one most often given, and the one that finds much support in Missouri law, is that a landowner’s liability for accidents that occur on his land is predicated on his “superior knowledge” of the conditions on his premises.\textsuperscript{46} It is argued that if the invitee has knowledge equivalent to that of the occupier, then the landowner is in no better position to protect the invitee than the invitee himself, and the invitee should exercise reasonable care for his own safety.\textsuperscript{47} Therefore, the landowner’s duty to protect the entrant is limited. As long as the landowner does not misrepresent the existence of dangerous conditions on his premises, he is not liable, even if it appears that his conduct in not removing the condition is unreasonable.\textsuperscript{48}

Another argument used to justify the no duty rule is that the condition is not unreasonably dangerous if it is obvious.\textsuperscript{49} The probability of injury is low because people are likely to discover the danger and protect themselves.\textsuperscript{50} Some jurisdictions have held that actual knowledge serves the same purpose as a warning,\textsuperscript{51} while others have found that it is unfair to hold a landowner liable for failing to foresee that an invitee would ignore an obvious danger.\textsuperscript{52}

Some courts use the rationale of other negligence defenses, such as assumption of risk\textsuperscript{53} and contributory negligence,\textsuperscript{54} to explain the doctrine.

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\textsuperscript{45} See Keeton, supra note 38, at 642-43.

\textsuperscript{46} See Cunningham v. Bellerive Hotel, Inc., 490 S.W.2d 104, 107 (Mo. 1973); Bohler v. National Food Stores, Inc., 425 S.W.2d 956, 958-59 (Mo. 1968); Sellens v. Christman, 418 S.W.2d 6, 9 (Mo. 1967); Doll, supra note 38, at 180; Keeton, supra note 38, at 634; 62 AM. JUR. 2D Premises Liability § 147 (1990).

\textsuperscript{47} One commentator argues that this idea has similar characteristics to contributory negligence, and that problem arose when many jurisdictions replaced contributory negligence with comparative negligence. See Doll, supra note 38, at 181; see also infra notes 61-72 and accompanying text.

\textsuperscript{48} See Keeton, supra note 38, at 634.

\textsuperscript{49} See James, supra note 33, at 623-25.

\textsuperscript{50} See James, supra note 33, at 623-25. “The knowledge of the condition removes the sting of unreasonableness from any danger that lies in it, and obviousness may be relied on to supply knowledge.” James, supra note 33, at 625.

\textsuperscript{51} See, e.g., Atherton v. Hoenig’s Grocery, 86 N.W.2d 252, 255 (Iowa 1957); Wagner v. Lone Star Gas Co., 346 S.W.2d 645, 648 (Tex. Ct. App. 1961). However, neither Iowa nor Texas have retained the open and obvious rule in its strict form. Iowa modified its open and obvious rule by adopting the Second Restatement of Torts in Hanson v. Town & Country Shopping Ctr., Inc., 144 N.W.2d 870, 874-75 (Iowa 1966), and Texas has since abolished the rule completely, replacing it with principles of contributory negligence. See Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978).

\textsuperscript{52} See, e.g., Webb v. Thomas, 296 P.2d 1036, 1039-40 (Colo. 1956).

\textsuperscript{53} See, e.g., Atherton, 86 N.W.2d at 254 (stating that an “invitee assumes all
However, some commentators believe that these other negligence principles only confuse the issue and add nothing to the analysis.\textsuperscript{55} At least one commentator has looked at two forms of assumption of risk and how each relates to the open and obvious doctrine.\textsuperscript{56} Primary assumption of the risk applies when defendant simply has no duty.\textsuperscript{57} This would reflect the original notion that a landowner owes no duty to protect an invitee from obvious dangers.\textsuperscript{58} On the other hand, secondary assumption of risk focuses on an invitee’s decision to take the risk of encountering the obvious danger.\textsuperscript{59} This is another way of applying contributory negligence.\textsuperscript{60}

