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ARTICLE

OKLAHOMA'S OPEN AND OBVIOUS DANGER DOCTRINE: WHERE DOES IT STAND, AND WHERE SHOULD IT GO?

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INTRODUCTION

Under Oklahoma law, a landowner traditionally could not be held liable for any injuries to visitors caused by obviously dangerous conditions on the landowner's property. However, in the 2014 case of *Wood v. Mercedes-Benz of Oklahoma*,[1] the Oklahoma Supreme Court ("the Court") appeared to cast doubt on the scope of this traditional "open and obvious danger" doctrine, holding that the defendant landowner could be held liable to the plaintiff injured by an artificially induced accumulation of ice on the premises, despite the obviousness of that dangerous condition.

While observers tend to view *Wood* as representing a change to Oklahoma's approach to the open and obvious danger doctrine,[2] there is

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1. Wood v. Mercedes-Benz of Okla., 2014 OK 68, 336 P.3d 457.
2. *See* Martinez v. Angel Expl., 798 F.3d 968, 975 (10th Cir. 2015) (characterizing the traditional open and obvious danger rule as "now in doubt" and suggesting that *Wood*

no consensus about what the emerging approach might be. The United States Court of Appeals for the Tenth Circuit interpreted *Wood* as rejecting the traditional rule, realigning Oklahoma law to comport with the approach of the *Restatement (Second) of Torts*, section 343A.[3] Under this view, a landowner may be liable to a visitor for negligently failing to protect that visitor from obvious dangers in a range of situations in which the visitor's encounter with the danger is foreseeable.[4] However, other courts have adopted a much narrower construction of *Wood*. These courts would recognize landowner liability for open and obvious dangers only where visitors would be required, by their employment obligations, to encounter the danger.[5] While the courts can't agree on the contours of the post-*Wood* open and obvious danger doctrine, they do seem to agree that *Wood* has left the rules surrounding liability for open and obvious dangers unclear.[6]

This Article will analyze the treatment of the open and obvious danger doctrine under Oklahoma law, both before and after *Wood*. Part I will provide a general overview of the open and obvious danger doctrine in American tort law, tracing its evolution and examining the different ways

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signals "a significant shift in Oklahoma premises liability law"); *See also,* Ritch v. Carrabbas Italian Grill, 719 F. App'x. 838, 842 (10th Cir. 2018) (claiming that *Wood* "modified" the traditional open and obvious danger rule); Fuqua v. Deer Run Apts., No. 16–CV–0318–CVE–TLW, 2017 WL 1193061, at *4 (N.D. Okla. Mar. 29, /2017) (treating *Wood* as creating a broad, foreseeability-based exception to the traditional open and obvious danger rule); Husman v. Sundance Energy, Inc., CIV-14-1436-R, 2015 WL 9094936, at *4 (W.D. Okla. Dec. 16, 2015) (characterizing *Wood* as "modif[ying] the open and obvious doctrine").

3. *See Martinez*, 798 P.3d at 976. Another court embraced a similar view in *Fuqua*, 2017 WL 1193061, at *7-8.

4. *See infra* notes 29-76, and accompanying text (discussing the Second Restatement approach to open and obvious dangers).

5. *See, e.g.,* Bower v. Donley-Kirlin Joint Venture, No. CIV-16-308-M, 2017 WL 95406, *3 n.5 (W.D. Okla. Jan. 10, 2017) (calling *Wood* a "narrow exception" to the open and obvious danger rule, limited to situations in which the plaintiff must proceed through the dangerous condition in furtherance of her employment); Hoagland v. Okla. Gas & Elec. Co., NO. CIV-15-0751-HE, 2016 WL 3523755 (W.D. Okla. Jun. 22, 2016) (characterizing *Wood* as being limited to situations in which the injured plaintiff is required to encounter the hazardous condition in order to fulfill a contractual duty); Norton v. Spring Operating Co., 2020 OK CIV APP 18, ¶¶ 23-27, 466 P.3d 598, 605-07 (interpreting *Wood* as limited to situation in which the plaintiff was required to encounter the hazardous condition in furtherance of her employment).

6. *See, e.g.*, *Martinez*, 798 P.3d at 978 (stating that the "reach of Oklahoma's newly-recognized exception to the open and obvious doctrine is yet to be determined"); *Hoagland*, WL 3523755, at *3 (noting that the "reach of the rule adopted in *Wood* is not altogether clear").

in which courts have applied it. Part II will examine the traditional approach to the open and obvious danger doctrine in pre-*Wood* Oklahoma case law. Part III will discuss *Wood* and the recent cases attempting to interpret it, looking at the various approaches to the meaning of the case, and placing it in the context of the various approaches to the open and obvious danger doctrine. Part IV will describe the various possible paths forward for the Court, and analyze their respective merits.

I. PREMISES LIABILITY, DUTY OF CARE, AND THE OPEN AND OBVIOUS DANGER DOCTRINE

A. Negligence Actions and the Duty of Care

The essence of negligence is the creation of unreasonable risks of harm to the person or property of another. A successful negligence claim requires a plaintiff to establish, by a preponderance of the evidence, that:

> (1) the defendant owed the plaintiff a duty of care;
> (2) the defendant breached that duty of care;
> (3) the plaintiff suffered some injury constituting a legally recognized harm;
> (4) the defendant's negligent behavior was a factual cause of plaintiff's injury;
> (5) the defendant's negligent behavior was a proximate or legal cause of plaintiff's injury.[7]

Generally speaking, a defendant owes to others a duty of ordinary care (defined as the care that would have been exercised by a reasonable and prudent person under the same or similar circumstances faced by the defendant) in order to minimize or eliminate the potential risk of foreseeable harm to others.[8] However, there are circumstances in which a defendant cannot be held liable for injuries that the defendant could have prevented. This is typically expressed by courts through the language of duty—the defendant will be said to have no duty to take reasonable steps to prevent harm to the plaintiff.

There are two key characteristics of these *no-duty* rules. The first is that these no-duty rules are categorical in nature, representing a conclusion

7. DAN B. DOBBS, THE LAW OF TORTS, 269 (2000).
8. *See id.* at 277.

that negligence liability is to be rejected for the entire class of cases covered by the rule.[9] This contrasts with the issue of breach, which entails a fact-specific evaluation of the reasonableness of an actor's behavior, in light of the potential risks of harm posed to other persons or property by that actor's behavior.[10] The second characteristic of no-duty rules follows from their categorical nature. The existence of a legal duty is a question of law, decided by judges, rather than a question of fact to be determined by juries.[11] A conclusion that a defendant owes no duty to the plaintiff permits a court to dispose of a negligence case by summary judgment, or some other pretrial disposition.[12] In contrast, the question of breach of an existing duty typically requires an evaluative judgment to be made by the fact-finder to assess whether a defendant took the precautions that a reasonable and prudent person would have taken under the circumstances.[13] Thus, the threshold question in any negligence case is whether the defendant owed the plaintiff a duty to exercise reasonable care.

Courts have recognized no-duty rules in a variety of situations. As Professor David G. Owen explains:

> Thus, the duty/no-duty element provides an important screening mechanism for excluding types of cases that are inappropriate for negligence adjudication. Among the recurring categories of cases where careless conduct does not always give rise to liability for resulting harm, where negligence claims may be barred or limited, are those involving harm to third parties that may result from the negligence of certain types of actors, such as manufacturers, professionals, employers, social hosts,

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9. *See* W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129, 1131 (2014) (observing that duty "is the element by which courts decide which broad, categorical types of negligence claims should reach a jury and potentially win at trial, and which should not.").

10. *See* Barry L. Johnson, *Why Negligence Per Se Should Be Abandoned,* 20 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 250-51 (2017).

11. *See* Cardi, *supra* note 9, at 1131 (explaining that duty is "the only element of negligence decided in the first instance by the court rather than the jury.").

12. *See* Dobbs, *supra* note 7, at 355; *See also* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1675 (2007) (noting that strong no-duty rules permit a wide range of negligence suits to be summarily ejected from the legal system).

13. *See* Johnson, *supra* note 10, at 250-51 (emphasizing the fact-finder's role in assessing breach).

> and probation officers; harm to unborn children; harm that landowners may cause to trespassers and other uninvited guests; harm from negligently failing to provide affirmative help to others in need; and harm that may cause to nonphysical interests, especially emotional harm and pure economic loss. In situations such as these, where the appropriateness of allowing recovery under normal principles of negligence depends upon conflicting values and policies, courts recognize the importance of duty's threshold, gatekeeper role.[14]

Among the various duty limitations mentioned by Professor Owen, the most salient for this Article are those associated with premises liability—that is, the potential liability of owners and occupiers of land for injuries to entrants caused by dangerous conditions on the land.

