Legal experts debate merits of open and obvious bill

By Andrea Lannom

If a hazard is clearly visible but someone is injured by it, should that person be able to sue over it?

West Virginia legislators wrestled with that issue this session, voting to change state law to revert back to what it was before a 2013 state Supreme Court decision. With many other high-profile issues being considered by the Legislature, this one hasn't gotten a lot of attention.

Under Senate Bill 13, which is awaiting signature from Gov. Earl Ray Tomblin, the owner or lessee of a property doesn't owe a "duty of care" to protect others from dangers that are "open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant."

The bill said a judge will decide the nature, severity or lack of violations of any statute relating to a cause of action.

Reaction is split down familiar lines as defense attorneys and plaintiffs attorneys assess the bill dealing with "open and obvious" hazards.

Defense attorneys say people have the responsibility to look out for and avoid open and obvious hazards instead of blaming a property owner for an injury sustained from such.

Plaintiffs lawyers argue it gives a pass to the owner to not fix a dangerous condition — especially if it violates safety codes — and not everyone may be able to determine what is open and obvious.

James Crockett Jr., an attorney with Spilman Thomas & Battle, said he thinks this is a good bill.

"The classic example is someone went under a farmer's fence and whether there is a bull or they ride around on a tractor in the dark, it's always put in terms of the trespasser," Crockett said. "It covers trespassers, but it would cover anyone ... who uncovers an open and obvious hazard and gets themselves hurt by not staying away from it — like a hole where you can't see the bottom and a person says you have to have a fence around the hole to keep the person from jumping in it. The Legislature says, 'I don't think so.'"

However, the West Virginia Association for Justice said in an emailed statement that it is "disappointed" with the bill.

"When someone gets hurt because a property owner has violated state or local building codes, there should not be immunity," Anthony Majestro, president of the association, said. "While it provides discretion to the judge on whether the law applies, this is not a gray area. If you break the law and someone gets hurt, you are responsible."

Crockett explained open and obvious was the law before the 2013 West Virginia Supreme Court decision in Hersh v. E-T Enterprises.

In this case, Walter Hersh alleged he sustained a severe head injury in October 2009 when he fell down the stairs of the parking lot of a Martinsburg shopping plaza. Hersh cited a local ordinance that

required the owners to install handrails, saying the lack of a handrail contributed to or caused his injury.

However, defendants argued the lack of a handrail was an open and obvious hazard. One of the owners testified that he removed the handrails because skateboarders were riding down them and causing them to lean dangerously, according to the opinion.

In the opinion, justices said the open and obvious doctrine in liability negligence actions was abolished and left it up to the jury to apportion fault if someone confronted an open and obvious hazard.

“In the ordinary premises liability case against the owner or possessor of the premises, the finder of fact may consider whether a plaintiff failed to exercise reasonable self-protective care when encountering an open and obvious hazard on the premises,” the opinion said.

Justices said if the owner isn’t negligent, then the he or she isn’t liable for a person’s injuries on the property, however.

Tom Cady, a West Virginia University College of Law professor, said justices made the right decision in Hersh and said the bill reinstates a bad law.

Much of the debate is on who should determine what’s considered open and obvious — the judge, or the jury.

“West Virginia law is adequate enough with duty of due care without an added exception and comparative negligence, which evaluates the conduct of a person who may have entered upon the land and saw an open and obvious danger encountered it,” Cady said. “It’s up to a jury to decide the percentage of a person’s fault, not a judge, as a matter of law, to determine ‘aha, that’s open and obvious.’”

Cady said juries are perfectly capable of deciding these issues.

“What it does is allows a person to try a case to a jury as opposed to a summary disposition by the judge,” he said. “Those are magic words. It allows a plaintiff to get a jury to evaluate his conduct, not a judge, because we believe in jury trials and not judge trials.”

However, Crockett said judges are well-equipped to decide what constitutes an open and obvious hazard.

“Judges do this for a living. They bring all this knowledge to the law and use common sense to determine for himself whether something was open and obvious. Hopefully, if it’s obvious, it will be, well, obvious,” he said, later noting it would be on a case by case basis.

Majestro said he is concerned about the effect on safety regulations.

“State and local building codes, fire codes and other safety regulations exist for a reason — to keep us safe,” he said. “A century ago, accidents occurred in workplaces, schools, apartment buildings, homes because no safety codes existed. There were accidents, and people died. It’s been said that behind every one of those codes and regulations are 100 bodies. Those codes keep us safe, and protect us from serious injury or death.”

Crockett said it comes down to personal responsibility and that the bill assigns responsibility for open and obvious hazards.

“First off, if it’s open and obvious and there was no rail at all, or the rail was made out of flaming gasoline, we’re only talking about open and obvious,” he said. “You have to stick your hand in the fire. ... If the Legislature has a statute, the court decides how to apply the doctrine. It’s entirely up to the court to figure out.”

Parween Mascari, state Chamber of Commerce attorney, agreed, saying it’s about personal responsibility. She said she thinks the bill will be good for businesses and property owners.

“I think creating a new duty for property owners is something that would cause their insurance premiums to rise and also it almost rewards people for being careless,” she said. “And that’s why that exception has always existed. People really pay attention to what’s going on around them and have personal responsibility.”

Majestro said the Legislature should have considered other issues such as whether everyone would be able to determine an open and obvious hazard and the effect on property values.

“First, not everyone is capable of fully understanding the risks that a hazard may pose,” Majestro said. “Children, the mentally and physically-challenged and seniors may not understand the dangers. They are going to be far more vulnerable than the rest of us — and if your child or elderly parent is hurt, there’s nothing you will be able to do.”

Majestro said the bill could cause property values to decrease.

“Think about it,” he said. “No one is going to be required to keep up their property,” he said. “Dilapidated and dangerous property conditions will be a real threat to public safety and will pull all property values in the area down in the gutter with them.”

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