Despite the fact that courts sometimes word the open and obvious defense in terms normally reserved for contributory negligence, the two defenses can yield different results.\textsuperscript{61} An invitee could encounter an obvious danger, and yet his actions might still be reasonable in certain circumstances, in which case he would not be negligent.\textsuperscript{62} Results of the two defenses could also differ depending on whether the entrant’s actions were deliberate. An invitee could accidently encounter the danger by either slipping (without negligence) or by

normal, obvious, or ordinary risks attendant on the use of the premises”); Dixon v. General Grocery Co., 293 S.W.2d 415, 418 (Mo. 1956) (same). \textit{See also} W. Page Keeton, \textit{Assumption of Risk and the Landowner}, 20 Tex. L. Rev. 562 (1942) (discussing generally the assumption of risk defense in premises liability cases).

54. \textit{See}, \textit{e.g.}, Texas Co., Inc. v. Washington B. & A. Elec. R.R. Co., 127 A. 752, 754 (Md. 1925) (“The real underlying principle of the decisions is the contributory negligence of the plaintiff. And this contributory negligence arises from the failure of the plaintiff to use due care to avoid dangers which he knows exist.”).

55. \textit{See} Ingram, \textit{supra} note 26, at 250-51 (recognizing that “commentators have expressed frustration over the confusion of courts in application of these related theories”); James, \textit{supra} note 33, at 630-31 (stating that “contributory negligence has often played an important role, and is sometimes hopelessly confused with the duty issue”); 62 Am. Jur. 2d § 149 (1990) (stating that “it is often difficult to determine from the language used by the court in a particular case whether recovery was denied under the ‘no duty’ rule, or on the theory of assumption of risk, or of contributory negligence”).

56. \textit{See} Doll, \textit{supra} note 38, at 181-82.
57. \textit{See} Doll, \textit{supra} note 38, at 181-82.
58. \textit{See} Doll, \textit{supra} note 38, at 181-82.
59. \textit{See} Doll, \textit{supra} note 38, at 181-82.
60. \textit{See} James, \textit{supra} note 33, at 631.

61. The traditional open and obvious rule focuses on a landowner’s duty, while contributory negligence (or comparative fault) focuses on an invitee’s actions. Although the obviousness of a condition is relevant in determining an invitee’s negligence, the existence of a duty on the part of a landowner must first be found. \textit{See} Doll, \textit{supra} note 38, at 190.

62. \textit{See} James, \textit{supra} note 33, at 630 (stating that “a traveler may knowingly use a defective sidewalk, or a tenant a defective common stairway, without being negligent if the use was reasonable under all the circumstances”).
being pushed into the danger.\(^{63}\) In all of these situations, an invitee would still be barred from recovering under the traditional open and obvious rule and the First Restatement, despite the fact that his actions were not negligent.\(^{64}\)

Those courts which tended to use principles of contributory negligence in applying the open and obvious rule began to have problems when their states replaced contributory negligence with comparative fault principles.\(^{65}\) For example, for years Missouri was faced with the question of how the adoption of comparative fault would effect the open and obvious defense in premises liability cases.\(^{66}\) The Missouri Supreme Court first encountered the problem in Cox v. J.C. Penney Co.\(^{67}\) The court stated that, under common law, if an invitee failed to act with reasonable care in discovering an obviously dangerous condition, he was contributorily negligent and could not recover.\(^{68}\) The court then noted that this was contrary to comparative fault standards because it “pretermits jury assessment of respondent’s fault for failure to maintain the premises in a reasonably safe condition.”\(^{69}\) The court stated that the adoption of comparative fault modified the traditional common law governing the relationship between an owner and an invitee.\(^{70}\) In Harris v. Niehaus,\(^{71}\) the supreme court clarified Cox by explicitly stating that the decision did not abolish the concept that an open and obvious condition is a consideration in determining a landowner’s duty.\(^{72}\)

63. See James, supra note 33, at 630.

64. See James, supra note 33, at 631. However, the invitee would probably not be barred from recovery under the modified rule of the Second Restatement, because if the invitee’s actions were reasonable then it would be likely that the landowner could have anticipated his actions. See infra note 79.