B. Premises Liability and Duty Limitations

Premises liability refers to negligence actions against landowners brought by those injured by dangerous conditions on the land. The traditional common law approach to premises liability cases began by classifying the land entrant as trespasser, licensee, or invitee.[15] The landowner owed varying duties to different classes of land entrants. Landowners were generally deemed to owe no duty of reasonable care to trespassers. Courts traditionally have said that the duty owed to licensees was similarly limited.[16] Under this traditional classification scheme, a landowner is under no duty of reasonable care to inspect or remedy potentially unsafe conditions on the land for the benefit of trespassers[17] or licensees.[18]

With respect to invitees, however, landowners owed a duty of care to make conditions on the land reasonably safe.[19] Thus, an invitee injured by an unsafe condition on the owner's land could maintain a negligence action against the owner for injury connected to that condition, provided

14. Owen, *supra* note 12, at 1675-76.
15. *See* Dobbs, *supra* note 7, at 591.
16. *See id.* at 597.
17. *See id.* at 592-93 (describing the traditional no-duty rules pertaining to trespassers, and their exceptions).
18. *See id.* at 597 (discussing the no-duty rules relating to licensees).
19. *See id.* at 602.

that she could establish the other elements of the negligence cause of action—breach of duty, factual causation, and proximate causation.

The traditional land entrant status classification scheme, and its attendant duty rules, meant that negligence actions brought by trespassers and licensees would never reach a jury. Because the existence of duty is a question of law, courts could dispose of these cases under the common law no-duty rules, unless one of the relatively narrow exceptions to the no-duty rules applied. Invitees, however, could potentially succeed in negligence cases, subject to the open and obvious danger doctrine.

C. The Open and Obvious Danger Doctrine

1. The Traditional Approach: Categorical Rejection of Liability, Based on the Absence of a Legal Duty

The traditional view, expressed in section 343 of the *Restatement (First) of Torts*, was that a landowner could never be liable for a visitor's injury arising from an open and obvious condition on the land.[20] The specific rationales for this traditional rule were varied. One idea that was often expressed was that if a danger was open and obvious, the visitor would be expected to observe it, and the land owner's failure to ameliorate the danger or to warn the visitor of its existence could therefore not be viewed as negligent.[21] This approach seems to locate the doctrine in the realm of breach, essentially reflecting the view that the landowner could not, as a matter of law, have breached the duty of reasonable care. Alternatively, courts often expressed the view that a plaintiff's encounter with an obvious danger constituted implied assumption of risk, or contributory negligence, either of which would bar recovery under traditional common law rules.[22] Other courts embraced policy-oriented duty conceptions of the doctrine. Some suggested that the landowner's duty to protect the visitor was a function of his superior knowledge of the dangers on the land, and where this superior knowledge was lacking, no

20. *See* RESTATEMENT (FIRST) OF TORTS § 343 (AM. L. INST. 1934).

21. Richard L. Ferrell, III, *Emerging Trends in Premises Liability Law: Ohio's Latest Modification Continues to Chip Away at Bedrock Principles,* 21 OHIO N.U. L. REV. 1121, 1132-33 (1995).

22. John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts*, 38 TEX. TECH. L. REV. 1, 27-28 (noting that courts in the First Restatement era would often characterize *open* and obvious danger cases in contributory negligence or assumption of risk terms).

duty would exist.[23] Others suggested that the complete exemption from liability for open and obvious dangers may have emerged from the privileged status of land ownership in English and American common law.[24]

Given that the open and obvious danger doctrine arose during the era of contributory negligence and assumption of risk as complete defenses, it didn't much matter whether that doctrine manifested absence of breach, contributory negligence, assumption of risk, or some kind of policy-based no-duty rule.[25] Whatever the rationale, the outcome would be the same. Over time, however, courts came to express the open and obvious danger doctrine as a no-duty rule, a characterization consistent with that rule's categorical rejection of liability.[26] The contributory negligence or assumption of risk notions became untenable as jurisdictions increasingly abandoned common law contributory negligence rules in favor of comparative negligence principles.[27] Similarly, the no-breach conception of the doctrine was inconsistent with its categorical nature. Assessment of whether the landowner's failure to address the danger, if evaluated as a question of breach, typically would require an evaluation by the fact-finder of the reasonableness of the landowner's behavior under the circumstances. Treating the doctrine as a no-duty rule reflected the reality that a judicial characterization of the danger as open and obvious would

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23. *See* W. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PENN. L. REV. 629, 634 (1952) (identifying the landowner's superior knowledge of the danger as a potential source of duty to exercise reasonable care).

24. *See, e.g.,* FOWLER V. HARPER ET AL., 5 THE LAW OF TORTS §27.1 at 131-32 (2d ed. 1986).

25. *See* Marks, *supra* note 22, at 27-28.

26. *See* Keeton, *supra* note 23, at 642 ("It is frequently asserted that there is no duty to protect customers against hazards which are known to the customer *or which are so apparent that he may reasonably be expected to discover them and be able to protect himself.*") (emphasis in original). Dobbs adopts this duty-oriented framing of the traditional open and obvious danger rule as well. *See* Dobbs, *supra* note 7, at 604 (characterizing the First Restatement as "saying that if the danger was open and obvious, then the defendant was under no duty at all, even if he could expect that invitees will not learn enough to protect themselves").

27. The traditional common law rule that a plaintiff's contributory negligence served as a complete defense to liability was widely repudiated by American jurisdictions in the 1960s and 1970s, with the widespread adoption of comparative negligence approaches, which allowed for plaintiffs' recoveries to be reduced, by not necessarily barred, by findings of plaintiff fault. For a discussion of the rise of modern comparative negligence principles, *see generally* Gary T. Schwartz, *Contributory Negligence and Comparative Negligence: A Reappraisal,* 87 YALE L. J. 647 (1978) (discussing and defending the shift from contributory negligence to comparative negligence regimes).

bar recovery, permitting defendant landowners to avoid liability at early stages of proceedings, without the input of juries.[28]

2. Partial Erosion of the Open and Obvious Danger Doctrine: Exceptions to the No-Duty Rule Under the Second and Third Restatements

The open and obvious danger rule came under some criticism by the middle of the twentieth century. Some of the academic giants of torts jurisprudence attacked the rule,[29] and courts began rejecting carving out exceptions to it under certain circumstances.[30] The *Restatement (Second) of Torts*, published in 1965, acknowledged these exceptions to the open and obvious danger rule, embracing the idea that, in some situations, a landowner could be liable for foreseeable harm to invitees, despite the obviousness of the danger.[31] Section 343A(1) provides that 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*."[32]

Note that section 343A(1) has two clauses. The first clause states the traditional view of the open and obvious danger doctrine—a landowner is not liable for injury caused by an open and obvious danger on the land. This is a categorical rejection of liability for open and obvious dangers, consistent with the traditional no-duty view expressed in the *Restatement (First)*.[33] However, the second clause articulates a foreseeability-based exception to that no-duty rule, explaining that a landowner may be liable for injury caused by obvious dangers on the land, in spite of their obviousness, if the landowner could be expected to anticipate the harm.

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28. *See* Dobbs, *supra* note 7, at 607 (explaining that the traditional rule, as articulated in the First Restatement, is a rule of law, not an evaluation of the presence or absence of the defendant's breach under the specific facts of the case).

29. *See* Keeton, *supra* note 23, at 642-48 (opining that the openness or obviousness of the danger should be treated merely as factors in assessing a plaintiff's contributory negligence, not as a blanket no-duty rule); Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 628-30 (1954) (arguing that there are situations in which a defendant landowner should be liable in spite of the obviousness of the danger encountered by the plaintiff).

30. *See, e.g.,* Johnson v. Brand Stores, Inc., 63 N.W.2d 370 (Minn. 1954); Walgreen-Texas Co. v. Shivers, 154 S.W.2d 625 (Tex. 1941); Wardhaugh v. Weisfield's, Inc., 264 P.2d 870 (Wash. 1953).

31. *See* RESTATEMENT (SECOND) OF TORTS, §343A (AM. L. INST. 1965).

32. *Id.* (emphasis added).

33. *See supra* notes 20-28 and accompanying text.

The comments to section 343A, along with accompanying illustrations, elaborate on these principles.

Comment e describes the rationale for retention of the traditional no-duty rule as a default, explaining that where the danger should be obvious to land entrants, the landowner can rely on them to protect themselves, so that reasonable care would not require the landowner to adopt precautions to mitigate the risk.[34] Illustration 1 demonstrates the application of this principle, describing a fact pattern in which a store's front door, made of heavy plate glass, is well-lighted and plainly visible, such that a reasonable person should notice it. When a customer, failing to pay attention, mistakes the door for an open entryway and runs into it, suffering injury, the store owner would not be liable to the customer.[35]

Comment f elaborates on the second clause of section 343A, the foreseeability-based limitations that the drafters of the *Restatement (Second)* imposed on the traditional open and obvious danger rule. The language of this comment is worth quoting extensively. It provides, in relevant part:

> There are, however, 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

34. *See* RESTATEMENT (SECOND) OF TORTS §343A cmt. e (AM. L. INST. 1965) (explaining that where the danger is obvious, a "possessor of the land may reasonably assume that [the invitee] will protect himself by the exercise of ordinary care or that he will voluntarily assume the risk of harm if he does not succeed in doing so," such that "[r]easonable care on the part of the [land] possessor therefore does not ordinarily require precautions").

35. *See id.* illus. 1.

> 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. [Internal citations omitted. -EDS] It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.[36]

The first paragraph of comment f states that landowners are not relieved of the duty of reasonable care when a risk of harm to land entrants could reasonably be anticipated, despite the obviousness of the danger. This appears to represent a foreseeability-based exception to the categorical no-duty rule of the first clause of section 343A.[37] Comment f then specifies two categories of cases in which foreseeable risks to land entrants posed by obvious dangers may remain. These are the *distraction* exception, and the *effectively unavoidable danger* exception. Illustrations are provided to demonstrate each of these categories of foreseeable residual danger.