65. See generally Patton v. May Dep’t Stores Co., 762 S.W.2d 38 (Mo. 1988); Cox v. J.C. Penney Co., 741 S.W.2d 28 (Mo. 1987); Dunn v. Baltimore & Ohio R.R., 537 N.E.2d 738 (1989). See also Doll, supra note 38, at 181; James, supra note 33, at 630.

66. See Cox, 741 S.W.2d at 28. A year later the court reaffirmed its decision. See Patton, 762 S.W.2d at 40 (holding that comparative fault principles apply to slip and fall cases on business premises, and an injured invitee no longer carries the burden of proving that she did not know of the dangerous condition); see also Ingram supra note 26, at 241 (discussing how these two cases affected the traditional no duty rule in Missouri).

67. Cox, 741 S.W.2d at 28.

68. Id. at 29-30.

69. Id. at 30. However, Judge Donnelly argued that the adoption of comparative fault in Gustafson did not have to change the laws governing premises liability. Id. (Donnelly, J., dissenting).

70. Id.

71. 857 S.W.2d 222 (Mo. 1993).

72. Id. at 227. In fact, the court found that defendants had no duty originally, and therefore, overruled a jury’s verdict, finding Mrs. Harris 90% at fault and the trustees only 10% at fault. Id. at 225, 227-28.
In addition to the confusion it created with other negligence defenses, the no duty doctrine began generating criticism for conflicting with modern principles of tort law. In 1954, Fleming James spoke out:

The Restatement [First] view is wrong in policy . . . For the invitee, the occupier must make reasonable inspection and give warning of hidden perils. Why should his duty stop at this point short of reasonable care? . . . The gist of the matter is unreasonable probability of harm in fact. And when that is great enough in spite of full disclosure, it is carrying the quasi-sovereignty of the landowner pretty far to let him ignore it to the risk of life and limb.\(^{73}\)

Courts also became dissatisfied when a negligent store owner escaped liability for injuries which occurred on his premises to a customer who was not negligent.\(^{74}\) The growing criticism of the traditional rule led to its modification in the Second Restatement.

**B. Modification of the Open and Obvious Rule**

The pure open and obvious rule reflected traditional notions of immunity for landowners.\(^{75}\) However, over the last century, tort law, and especially negligence, has gained broader application, resulting in a wider range of liability.\(^{76}\) This has had a significant effect on premises liability and the traditional idea of landowner sovereignty.\(^{77}\) One of the results of this increase in liability of landowners has been a modification of the no duty rule.

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73. James, *supra* note 33, at 628. James also stated that "[t]he law has never freed land ownership or possession from all restrictions or obligations imposed in the social interest," to support his criticism of the First Restatement. James, *supra* note 33, at 628.

74. See, e.g., Williamson v. Derry Elec. Co., 196 A. 265 (N.H. 1938). Some courts chose not to directly state that they were rejecting the traditional rule, but simply held that when the danger was significant and could easily be remedied, the defendant should not escape liability. See, e.g., Dean v. Safeway Stores, 300 S.W.2d 431 (Mo. 1957); Petera v. Railway Exch. Bldg., 42 S.W.2d 947 (Mo. Ct. App. 1931). See also Ingram, *supra* note 26, at 251; James, *supra* note 33, at 628-30; Keeton, *supra* note 38, at 634-35.