The first category, distraction, is examined in illustration 2, in which a department store leaves a weighing scale protruding into an aisle, which displayed goods.[38] A customer passing though the aisle, distracted by examination of the goods, trips on the scale and is injured. Despite the fact that the scale was readily visible, and therefore its danger obvious to a reasonable customer, the illustration posits that the department store should be held liable to the customer.[39] The rationale presumably is that a distracted customer foreseeably may fail to notice an otherwise obvious danger. A reasonable landowner should anticipate this and take reasonable steps to mitigate the risk.

36. *Id.* cmt. f (emphasis added) (citations omitted).
37. *See infra* notes 58-76, and accompanying text.
38. *See* RESTATEMENT (SECOND) OF TORTS §343A cmt. f, illus. 2 (AM. L. INST. 1965). According to the Reporter's notes, this Illustration is based on Johnson v. Brand Stores, 63 N.W.2d 370 (Minn. 1954). *Id.*
39. *Id.*

Cases following comment f, and recognizing this distraction exception to the open and obvious danger rule, are fairly common.[40] One prominent example is *Michalski v. Home Depot*, *Inc.*, a case in which the United States Court of Appeals for the Second Circuit, applying New York law, concluded that a building supply store may be liable to a customer for injuries suffered when she tripped over a pallet resting on the prongs of a forklift in a store aisle.[41] Rejecting the lower court's conclusion that the store could not, as a matter of law, be held liable, the court concluded that New York would adopt the principles of Section 343A, and ruled that a reasonable jury might impose liability, due to the fact that the customer might be distracted from the hazard by the displays of merchandise in the store.[42]

Illustration 3 addresses a variant of the distraction exception. Here, a drug store soda fountain is perched on a raised platform, six inches above the floor.[43] A customer steps up the platform and sits on a stool to enjoy some ice cream. When finished, the customer forgets about the raised platform, falls, and is injured. Again, the illustration concludes that the defendant should be liable to the customer.[44] Unlike illustration 2, this is not a case in which contemporaneous distraction causes the land entrant to not notice the danger. Rather, the passage of time and the distraction of intervening activity cause the land entrant to forget about the existence of a hazard that she might earlier have been aware of. The basic principle is, however, the same. The landowner was in a position to anticipate the

40. *See, e.g.*, Matteo v. Kohl's Dept. Stores, Inc., No. 09 Civ. 7830(RJS), 2012 WL 760317 (S.D.N.Y. Mar. 6, 2012) (acknowledging a duty of reasonable care with respect to obvious dangers where a "store is arranged in such a way as to foreseeably distract shoppers" from otherwise obvious hazards); Urban v. Wait's Supermarkets, Inc., 294 N.W.2d 793 (S.D. 1980) (noting that a grocery store owner may be able to foresee that a distracted shopper might fall); Hale v. Beckstead, 2005 UT 24, 116 P.3d 263 (concluding that landowner liability cannot be rejected as a matter of law, because the injured painter might have been distracted or forgotten about the otherwise obvious danger posed by an unenclosed balcony in semiconstructed home in which he was painting).

41. Michalski v. Home Depot Inc., 225 F.3d 113 (2d Cir. 2000).

42. The *Michalski* court had to address the potential applicability of Section 343A as a threshold matter, because it viewed the status of the open and obvious doctrine as unsettled, as a matter of New York law. *See id.* at 116-17. After analyzing the state of existing jurisprudence, and concluding that the New York Court of Appeals would adopt the reasoning of Section 343A, the court then applied those principles to the case, concluding that summary judgment for the Defendant was inappropriate, in light of comment f's distraction principle.

43. *See* RESTATEMENT (SECOND) OF TORTS §343A cmt. f, illus. 3 (AM. L. INST. 1965). This illustration is based on Walgreen-Texas Co. v. Shivers, 154 S.W.2d 625 (Tex. 1941).

44. *See id.*

residual risks posed by the obvious hazard, and to act accordingly, to reduce those risks.

Illustration 4 provides another example of the distraction exception. In this scenario, a grocery store owner has left a fallen rainspout across a footpath outside the store, near the customer exit. The customer leaves the store carrying sacks of goods which obstruct her vision, trips over the spout, and is injured. Again, the illustration concludes that the store should be liable.[45] It is foreseeable that a package-laden customer might fail to notice the dangerous obstruction, or might forget about its existence, even if it had been noticed prior to entering the store.

A prominent modern case exemplifying illustration 4 is *Ward v. K-Mart Corp.*,[46] in which the Illinois Supreme Court adopted section 343A and affirmed a jury verdict for a K-Mart customer injured when he collided with a concrete post located near the store's exit. Despite the obviousness of the risk posed by the concrete post,[47] the Court concluded that it was foreseeable that a customer might be distracted while carrying a large, bulky item, or forget about the existence or location of the obstruction while shopping in the store.[48]

The second category of foreseeable residual danger posed by obvious conditions involves effectively unavoidable dangers. This category involves situations in which the land entrant might foreseeably choose to encounter an obvious danger, rather than avoid it, in efforts to achieve some important, overriding goal.[49] Illustration 5 explores this exception. Here, the defendant is the owner of an office building in which the only approach to one particular office is over a slippery, waxed stairway. The plaintiff, employed by a building tenant, uses the stairway on the way to work. She slips and is injured.[50] This illustration concludes that the

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45. *See id.*, illus. 4.

46. Ward v. K-Mart Corp., 554 N.E.2d 223 (Ill.1990).)

47. *See id.* at 232 (acknowledging that the danger posed by the concrete post was obvious, and "not a hidden danger").

48. *See id.* at 234 (concluding that a landowner "can be expected under certain circumstances to anticipate that customers even in the . . . exercise of reasonable care will be distracted or momentarily forgetful").

49. I have called this the "effectively unavoidable danger" exception, even though the danger is not necessarily, in a literal sense, unavoidable. Courts sometimes refer this using the language of necessity – emphasizing that it may be necessary for the land entrant, in an effort to achieve some important, overriding goal to risk an encounter with the danger. Note that comment f talks about this is cost-benefit terms, noting that a land entrant might choose to risk encounter with the danger because the corresponding advantages of doing so outweigh the risk. *See supra* text accompanying notes 36-37.

50. *See* RESTATEMENT (SECOND) OF TORTS §343A cmt. f, illus. 5 (AM. L. INST. 1965).

defendant should be liable, despite the obviousness of the danger, due to the plaintiff's need to encounter the danger in order to get to her job.[51]

Martinez v. Chippewa Enterprises, Inc.[52] is a case exemplifying this exception. Martinez slipped and fell on wet pavement on the defendant's premises. The lower court granted summary judgment for the defendant, based on its conclusion that the "existence of water on concrete or asphalt located outdoors is an open and obvious condition."[53] The appellate court reversed, explaining that the obviousness of the condition does not eliminate the landowner's duty to exercise reasonable care if it foreseeable that the condition poses a danger despite its obviousness.[54] In *Martinez*, the risk was foreseeable, because "the pavement appears to have provided a principal if not sole access way from the street to defendant's building, which housed a government office serving the public."[55]

Comment f and the case illustrations clearly reflect a rejection of the *Restatement (First)*'s rigid no-duty rule, by recognizing significant exceptions based on categories of foreseeable circumstances in which a defendant landowner should anticipate that potential plaintiffs cannot be relied upon to protect themselves, despite the apparent obviousness of the danger. In recognizing a duty of reasonable care in that situation, the Illinois Supreme Court in *Ward* observed that the "manifest trend of the courts" was away from the rigid, traditional no-duty rule, toward the more flexible *Restatement (Second)* approach.[56] It cited cases from sixteen different jurisdictions embracing the section 343A standard.[57]

There is some dispute, however, about whether comment f retains the traditional no-duty rule as a default, subject to the previously-noted foreseeability exceptions, or whether it should be viewed as abolishing the traditional no-duty rule completely, with a recognition that the landowner's non-liability for obvious dangers is based on the conclusion

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51. *See id*. This Illustration is based on Seelbach, Inc. v. Mellman, 140 S.W.2d 18 (Ky. 1943). Comment f further notes that a defendant might still avoid liability in this class of case by establishing that the plaintiff was contributorily negligent in unreasonably encountering the risk, or assumed the risk in doing so. However, the drafters reiterate that this should not be treated as a no-duty situation. *See* RESTATEMENT (SECOND) OF TORTS, §343A comment f (1965).

52. Martinez v. Chippewa Enters., Inc., 18 Cal. Rptr.3d 152 (Cal. Dist. Ct. App. 2004).

53. *Id.* at 155.

54. *See id.*

55. *Id.* at 156.