75. See *supra* notes 38-39 and accompanying text.


77. For instance, there has been movement to reform the rigid classifications of entrants. The British Parliament abandoned the classifications in 1957, and beginning with California in 1968, seven other states (Alaska, Colorado, Hawaii, Louisiana, New Hampshire, New York, and Rhode Island) have abolished the distinctions completely. See HARPER ET AL., *supra* note 25, at 132-33 n.18. Other jurisdictions have combined the classifications of invitee and licensee, and only recognize trespasser as a distinct classification. All of these jurisdictions now apply normal negligence standards to invitees. See HARPER ET AL., *supra* note 25, at 132-33; Ingram, *supra* note 26, at 244-46.
Many jurisdictions now hold that an open and obvious condition does not automatically negate a landowner’s duty to exercise reasonable care in keeping his property safe. 78 These jurisdictions have followed the Second Restatement of Torts, which adopted the First Restatement concerning the duty owed to an invitee, 79 but then added another section to include:

§ 343A. KNOWN OR OBVIOUS DANGERS
(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.
(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated. 80

Courts have interpreted this to mean that the landowner may have a duty to warn and/or protect if he anticipates that the invitee will encounter the danger even though it is known or obvious. There are three situations when a landowner could anticipate such an encounter: (1) when it is to the customer’s advantage to encounter the known danger; (2) when the customer could be distracted from noticing the open and obvious danger; or (3) when the customer could forget that he earlier discovered the danger. 81

The Second Restatement gives four illustrations of situations when a landowner would be liable to an invitee. In the first fact pattern, a department store has a weighing scale which sticks out into the aisle. The scale has displays

79. RESTATEMENT (SECOND) OF TORTS: DANGEROUS CONDITIONS KNOWN TO OR DISCOVERABLE BY POSSESSOR § 343 (1965). This Section provides that:
A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.
Id. (emphasis added).
80. RESTATEMENT (SECOND) OF TORTS § 343A (1965) (emphasis added).
of products all around it, but it is still easily noticeable. In the second situation, a drug store has a platform six inches high which the customer notices when she sits down at the stool to buy ice cream, but forgets when she leaves. The third involves a grocery store that has allowed a fallen rain spout to remain on a sidewalk used by customers leaving the store. A woman, whose arms are full of purchases blocking her vision, does not notice the spout. In the last illustration, the landowner rents office space to an employer whose employee has no choice but to use a slippery waxed stairway on her way to work. All of these cases, the danger was "visible and quite obvious," yet the Restatement says the owner should be held liable. Many courts that have applied the modified version of the open and obvious rule in a particular case have faced facts similar to those used in one of these four illustrations.

Missouri adopted Section 343A of the Second Restatement in Harris v. Niehaus. In Harris, three children drowned after the car in which they were left slid down a steep slope into a lake at the bottom of the hill. The parents filed a wrongful death action against the trustees of the subdivision, arguing that the trustees should have warned or protected the children from the dangerously steep slope. The court held that the steep slope with the lake at the bottom was an open and obvious condition as a matter of law.

The court then addressed the conditional aspect of the open and obvious rule in the Second Restatement. It held that the evidence, and commonsense, supported the trustees’ position that they could rely on their invitees to take precautions in avoiding the hazardous conditions. The court stated that “[t]he trustees are entitled to expect that their invitees will exercise ordinary perception.

82. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f, illus. 2 (1965).
83. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f, illus. 3 (1965).
84. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f, illus. 4 (1965).
85. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f, illus. 5 (1965).
86. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f, illus. 2-5 (1965).
87. In one case, a customer ran into a five foot tall post as he left the store carrying a mirror that obstructed his vision. He passed the post when entering the store. Ward v. K-Mart Corp., 554 N.E.2d 223 (1990). In another case, a woman slipped and fell on ice in the parking lot. The court held that there was a question for the jury as to whether a reasonable person would take the risk of walking on an icy parking lot "in order to enjoy the benefit of shopping at Droege's." Hellmann v. Droege's Super Market, Inc., 943 S.W.2d 655, 660 (Mo. Ct. App. 1997).
88. 857 S.W.2d 222, 226 (Mo. 1993).
89. Id. at 224. The children’s mother, who had successfully bid on a roofing job, stopped by the subdivision to see the progress. Id.
90. Id. at 225.
91. Id. at 227.
92. Id. at 226-27. However, the dissent argued that the trustees could have anticipated the mother’s negligence, a possible mechanical malfunction in an automobile causing it to roll down a hill, and that a parent might leave a child in a car unsupervised. Id. at 228 (Benton, J., dissenting).
intelligence and judgment, discover this obvious condition, appreciate the risk it presented, and take the minimal steps necessary to avert a tragedy.\textsuperscript{93} The court also reiterated that landowners are not insurers.\textsuperscript{94}

The Missouri Court of Appeals for the Eastern District of Missouri embraced the \textit{Second Restatement} in \textit{Hellmann v. Droge's Super Market, Inc.}\textsuperscript{95} In this case, a customer slipped and fell on a patch of ice in a grocery store's parking lot.\textsuperscript{96} The court found that the ice was open and obvious, but that a jury could find that the store should have anticipated that customers would still come into contact with the danger because of the benefit of shopping at the store.\textsuperscript{97} The court distinguished \textit{Hellman} from \textit{Harris} by declaring that the plaintiff's actions in \textit{Harris} were "patently unreasonable" and that the risk of leaving children in a car parked on an incline outweighs the benefits of doing so.\textsuperscript{98}

The Missouri Supreme Court is one of the few state courts to have adopted the modified version of the open and obvious doctrine, while still deciding in favor of the possessor of land.\textsuperscript{99} It apparently narrowed the application of the doctrine, and it refused to speculate about situations that the trustees might have been able to anticipate.\textsuperscript{100} Other courts, however, have given the doctrine a broad application, effectively abolishing the doctrine.\textsuperscript{101}

For instance, in \textit{Ward v. K-Mart Corp.},\textsuperscript{102} the Illinois Supreme Court broadly interpreted the \textit{Second Restatement}.\textsuperscript{103} In \textit{Ward}, the plaintiff entered K-Mart, passing two concrete filled metal posts about five feet tall outside the entrance.\textsuperscript{104} He purchased a mirror at the store, and as he was leaving, he held the mirror in front of him, blocking his vision.\textsuperscript{105} He ran into one of the posts

\begin{itemize}
\item \textsuperscript{93} \textit{Id.} at 226.
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} 943 S.W.2d 655, 658 (Mo. Ct. App. 1997).
\item \textsuperscript{96} \textit{Id.} at 657.
\item \textsuperscript{97} \textit{Id.} at 658-60.
\item \textsuperscript{98} \textit{Id.} at 659. However, \textit{Harris} does not address whether the plaintiff's actions were reasonable or unreasonable, but instead addresses whether the trustees could rely on invitees protecting themselves. \textit{Harris v. Niehaus}, 857 S.W.2d 222, 226 (Mo. 1993).
\item \textsuperscript{100} However, the dissent does speculate on foreseeable situations. See \textit{supra} note 92.
\item \textsuperscript{101} See generally \textit{Doll}, \textit{supra} note 38.
\item \textsuperscript{102} 554 N.E.2d 223 (Ill. 1990).
\item \textsuperscript{103} See \textit{Doll}, \textit{supra} note 38, at 192-94. However, the court's application is consistent with the \textit{Restatement}’s literal meaning, considering the illustrations following \textit{Restatement} Section 343A. See \textit{supra} notes 82-85 and accompanying text.
\item \textsuperscript{105} \textit{Id.} at 1037-38.
\end{itemize}
with the mirror and injured his eye. The court found that the store should have anticipated that a customer might block his vision with a purchase, and therefore not discover the dangerous condition.

The general trend throughout the country is a rejection or modification of the traditional open and obvious rule. Limiting the landowner's immunity reflects the trend in modern negligence law of increasing liability. Most jurisdictions try to incorporate normal negligence principles in premises liability cases in order to yield consistent results.

IV. INSTANT DECISION

In Smith v. Wal-Mart Stores, Inc., the Missouri Court of Appeals for the Eastern District of Missouri found that Wal-Mart could still be held liable even if the water upon which Smith slipped was an open and obvious condition. Wal-Mart's liability hinged on the question of whether the store could have anticipated that the risk of harm existed even though the condition was open and obvious.