56. Ward v. K-Mart Corp., 554 N.E.2d 223, 231 (Ill.1990).

57. *See id.* (citing cases).

that there is no *breach* of the applicable duty of reasonable care.[58] The distinction matters because it determines who decides, as a threshold matter, whether one of the foreseeability exceptions in comment f applies. If comment f retains the *Restatement (First)*'s traditional no-duty rule as a default principle, subject to the foreseeability exceptions, the judge must make an initial determination whether one of the exceptions applies. If neither applies, the judge then would conclude that the landowner owed no duty of reasonable care to land entrants, and the defendant would prevail.[59] If the principle is one of breach, rather than duty, then the determination of whether there is foreseeable distraction or whether the danger was foreseeably effectively unavoidable would typically be left to the fact-finder's assessment.[60]

Professor John H. Marks advocates for the breach-oriented view,[61] and there is at least some case law consistent with that interpretation of the *Restatements*.[62] However, this view seems inconsistent with some of the plain language of comment f. Look again at the first two sentences of that provision. The first sentence states that there are cases in which a land possessor should anticipate that a risk of harm remains, despite the obviousness of the danger. The next sentence says that in "such cases" the land possessor "is not relieved of the duty of reasonable care which he owes to the invitee."[63] The obvious implication is that in other cases—cases in which the land possessor should *not* anticipate the residual risk of harm posed by obviously dangerous conditions—the possessor *is* relieved of the duty of reasonable care. Thus, even though the language section

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58. *See* Marks, *supra* note 22, at 28-34. Prof. Marks bemoans what he characterizes as the "aggravating ambiguity" of the Second Restatement in this regard. *Id.* at 39.

59. *See, e.g.,* Ferrell, III, *supra* note 21, at 1136 (explaining that once a "court determines that a danger is open and obvious, the crucial duty element is missing.").

60. *See* Marks, *supra* note 22, at 38 (explaining that the questions of whether the landowner exercised reasonable care with respect to obvious dangers should be for the jury to decide, when the Second Restatement's foreseeability-related exceptions are at issue).

61. *See id.* at 33 (concluding that the "language and thrust of section 343A's comments and illustrations suggest that the Second Restatement envisions juries, functioning in their role on the breach element, answering case-specific questions of foreseeability.").

62. *See, e.g.,* Foster v. Costco Wholesale Corp., 291 P.3d 150, 156 (Nev. 2012) (interpreting the Third Restatement's comment k as treating the obviousness of the danger was part of the assessment of whether the defendant employed reasonable care). Foster follows the Third Restatement, rather than the Second Restatement, but the former appears to represent a minor clarification of the latter, rather than a re-conceptualization of doctrinal location for open and obvious danger analysis. *See infra* notes 101-03 and accompanying text.

63. RESTATEMENT (SECOND) OF TORTS, §343A cmt. f (AM. L. INST. 1965).

343A(1) speaks in terms of the land possessor's liability (rather than specifically mentioning duty) it would appear that the *Restatement (Second)*'s approach retains the *Restatement (First)*'s no-duty rule as a default principle, subject to the two classes of foreseeability exceptions. This seems to be a popular interpretation.

For example, in *Lugo v. Ameritech Corp.,*[64] the Michigan Supreme Court, relying on the *Restatement (Second)*'s section 343A, affirmed summary judgment for a landowner in a case brought by a customer who fell in the landowner's parking lot after stepping into a pothole. Noting that a landowner's duty "does not generally encompass removal of open and obvious dangers,"[65] the Court explained that the open and obvious doctrine should be viewed as "an integral part of the definition of" the duty owed invitees by landowners.[66] It concluded:

> In sum, the general rule is that the premises possessor is not required to protect an invitee from open and obvious dangers, but, if *special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor* ***has a duty*** to undertake reasonable precautions to protect invitees from that risk.[67]

Lugo explained that this "special aspects" proviso might be satisfied if, for example, a commercial business with only one exit for the general public left standing water on the floor, rendering the obvious condition effectively unavoidable.[68] However, in *Lugo*, the Court found that the pothole in the parking lot did not satisfy the "special aspects" exception, leaving the plaintiff's claim barred by the open and obvious danger doctrine.[69] This summary disposition of the case reflects *Lugo*'s no-duty interpretation of section 343A.

In *Coln v. City of Savannah*,[70] the Tennessee Supreme Court similarly treated the *Restatement (Second)* approach as a no-duty rule, subject to

64. Lugo v. Ameritech Corp., 629 N.W.2d 384 (Mich. 2001).
65. *Id.* at 386.
66. *Id.* (quoting *Bertrand v. Alan Ford, Inc.* 537 N.W.2d 185 (Mich. 1995), and *Bertrand*'s discussion of §343A).
67. *Id.* (emphasis added).
68. *See id.* at 387. Note that this is, essentially, the Second Restatements "effectively unavoidable" danger situation, analogous to Illustration 5. *See also, supra* notes 49-55 and accompanying text.
69. *See Lugo.* 629 N.W.2d 384 at 388.
70. Coln v. City of Savannah, 966 S.W.2d 34 (Tenn. 1998).

limited exceptions, embodied in foreseeability language of section 343A. After briefly tracing the rationales and evolution of the open and obvious danger rule, as well as the modern trend (embodied in section 343A of the *Restatement (Second)*) toward carving out exceptions to the traditional no-duty rule, the Court endorsed the *Restatement (Second)*.[71] It then noted that a majority of courts that have abandoned the traditional open and obvious danger rule interpret the *Restatement* as retaining the no-duty rule in situations in which the comment f foreseeability limitations are inapplicable.[72] It concluded with the following observation about the *Restatement (Second)* analysis:

> The principles stated in the Restatement (Second) of Torts, § 343A relate directly to foreseeability and facilitate consideration of *the duty issue* . . . . In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, *thereby imposing a duty on a defendant*, despite its potentially open and obvious nature. Accordingly, while we restrict the once broad application of the "open and obvious" doctrine, *we stress that duty remains a separate component of a plaintiff's negligence action*.[73]

Other courts have adopted a similar view.[74] In short, this interpretation of the *Restatement (Second)*'s approach to open and obvious dangers is that it retains the no-duty rule from the *Restatement (First)*, subject to exceptions for situations in which a landowner should foresee continued danger from the dangerous conditions on the land, despite their obviousness. In such situations, the landowner has a duty of reasonable care that might result in liability, depending upon the fact-finder's

71. *See id.* at 42 (stating agreement with the majority of courts limiting the traditional open and obvious danger doctrine, and adopting the Second Restatement approach).

72. *See id.* (concluding that under the Second Restatement, consideration of the landowner's duty "remains a necessary part of the analysis.").

73. *Id.* (emphasis added).

74. *See, e.g.,* Hale v. Beckstead, 2005 UT 24, ¶ 34, 116 P.3d 263, 270 (treating §343A as requiring "an inquiry into whether factors existed to vest in the defendant a duty to warn or otherwise protect the plaintiff from an obvious harm); Hersh v. E-T Enters., Ltd., 752 S.E.2d 336, 347-49 (W.Va. 2013) (embracing as instructive the approaches of the Second and Third Restatements to open and obvious dangers, and finding the existence of a duty of care to be contingent on the foreseeability of harm).

assessment of breach of duty and apportionment of responsibility for any comparative negligence of the plaintiff.

Whether or not the *Restatement (Second)*'s section 343A is viewed as retaining, as a default subject to foreseeability exceptions, a no-duty rule, its rejection of the traditional, rigid approach to obvious dangers has been widely adopted. As Professor Dobbs notes, the *Restatement (Second)* view "has commanded almost complete acceptance where it has been expressly considered."[75] Only a small handful of jurisdictions other than Oklahoma purport to adhere to the traditional rule.[76] In most jurisdictions, a landowner may be liable for even obvious dangers, if the risks to visitors remain foreseeable, despite their obviousness.

The *Restatement (Third)*'s language is somewhat different, but it embraces a substantially similar view. One key distinction, though, is that the *Restatement (Third)* abandons the common law's traditional tripartite land entrant classification scheme, adopting the view that owners and occupiers of land generally owe a duty of ordinary care to all land entrants.[77] Thus, the open and obvious danger principles are applicable to all land entrants, not just invitees, as under the traditional common law approach.[78] Apart from that, the *Restatement (Third)*'s approach to the open and obvious danger doctrine is quite similar to that of the *Restatement (Second)*.[79] Comment k of section 51 (which is entitled "General Duty of Land Possessors") provides:

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75. *See* Dobbs, *supra* note 7, at 604 (citing cases); *See also*, *Ward* v. K-Mart Corp.,, 554 N.E.2d 223,at 231 (Ill.1990) (stating that the "manifest trend of the courts in this country is away from the traditional rule absolving, *ipso facto*, owners and occupiers of land from liability for injuries resulting from known or obvious conditions") (citing cases); *Hersh*, 752 S.E.2d at 345-46, n.24 (noting that after "the adoption of Section 343A(1) in 1965, many jurisdictions throughout the country have abolished the open and obvious doctrine.") (citing cases).

76. *See, e.g.,* Jones Food Co., v. Shipman, 981 So. 2d 355 (Ala. 2006); Pryor v. Iberia Parish Sch. Bd., 2010-1683 (La. 3/15/11); 60 So. 3d 594; Armstrong v. Best Buy Co., 2003-Ohio-2573, 788 N.E.2d 1088.

77. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §51 cmt. a (AM. L. INST. 2018) (characterizing the traditional status-based duties as "not in harmony with modern law," and adopting "a unitary duty of reasonable care to entrants on the land"). The only exception is that no such duty is owed to "flagrant trespassers.").

78. *See supra* notes 15-19 and accompanying text.

79. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §51 cmt. k (AM. L. INST. 2018) (noting that the "duty imposed in this Section, as amplified in this Comment, is consistent with §343A.").