The court first looked at general premises liability principles. It stated that the duty owed by the landowner to a customer is "reasonable and ordinary care in making the premises safe." There is a breach of this duty when the landowner's "conduct falls below the applicable standard of care." The applicable standard of care is decided by the courts as a matter of law, and whether the landowner fell below that line is a question for the jury.

The court then turned to the Missouri Supreme Court's decision in Harris v. Niehaus, in which Missouri adopted Sections 343 and 343A(1) of the Restatement (Second) of Torts. Section 343 sets out the applicable standard of care for landowners. Section 343A addresses those dangers which are

106. Id.
112. Id. at 203-04 (quoting Hellman v. Droege's Super Market, Inc., 943 S.W.2d 655, 658 (Mo. Ct. App. 1997)).
113. Id. at 204.
114. 857 S.W.2d 222, 225-26 (Mo. 1993).
115. Smith, 967 S.W.2d at 204.
116. The court summarized as follows:
[T]he possessor of land must "(1) exercise reasonable care; (2) disclose to the
known or obvious to invitees: "[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."\textsuperscript{117} 

The court focused on this last phrase of the paragraph, and recalled its holding in \textit{Hellman v. Droege's Super Market, Inc.},\textsuperscript{118} in which it stated that finding a condition open and obvious is not the end of the inquiry.\textsuperscript{119} The jury must still decide if the owner of the premises should have anticipated that the risk of harm existed despite the open and obvious danger.\textsuperscript{120} The court reviewed how it applied this concept in \textit{Hellman} to a woman who had slipped and fallen on ice in the parking lot of the store.\textsuperscript{121} 

The court then found that Wal-Mart should have anticipated harm to its customers because the store knew that the water from the parking lot was being tracked into the store's vestibule. Additionally, the store was aware that the floor was wet and could be dangerous because another customer (an off-duty employee) had slipped and informed the store of the condition almost an hour before Smith's incident.\textsuperscript{122} 

Therefore, the court held that the jury's verdict finding Wal-Mart one hundred percent at fault for Smith's injuries was acceptable because "Wal-Mart should have anticipated that . . . a reasonable person would take a reasonably anticipated risk of walking across a wet parking lot and enter[ing] a wet vestibule for the purpose of obtaining the benefit of shopping at the store."\textsuperscript{123} 

\section*{V. Comment} 

The significance of \textit{Smith v. Wal-Mart Stores, Inc.} lies in the court's application of the Second Restatement of Torts regarding the open and obvious doctrine. The traditional doctrine needed to be revised so that an obvious condition would not automatically eliminate liability for landowners; however, 

\footnotesize{invitee all dangerous conditions which are known to the possessor and are likely not to be discovered by the invitee; and (3) see that the premises are safe for the reception of a visitor, or at least ascertain the condition of the land, to give such warning that the invitee may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.} 

\textit{Smith v. Wal-Mart Stores, Inc.}, 967 S.W.2d 198, 204 (Mo. Ct. App. 1998) (citing \textit{Harris v. Niehaus}, 857 S.W.2d 222, 226 (Mo. 1993)). 

\textsuperscript{117} RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965) (emphasis added). 

\textsuperscript{118} 943 S.W.2d 655, 659 (Mo. Ct. App. 1997). 

\textsuperscript{119} \textit{Smith}, 967 S.W.2d at 204. 

\textsuperscript{120} \textit{Id.} 

\textsuperscript{121} \textit{Id.} 

\textsuperscript{122} \textit{Smith v. Wal-Mart Stores, Inc.}, 967 S.W.2d 198, 204 (Mo. Ct. App. 1998). 

\textsuperscript{123} \textit{Id.} at 204-05. 

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the Eastern District needs to carefully apply the modification so that it does not in effect abolish the doctrine.