> Section 343A(1) of the Restatement Second of Torts requires possessors to take reasonable precautions for known or obvious dangers when the possessor "should anticipate the harm despite such knowledge or obviousness." The duty imposed in this Section, as amplified in this Comment, is consistent with § 342A.... known or obvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves. Nevertheless, despite the opportunity of entrants to avoid an open and obvious risk, *in some circumstances a residual risk will remain. Land possessors have a duty of reasonable care with respect to those residual risks*. Thus, the fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability.[80]

Note that the *Restatement (Third)* replaces the notions of distraction and effectively unavoidable danger with the more general term "residual risk." This "residual risk" language is an apt term for the Second Restatement concepts explored in the previous section, but seems to represent the same basic concept seen in the *Restatement (Second)*.

As to whether cases involving obvious dangers *not* entailing residual risk should be treated as no-duty rules, comment k contains language emphasizing that the duty approach "is consistent with § 343A," as well as subsequent language noting that in "some circumstances," residual risks will remain, and that a duty of reasonable care exists "with respect to *those* residual risks."[81] This suggests that a landowner owes no duty of reasonable care unless residual risks exist. Comment k goes on to observe that a plaintiff who unreasonably encounters an obviously dangerous condition may be contributorily negligent, and cautions that comparative negligence principles require that evaluating the implications of the obviousness of the danger for the defendant's duty and breach must be viewed as distinct doctrinal inquiries.[82] This apparent acknowledgement

80. *Id.*

81. *Id.* (emphasis added).

82. *See id.* (noting that "[b]ecause of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence").

that obviousness may be relevant to the duty inquiry further suggests a continuity with the *Restatement (Second)*'s approach.[83]

3. A Third Approach: Abandonment of the Open and Obvious Danger No-Duty Rule

The previous section explored a modified approach to the open and obvious danger rule, embodied in the *Restatement (Second)* and *Restatement (Third)*, and embraced by a large number of modern courts, in which limited exceptions to the traditional no-duty rule were recognized in particular kinds of cases in which residual risks to land entrants foreseeably remain. In such cases, landowners owe a duty of reasonable care that may result in liability for injuries caused by obvious dangers. However, some jurisdictions have gone further than this, and have completely abandoned the no-duty approach to open and obvious dangers. This complete rejection of the obviousness of the danger as a determinant of the landowner's duty is generally grounded in the notion that the traditional rule is inconsistent with the adoption of comparative negligence principles, and should, on corrective justice and social policy grounds, be abandoned.[84]

The Hawaii Supreme Court's rejection of the open and obvious danger rule in *Steigman v. Outrigger Enterprises, Inc*.[85] is a good example of this modern judicial abandonment of no-duty rules in open and obvious danger cases. In *Steigman*, a hotel guest slipped and fell on her hotel balcony after a rainstorm, sustaining injury. The jury found that the defendant hotel was not liable, after having been instructed that the defendant should not be held liable for open and obvious dangers, unless the defendant should nevertheless have anticipated the harm.[86] The plaintiff appealed, arguing that the instruction was inconsistent with the state's comparative

83. *See id.;. But see* Foster v. Costco Wholesale Corp., 291 P.3d 150 (Nev. 2012) (treating the Third Restatement as rendering the obviousness of the risk as a factor relevant to breach, rather than to duty).

84. *See, e.g.,* Steigman v. Outrigger Enters., Inc., 267 P.3d 1238, 1240 (Haw. 2011) (concluding that the open and obvious danger doctrine conflicts with the legislative purpose underlying the jurisdiction's comparative negligence provisions, and thus is no longer viable as a complete bar to premises liability claims).

85. *Id.*

86. *See id.* at 1241 (noting the instruction was consistent with the approach of the Second Restatement's §343A).

negligence statute, an issue which the *Steigman* Court characterized as one of first impression.[87]

The *Steigman* Court ruled for the plaintiff, rejecting even the limited no-duty rule of section 343A. It observed that any approach rejecting a negligence duty on open and obvious danger grounds would be inconsistent with the central tort policy of compensating persons injured by the wrongful acts of others,[88] and is, in particular, inconsistent with the Hawaii Legislature's adoption of comparative negligence principles.[89] The Court also noted that a no-duty rule, because it operates to completely absolve landowners of liability, fails to provide adequate incentive for them to adequately maintain their premises.[90] Finally, the Court expressed concern that the rule excessively empowers judges to resolve questions that are better suited for fact-finder determination. It explained:

> In Hawai'i, the existence of a duty is a question of law. [Internal citation omitted] Accordingly, if this court were to retain the known or obvious danger defense as defeating a landowner's duty, it would fall to the judge to decide whether the defense applies. That result is undesirable. As our review of the known or obvious cases shows, the characterization of the danger as known or obvious is fact-intensive and depends on the circumstances involved in each case. We believe such an assessment should be reserved to the jury, unless reasonable minds could not differ.[91]

Steigman concluded that the obviousness of a danger should no longer operate as a complete bar to premises liability, even with the exceptions recognized under the *Restatement (Second)* approach. Rather, the obviousness of the danger should be treated merely as one of the general

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87. *See id.* at 1241-42.

88. *See id.* at 1247 (noting that "[w]hen enacted as a complete bar, the known or obvious defense precludes an injured plaintiff from recovering from even an unreasonable landowner, and opposes this important social policy [of compensating injured plaintiffs]").

89. *See id.* at 1250 (explaining that the Second Restatement rule would bar a plaintiff's recovery, based on the judge's conclusion that an obvious danger was not foreseeable, preventing the apportionment of responsibility between the parties that the comparative negligence statute requires).

90. *See id.* at 1247.

91. *Id.* at 1251.

circumstances relevant to determining liability and apportioning responsibility for the injury under comparative negligence principles.[92]

Other courts have adopted this view as well. For example, in *Parker v. Highland Park, Inc.*,[93] the Texas Supreme Court abolished the traditional no-duty rule, treating the obviousness of the dangerous condition principally as an issue of the plaintiff's contributory negligence, to be assessed under that jurisdiction's comparative negligence regime.[94] The *Parker* Court's stated rationales for this abolition included the confusion that the rule had engendered in prior case law, as well as the tension that the no-duty rule created with the legislative comparative negligence statute.[95] Similarly, in *Tharp v. Bunge Corp.*,[96] the Mississippi Supreme Court abolished its open and obvious danger rule as a complete bar to liability, concluding that the obviousness of the danger should be viewed as "simply a comparative negligence defense used to compare the negligence of the plaintiff to the negligence of the defendant."[97] The Idaho Supreme Court abandoned the no-duty rule in *Harrison v. Taylor*,[98] deciding to "retire the open and obvious danger doctrine," and holding that "owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises."[99] The *Harrison* Court concluded that the no-duty rule was incompatible with the jurisdiction's comparative negligence regime.[100]

More recently, in *Foster v. Costco Wholesale, Corp.*,[101] the Nevada Supreme Court adopted the view that the obviousness of the danger does not negate the landowner's duty of reasonable care, but is merely a factor in determining whether there was a breach of that duty.[102] In *Foster*, the Nevada Supreme Court reversed a summary judgment in favor of the warehouse chain, in a case in which a customer tripped and fell over a

92. *See id.* at 1251.
93. Parker v. Highland Park, Inc., 565 S.W. 2d 512 (Tex. 1978).
94. *See id.* at 517 (expressly abolishing "the so-called no-duty concept" of open and obvious danger, and treating the plaintiff's encounter with the obvious risk "under principles of contributory negligence").
95. *See id.* at 517-18.
96. Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994).
97. *Id.* at 24.
98. Harrison v. Taylor, 768 P.2d 1321 (Idaho 1989).
99. *Id.* at 1328.
100. *See id.* at 1326.
101. Foster v. Costco Wholesale, Inc., 291 P.3d 150 (Nev. 2012).
102. *See id.* at 156 (explaining that while "the open and obvious nature of the conditions does not automatically preclude liability, it instead is part of assessing whether reasonable care was employed").

wooden pallet in the store aisle. As the Court noted, "[e]ven if a jury finds the risk to be open and obvious, it must also decide whether Costco nevertheless breached its duty of care to Foster by allowing the conditions to exist and by permitting Foster to encounter those existing conditions."[103]

In short, a number of jurisdictions have completely abandoned the traditional no-duty approach to open and obvious dangers, going even farther than the restatements in treating obviousness as merely one factor among many in determining the existence and extent of premises liability. This approach enhances the role of the fact-finder in evaluating the reasonableness of the landowner's precautions, and in apportioning responsibility between the landowner and the visitor for any injury caused by obviously dangerous conditions. The next section briefly reviews the three distinct approaches to obvious dangers discussed in this section by examining the journey of the Kentucky Supreme Court's open and obvious danger jurisprudence.

D. One Jurisdiction, All Three Approaches: Kentucky's Transformed Open and Obvious Dangers Rule

The evolving approach of the Kentucky Supreme Court to the open and obvious danger doctrine presents a nice case study of the courts' varied treatment of that doctrine. Traditionally, the obviousness of the danger that caused a visitor's injury was a complete bar to premises liability in Kentucky.[104] Once the danger was deemed by a court to be obvious, the landowner was relieved of a duty of care to the visitor, permitting trial courts to easily dispose of premises liability cases in response to a defendant's summary judgment motion or motion for a

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103. *Id.* The Nevada Supreme Court purported to find this breach-focused principle in the Third Restatement, rather than deriving it from first principles, as did the Hawaii Supreme Court in *Steigman.* As noted earlier, it is not at all clear that this is what the Third Restatement requires. *See supra* notes 77-83 and accompanying text (noting that the *Restatement (Third)* appears to adopt an approach substantively similar to that of the *Restatement (Second)*). In any event, *Foster* clearly embraced a complete rejection of the no-duty rule associated with the traditional open and obvious danger rule.

104. *See* Becca Reynolds, *A Question of Duty or Breach?: The Ever-Changing Role of the Open and Obvious Doctrine in Kentucky and Why Kentucky Courts Should Reimplement the Doctrine as a Determination of the Landowner's Duty in Premises Liability Disputes*, 54 LOUISVILLE L. REV. 157, 163 (2016) (noting that before the Kentucky Supreme Court's modern modifications of the open and obvious danger doctrine, it provided " a clear defense to defendant-landowners against premises liability lawsuits").

directed verdict.[105] Kentucky courts adhered to that approach through at least the end of the twentieth century.[106]

The Kentucky Supreme Court signaled a potential change in the law in a 2005 case involving a visitor to an automobile dealership who was injured after tripping over a concrete parking barrier, which was partially obscured by a crookedly parked vehicle.[107] Although the Court ruled that the open and obvious danger doctrine did not apply because the hazard was obscured, it went on to endorse the *Restatement (Second)*'s analysis in section 343A, comment f, suggesting that the distraction exception of that provision provided an alternative ground for reversal of the lower court's grant of summary judgment for the defendant.[108]

Five years later, in *Kentucky River Medical Center v. McIntosh*,[109] the Kentucky Supreme Court formally embraced the *Restatement (Second)*'s approach to obvious dangers. In *McIntosh*, the Court affirmed a trial court's rejection of a summary judgment motion brought by a hospital in connection with an injury suffered by a paramedic who tripped over an unmarked and unprotected curb at an ambulance dock while transporting a critically ill patient to the hospital.[110] The defendant argued that the open and obvious danger doctrine barred imposition of liability, claiming that it owed no duty in connection with obvious dangers on its property.[111] The *McIntosh* Court disagreed, highlighting that "[t]he manifest trend of the courts in this country is away from the traditional" open and obvious danger rule,[112] and observing that courts following that trend generally

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105. *See id.* at 163-64.

106. *See, e.g.,* Johnson v. Lone Star Steakhouse & Saloon of Ky., Inc., 997 S.W.2d 490 (Ky. App. 1999) (concluding that restaurant had no duty to warn or otherwise act to protect patron from dangers posed by layer of loose peanut shells that patrons were permitted to toss onto the floor, given that the danger was open and obvious).

107. *See* Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364 (Ky. 2005) (reversing a summary judgment in favor of the Defendant which had been granted on open and obvious danger grounds, concluding that the partially-concealed nature of the hazard rendered it not obvious under the circumstances).

108. *See id.* at 370 (concluding that even if the hazard had been obvious, the § 343A comment f rationale would apply to create a duty of care). It might be fair to say that the Court's embrace of the Second Restatement's approach was dicta in *Horne*, in light of the Court's holding that the danger was not obvious.

109. Ky. River Med. Ctr. v. McIntosh, 319 S.W.3d 385 (Ky. 2010).

110. *See id.*

111. *See id.* at 388.

112. *Id.* at 389 (quoting Ward v. K-Mart, 554 N.E.2d 223, 231 (Ill. 1990)).

adopt the *Restatement (Second)* view.[113] It explicitly joined that trend, approving the *Restatement (Second)*'s section 343A(1) approach.[114]

McIntosh explained that the *Restatement (Second)* view was consistent with Kentucky's traditional emphasis on foreseeability in determining the existence of duty in negligence cases,[115] and noted that the *Restatement (Second)* view also was more consistent with Kentucky's rule of comparative fault than was the traditional, rigid no-duty rule.[116] It further noted that the earlier *Horne* decision endorsed the *Restatement (Second)*'s view, and quoted the distraction exception language from comment f, before concluding:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can he held liable. Thus, this Court rejects the minority position, which absolves, *ipso facto*, land possessor from liability when a court labels the danger open and obvious.[117]

Applying the *Restatement (Second)* principles to the facts, *McIntosh* concluded that any or all of the *Restatement (Second)*'s comment f exceptions could support the view that the defendant hospital owed a duty of ordinary care. First, *McIntosh* concluded that the defendant hospital should have foreseen that a paramedic would be distracted from the danger posed by the curb in front of the emergency room entrance, despite its

113. *See id.* at 389-90.

114. *See id.* at 393 (explaining that its conclusion that the Defendant hospital owed McIntosh a duty of ordinary care in that case "is based on our adherence to the Restatement (Second) approach to open and obvious dangers").

115. *See id.* at 390 (stating that the Second Restatement approach "is the better position," compared to the traditional no-duty rule, and praising the former as "consistent with Kentucky's focus on foreseeability in its analysis of whether or not a defendant has a duty").

116. *See id.* at 391 (explaining that even if an invitee was negligent in encountering an open and obvious danger, "this does not necessarily mean that the land possessor was not also negligent for failing to fix an unreasonable danger in the first place").

117. *Id.* at 392.

obvious character.[118] Second, it noted that, even though the plaintiff had encountered this very curb on prior occasions, it was foreseeable that the risk could be forgotten in the heat of the moment.[119] Finally, the *McIntosh* Court noted that, in the context of rushing a critically ill patient into the hospital, there would be reason to expect a paramedic to risk encounter with a known or obvious danger.[120]

Three years later, in *Shelton v. Kentucky Easter Seals Society, Inc.*,[121] the Kentucky Supreme Court took the final step in its interpretive journey regarding the open and obvious danger doctrine, clarifying and extending *McIntosh* to rule that the obviousness of a danger encountered by a plaintiff is *always* to be treated as a question of breach, not a question of duty. *Shelton* represents a complete abandonment of the traditional open and obvious danger doctrine as a no-duty rule. In *Shelton*, the plaintiff fell and was injured after becoming entangled in wires strung along the side of her husband's bed at the defendant's rehabilitation hospital. The trial court dismissed her ensuing personal injury suit, on the ground that the defendant owed her no duty of care, given the open and obvious nature of the risk she encountered.[122] The Kentucky Supreme Court reversed, concluding that the defendant owed a duty of reasonable care, because it was foreseeable that someone in Shelton's position might proceed to encounter the wires, despite the obvious risks they posed.[123]

The outcome in *Shelton* is consistent with the *Restatement (Second)* approach previously adopted in *McIntosh*. The *Shelton* Court noted that Shelton's husband's bed was positioned such that Shelton had to encounter the wires in order to approach the bed to care for him. It reasoned that the defendant therefore "had reason to foresee that Shelton would proceed to encounter the wires because the *advantage of doing so outweighed the risk*."[124] *Shelton* thus could have been resolved exclusively by invoking the effectively unavoidable danger exception of section 343A, demonstrated in illustration 5.[125] However, *Shelton* reconceptualized the

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118. *See id.* at 393.
119. *See id.* at 394 (observing that it "is likely that in such a situation, a paramedic such as McIntosh may forget that this particular entrance has a unique danger that she must avoid").
120. *See id.*
121. Shelton v. Kentucky Easter Seals Soc'y, 413 S.W.3d 901 (Ky. 2013).
122. *See id.* at 903.
123. *See id.* at 917.
124. *Id.* at 917 (emphasis added).
125. *See supra* notes 50-55 and accompanying text (discussing §343A, comment f, and its illustration 5).

Restatement (Second) provision, and its own earlier decision in *McIntosh*, as broad repudiations of the no-duty rule. The obviousness of the danger should be viewed, under *Shelton's* approach, as relating to the landowner's *breach* of the duty of reasonable care. To treat the foreseeability exceptions as questions of duty improperly usurps the role of the fact-finder. The Court explained:

> In previous open-and-obvious cases, because the question of duty is a question of law, we have also treated the foreseeability of harm as a question of law. As a result, especially when cases are before courts on motion for summary judgment, courts are left in "the peculiar position . . . of deciding questions, as a matter of law, that are uniquely rooted in the facts and circumstances of a particular case and in the reasonability of the defendant's response to those facts and circumstances."[126]

Shelton further noted that the no-duty approach is inconsistent with the process of apportionment of responsibility for the injury contemplated in a comparative fault regime.[127]

In the space of a decade, the Kentucky courts thus moved from the traditional no-duty rule, to the modified no duty rule of the *Restatement (Second)* and *Restatement (Third)*, and then to the complete repudiation of obviousness of the danger as a determinant of the landowner's duty. After *Shelton*, the obviousness of the danger encountered by a land entrant is relevant only to assessment of breach and apportionment of responsibility, not to the threshold question of whether the landowner owed a duty of care.

II. THE OPEN AND OBVIOUS DANGER DOCTRINE IN OKLAHOMA PRIOR TO *WOOD*

The Oklahoma Supreme Court has recognized the open and obvious danger doctrine since at least its 1931 decision in *City of Tulsa v.*

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126. *Shelton.* at 912 (quoting A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907, 914 (Neb. 2010). *See also id.* at 916 (explaining that "the question of foreseeability and its relation to the unreasonableness of the risk of harm is properly categorized as a factual one, rather than a legal one").