The supreme court in *Harris*\(^{124}\) was careful in applying the new modification, and in fact found in favor of the defendant after applying it.\(^{125}\) It was obvious that the majority wanted to narrowly apply the modification and avoid extreme speculation about what is foreseeable.\(^ {126}\) The court probably wanted to avoid results similar to those that have occurred in other states that have applied the *Second Restatement* approach to open and obvious conditions.\(^ {127}\) However, the Eastern District failed to observe this in both *Hellman*\(^ {128}\) and *Smith*.\(^ {129}\)

In *Hellman*, the Eastern District logically extended the holding in *Harris* in finding that the grocery store should have anticipated that its customers would encounter the ice in the parking lot and that injuries might result, because often times it is impossible to walk on ice without slipping and falling.\(^{130}\) However, the court has now extended the application to include customers who slip and fall in a puddle of water.\(^ {131}\) The distinction is that sometimes there is nothing one can do to protect oneself if forced to walk on ice. However, a careful and prudent customer should be able to maneuver around a known puddle of water without slipping and falling. Still, the decision in *Smith* is consistent with the supreme court’s decision in *Harris* because Wal-Mart had notice that somebody else had already slipped and fallen in the vestibule.\(^ {132}\) Therefore, it was reasonable for Wal-Mart to anticipate that another accident under the same conditions might happen.

Modification of the open and obvious doctrine leaves invitees little incentive to take precautions against injury when on someone else’s land. The present case does not hold plaintiffs responsible for using ordinary care in trying to avoid water puddles and possible injuries. However, without liability in such a situation, storeowners are allowed to keep a dangerous condition which could easily be removed simply because the condition is open and obvious. The court in *Smith v. Wal-Mart* might have decided that the store was in a better position than its customers to prevent the accident by cleaning up the puddle. If this was

\(^{124}\) 857 S.W.2d 222 (Mo. 1993).

\(^{125}\) Id. at 227-28; see supra notes 88-94 and accompanying text.

\(^{126}\) See supra notes 92-94. The dissent, however, would have applied the concept more broadly and would have held trustees responsible for anticipating certain events. See supra note 92.


\(^{128}\) 943 S.W.2d 655 (Mo. Ct. App. 1997).

\(^{129}\) 967 S.W.2d 198 (Mo. Ct. App. 1998).

\(^{130}\) *Hellman*, 943 S.W.2d at 659.

\(^{131}\) *Smith*, 967 S.W.2d at 204.

\(^{132}\) Id.
the case, the court should have so stated to avoid broad interpretations of the Second Restatement by future courts in its jurisdiction.

The modification of the open and obvious rule could also have an effect on the warning element of premises liability. Traditionally, a landowner only had a duty to warn invitees of hidden dangers. Some commentators have suggested that an open and obvious condition serves notice on an invitee and serves the same purpose as a warning.\textsuperscript{133} Would Wal-Mart still have been held liable in Smith if it had put up a sign warning customers of the slippery floor? After all, Wal-Mart could still anticipate that customers would ignore the warning, just as they ignore the obvious condition.

The Eastern District’s decision in Smith v. Wal-Mart is consistent with Missouri law after the Harris decision. However, the court needs to be cautious in applying this concept. The court should apply the modification of the open and obvious rule sparingly, and only if the landowner can actually anticipate that harm may still exist regardless of knowledge by the invitee. The owner of the premises should not be responsible for every possibly foreseeable event. After all, he is not an insurer for all invitees who enter his premises.

\section*{VI. CONCLUSION}

The Missouri Court of Appeals for the Eastern District of Missouri held that an open and obvious condition does not automatically negate a landowner’s liability if the landowner could have anticipated that the invitee would still encounter the danger. How future courts will apply this rule after Smith v. Wal-Mart remains to be seen. For now, all landowners should act with reasonable care by removing from their premises all dangers, even those which are known and obvious to their customers.

\textbf{ANN K. DITTMERIE}

\textsuperscript{133} See supra note 51 and accompanying text.