127. *See id.* at 912 n.43 (expressing concern that the no-duty determination necessarily implies that the plaintiff was contributorily negligent, and that this focus on plaintiff responsibility within the duty determination is improper).

Harman.[128] Earlier case law, on which *Harman* relied, treated a plaintiff's encounter with an open and obvious danger as contributory negligence, barring recovery on that basis.[129] However, *Harman*'s language is consistent with the no-duty conception of that doctrine, a view to which the Court has since consistently adhered.[130] The Court clearly articulated this open and obvious danger rule in its 1967 opinion in *Buck v. Del City Apartments*,[131] stating:

> The owner or person in charge of the premises has no obligation to warn an invitee, who knew or should have known of the condition of a property, against patent and obvious dangers. The invitee assumes all normal or ordinary risks incident to the use of the premises, *and the owner or occupant is under no legal duty to reconstruct or alter the premises so as to remove known and obvious hazards,* nor is he liable to an invitee for an injury resulting from a danger which was obvious and should have been observed in the exercise of ordinary care.
>
> The duty to keep premises in a reasonably safe condition for the use of the invited public applies solely to defects or conditions which may be characterized as in the nature of hidden dangers, traps, snares, pitfalls, and the like – things which are not readily observable.[132]

The notion that landowners owe no duty with respect to open and obvious dangers survived the abolition of the common law contributory negligence

128. City of Tulsa v. Harman,1931 OK 73, 299 P. 462, 468.

129. *See* Pittman v. City of El Reno, 1896 OK 84, 46 P. 495. *See supra* notes 21-24 and accompanying text for discussion of the various rationales offered for the open and obvious danger doctrine.

130. *See, e.g.,* Nicholson v. Tacker, 1973 OK 75, 512 P.2d 156, 158 (stating that it was long-settled that an "invitor has no duty to protect the invitee from dangers which are so apparent and readily observable that one would reasonably expect them to be discovered") (citing Harrod v. Bagett, 1966 OK 171, 418 P.2d 652); Henryetta Constr. Co. v. Harris, 1965 OK 88 ¶7, 408 P.2d 522, 525 (noting that an "occupant of premises is under no legal duty to obviate known and obvious dangers"); Beatty v. Dixon, 1965 OK 169 ¶13, 408 P.2d 339, 343-44 (stating that landowners have "no obligation to warn an invitee who knew the condition of a property, against patent and obvious dangers, and there is no actionable negligence in the absence of a duty neglected or violated") (quoting Jackson v. Land, 1964 OK 102, 391 P.2d 904, 907).

131. Buck v. Del City Apartments, Inc., 1967 OK 81, 431 P.2d 360.

132. *Id.* at 365 (emphasis added).

defense,[133] and modern Oklahoma cases continued to adhere to this rule. For example, in a 1997 case, the Court affirmed summary judgment for a landowner in an action brought by a visitor who fell off a retaining wall on the property. That wall had been constructed without guardrails or other barriers, creating a potential hazard.[134] The Court noted that the dangers posed by the wall were indisputably obvious,[135] and that the landowner therefore owed no duty to protect the injured party against those dangers.[136]

Similarly, in *Scott v. Archon Group*,[137] the Court affirmed summary judgment for the owners of a parking garage in a case in which the plaintiff drove an oversized truck up a ramp leading to the upper deck of that garage. The truck struck a steel barrier beam erected across the entrance ramp, causing the beam to crash down onto the truck, inflicting injury.[138] The Court reiterated the no-duty rule of *Buck* and *Pickens*, concluding:

> As an invitee, defendants owed no legal duty to [the plaintiff] to warn or otherwise protect him from the open and obvious danger of the beam and the obviously dangerous possible consequences of driving his 11-foot truck into the beam clearly marked as having an eight foot six inch clearance.[139]

Justice Kauger and two of her colleagues dissented in part, observing that fact questions about the obviousness of the danger remained, which should have precluded the grant of summary judgment to the landowner.[140]

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133. The Oklahoma Legislature abolished common law contributory negligence by statute in 1973, adopting a modified comparative negligence scheme. *See* Page Keeton, *Comparative Negligence – the Oklahoma Version*, 10 TULSA L.J. 19, 19-20 (1974). The statute was amended to its present form in 1979, s*ee* OKLA STAT. tit. 23, § 13 (1979).

134. *See* Pickens v. Tulsa Metro. Ministry, 1997 OK 152, 951 P.2d 1079.

135. *See id.* ¶ 13, 951 P.2d at 1086.

136. *See id.* ¶ 10, 951 P.2d at 1084 (noting that "the law does not require that the landowner protect the invitee against dangers which are so apparent and readily observable that one would reasonably expect them to be discovered"). *Pickens* reiterated, however, that a landowner does have "a duty to protect [the invitee] from conditions which are in the nature of hidden dangers, traps, snares and the like."

137. Scott v. Archon Grp., 2008 OK 45, 191 P.3d 1207.

138. *See id.* ¶ 11, 191 P.3d at 1210.

139. *Id.* ¶ 21, 191 P.3d at 1212.

140. *See id.* ¶ 1, 191 P.3d at 1215 (opinion of Kauger, J., concurring in part, and dissenting in part).

Cases like *Pickens* and *Scott* demonstrate the Court's adherence to the traditional open and obvious danger doctrine. The Court repeatedly has emphasized that landowners owe no duty to invitees to address dangerous conditions on the land that are obvious to reasonable visitors. However, the divergent views among the Justices in *Scott* about whether the danger the plaintiff encountered was, in fact, open and obvious as a matter of law, highlight practical limits of the reach of that doctrine. Before concluding that a landowner owes no duty because of the obviousness of the danger, a court must first determine that the danger is obvious. In many situations, determining the obviousness of the danger requires an evaluation by the fact-finder, precluding summary judgment for a landowner on duty grounds.

The Court has long acknowledged the situationally contingent nature of the obviousness determination. For example, in its 1965 opinion in *Henryetta Construction Co. v. Harris,*[141] the Court affirmed a jury verdict for the plaintiff who was injured after falling into a drainage inlet on a road construction site. The Court rejected the defendant's open and obvious danger argument, reasoning that the obviousness of the danger in that case was a question of fact for the properly instructed jury.[142] Two years later, in *Jack Healy Linen Services v. Travis*,[143] the Court affirmed the trial court's rejection of the defendant's motion for a directed verdict in a slip and fall case. The Court held that the water puddle in which the plaintiff slipped could not be characterized as an open and obvious danger as a matter of law, because fact questions remained as to whether the hazard was deceptively innocent in appearance.[144]

Numerous subsequent decisions by the Court, as well as by the Oklahoma Court of Civil Appeals, have rejected the applicability of the open and obvious danger doctrine in specific cases on similar grounds.[145]

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141. Henryetta Constr. Co. v. Harris, 1965 OK 88, 408 P.2d 522.

142. *See id.* at 526.

143. Jack Healy Linen Servs. v. Travis, 1967 OK 213, 434 P.2d 924.

144. *See id.* ¶¶ 8-9, 434 P.2d at 927-928.

145. *See, e.g.,* Sholer v. ERC Mgmt. Grp., 2011 OK 24, 256 P.3d 38 (ruling that the Plaintiff's suit for injury suffered when diving into the shallow end of a swimming pool was not barred by open and obvious danger rule, because fact questions remained about whether the lighting made for a deceptively innocent appearance); Miller v. David Grace, Inc., 2009 OK 49, 212 P.3d 1223 (concluding that the visibility of damage to a balcony guardrail is insufficient to show that the danger posed was, as a matter of law, obvious); Brown v. Nicholson, 1997 OK 32, 935 P.2d 319 (holding that the danger posed by a damaged floor surface of a parking ramp was not open and obvious as a matter of law); Phelps v. Hotel Mgmt., 1996 OK 114, 925 P.2d 891 (reversing summary judgment for the Defendant hotel, granted by the trial court on open and obvious danger grounds, because

Of particular interest is a series of decisions that focus on the role of potential distractions in negating the obviousness of the injury: *Spirgis v. Circle K Stores*,[146] *Roper v. Mercy Health Ctr.*,[147] *Zagal v. Truckstops Corp. of America*,[148] and *Nider v. Republic Parking*.[149]

In *Spirgis*, the plaintiff was injured when he stepped into a pothole in the parking lot of the defendant's store. The trial court granted summary judgment for the defendant, reasoning that the danger posed by the pothole was open and obvious.[150] The appellate court reversed, concluding that the automobile traffic in the parking lot "obscured the danger *and diverted Spirgis' attention away from it.*"[151] As a result, the obviousness of the danger was a disputed issue of material fact, precluding summary judgment for the store operator.[152]

The Court adopted a similar view in *Roper*, a case in which the plaintiff tripped over a small light fixture installed in the center of a sidewalk adjacent to the defendant's hospital.[153] The defendant moved for

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fact questions remained about whether the danger posed by a large glass bowl protruding into hotel lobby seating area was open and obvious); Rogers v. Hennessee, 1979 OK 138, 602 P.2d 1033 (holding that fact questions remained regarding whether the puddle in which the Plaintiff slipped posed an open and obvious danger).

For Court of Civil Appeals cases, *see, e.g.,* Hansen v. Academy, Ltd., 2006 OK CIV APP 63, 136 P.3d 725 (rejecting summary judgment due to remaining fact questions regarding the obviousness of the danger posed by a metal protrusion from a boat over which Plaintiff tripped and fell); Julian v. Secured Inv. Advisors, 2003 OK CIV APP 81, 77 P.3d 604 (holding that remaining fact questions prevented affirmance of summary judgment for landowner regarding the obviousness of the danger posed by a chunk of rock-like debris that tripped the Plaintiff in landowner's parking lot); Moore v. Albertson's, Inc., 2000 OK CIV APP 58, 7 P.3d 506 (concluding that fact question remained as to whether spilled milk on floor of grocery store was an obvious danger, especially in light of the plaintiff's potentially being distracted by effort to avoid collision with another cart in the aisle).

146. Spirgis v. Circle K Stores,1987 OK CIV APP 45, 743 P.2d 682.

147. Roper v. Mercy Health Ctr., 1995 OK 75, 903 P.2d 314.

148. Zagal v. Truckstops Corp. of America, 1997 OK 75, 948 P.2d 273.

149. Nider v. Republic Parking, 2007 OK CIV APP 95, 169 P.3d 738.

150. *See Spirgis*, 743 P.2d at 683-84. To be more precise, the defendant moved for summary judgment on the ground that the danger was open and obvious, and the plaintiff did not file a timely response. *See id.* The Court of Civil Appeals ultimately rejected the procedural default argument, electing to address the open and obvious danger issue on the merits. *See id.* at 685 (explaining that even in the absence of a response to the motion, "it is still incumbent upon the trial court to insure [sic] that the motion is meritorious").

151. *Id.* (emphasis added)

152. *See id.* (stating that "[r]easonable men could differ as to whether the defect was patent and obvious or whether it was rendered a latent defect because of its location and the foreseeable traffic that could and perhaps did divert Plaintiff's attention from it").

153. *See* Roper v. Mercy Health Ctr., 1995 OK 75, 903 P.2d 314, 315. The light fixture

summary judgment, on the ground that the danger posed by the light fixtures was obvious. The district court agreed, despite Roper's deposition testimony which suggested that she didn't see the hazard because the sun was in her eyes, and she was looking for her car.[154] Citing *Spirgis*, the Oklahoma Supreme Court reversed.[155] The Court explained:

> Under the rule announced in *Spirgis*, Mrs. Roper's testimony that people in front of her on the sidewalk prevented her from seeing the light fixture over which she tripped creates the following jury question: Was the defect obvious, or was it hidden because of the *foreseeability* that pedestrian traffic might obscure one's view of the light fixtures in the sidewalk?[156]

In the Court's view, in *Roper*, as in *Spirgis*, a risk that may be obvious in the abstract, may not be obvious in the context of potentially foreseeable distractions. The Court framed this in terms of the obviousness of the risk being not determinable as a matter of law.

Two years after *Roper*, the Court engaged in a similar analysis in a case in which the plaintiff tripped and fell over a box which partially obstructed the aisle floor over which she walked.[157] The trial court granted summary judgment on open and obvious danger grounds, and the Court reversed.[158] Again, it explained that simply because a hazard is observable, it does not follow that it is, as a matter of law, an open and obvious danger that would negate the landowner's duty. In the Court's view, "[a]ll of the circumstances must be examined to determine whether a particular condition is open and obvious to the plaintiff or not,"[159] and under *Zagal's*

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was one a series of similar fixtures installed in twenty-foot intervals along the middle portion of the sidewalk. They protruded a few inches above the paved surface of the sidewalk. *Id.* at 315.

154. *See id.* at 314-15.

155. The *Roper* Court treated *Spirgis* as having precedential authority. Although *Spirgis* was an opinion of the Court of Civil Appeals, it (the Supreme Court) had approved *Spirgis* for publication, giving Spirgis precedential effect under Rule 1.200C of the Oklahoma Rules of Appellate Procedure. *See id.* at 315.

156. *Id.* at 315 (emphasis added).

157. *See* Zagal v. Truckstops Corp., 1997 OK 75, 948 P.2d 273.

158. *See id.* ¶ 0, 948 P.2d at 273.

159. *Id.* ¶ 0, 948 P.2d at 275.

facts, reasonable minds could differ as to whether a cardboard box partially protruding into the aisle would be obvious.[160]

A decade later, in *Nider v. Republic Parking, Inc*., the Oklahoma Court of Civil Appeals, citing, among other cases, *Spirgis*, *Roper*, and *Zagal*, again reversed a summary judgment that had been granted on open and obvious danger grounds.[161] Nider had fallen while walking down a steep ramp in the defendant's parking garage. In response to her allegation that the condition of the ramp was unsafe due to its steep slope, the absence of a handrail near the bottom of its length, and the worn and damaged non-skid material on its surface, the defendant asserted that those conditions were open and obvious, negating the existence of a duty of ordinary care with respect to the ramp's condition.[162]

After acknowledging the open and obvious danger rule,[163] the *Nider* court found it inapplicable to the case. Citing the Oklahoma Supreme Court's opinion in *Jack Healey*,[164] as well as section 343A of the *Restatement (Second) of Torts*,[165] the court noted that a property owner may be liable for injuries arising from obvious conditions "if the property owner had reason to know that the dangerous condition would cause harm to an invitee despite the invitee's knowledge."[166] The *Nider* court focused particularly on the possibility of the plaintiff's potential distraction, linking the Oklahoma Supreme Court's opinions in *Jack Healey*, *Roper*, *Spirgis*, and *Zagal* to the *Restatement (Second)*'s distraction exception,[167] and concluding that this precluded a conclusion that the condition was open and obvious as a matter of law.[168]

This look at the Oklahoma courts' treatment of the open and obvious danger doctrine from its inception through 2011 demonstrates a few things. First, the courts have consistently adhered to the traditional view that landowners owe no duty to visitors in connection with open and

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160. *See id.*

161. *See* Nider v. Republic Parking, Inc., 2007 OK CIV APP 95, 169 P.2d 738.

162. *See id.* ¶¶ 10-14, 169 P.3d at 742-43.

163. *See id.* ¶ 21, 169 P.3d at 745 (stating that "[a]s Republic correctly observed, it had no duty to protect invitees from any dangerous condition that was open, obvious and readily observable under ordinary circumstances.").

164. *See supra* notes 143-44 and accompanying text.

165. *See supra* notes 29-83 and accompanying text.

166. *Nider*, ¶ 21, 169 P.3d at 745.

167. *See id.* ¶¶ 23-26, 169 P.3d at 745-46.

168. *See id.* ¶ 26, 169 P.3d at 746 (concluding that "Republic failed to establish as a matter of law that it owed Nider no duty regarding the condition of the ramp.").

obvious dangers that may be encountered on the landowners' property.[169] However, the courts have noted that the general visibility of the danger is not necessarily sufficient to negate a duty of care. Second, the courts have repeatedly held that various hazards which might, at first blush, appear to be obvious, may not be so.[170] It is often the case that in particular contexts, factors such as the potential for diversion of a visitor's attention leave residual risks for which liability may be imposed. Finally, cases like *Scott*, in which the Court was willing to affirm summary judgment for a landowner, seem to be the exception, rather than the rule.

III. RECENT TAKES ON OKLAHOMA'S OPEN AND OBVIOUS DANGER DOCTRINE: *WOOD V. MERCEDES-BENZ* AND BEYOND

A. *Possible Re-Evaluation of the Scope of the Open and Obvious Danger Rule: The Court's Opinion in* Wood

The Oklahoma Supreme Court's 2014 opinion in *Wood v. Mercedes-Benz* raised questions about the continued scope of the traditional open and obvious danger doctrine. In *Wood*, the plaintiff, an employee of a catering company contracted by the defendant dealership to cater an event on its premises, was injured when she slipped and fell on a large patch of ice outside the dealership's entrance. The ice had been formed when the dealership's sprinkler system activated overnight, while the temperature was below freezing.[171]

There was no question in *Wood* that the danger was open and obvious. The icy conditions were plainly visible, and the plaintiff acknowledged that she was aware of them, but nevertheless chose to encounter them in order to fulfill her job obligations.[172] Nevertheless, the Court, while acknowledging the continued validity of the open and obvious danger rule,[173] held that the dealership owed a duty of ordinary care to the

169. *See supra* notes 128-40 and accompanying text.

170. As the Court phrased it in *Sholer,* "not every 'observable' condition is 'open and obvious' as a matter of law." *See Sholer* v. ERC Mgmt. Group, 2011 OK 24, ¶ 13, 256 P.3d 38, 43.

171. Wood v. Mercedes-Benz of Oklahoma, 2014 OK 68 ¶ 1, 336 P.3d 457, 458. The weather had otherwise been clear in the city, so the icy surface was a product of the dealership's conduct, not naturally occurring conditions.

172. *See id.* ¶ 9, 336 P.3d at 460 n.8 (explaining that plaintiff was "required to cross the hazardous condition in furtherance of her employment").

173. *See id.* ¶6, 336 P.3d at 459.

plaintiff.[174] The Court explained that "the open and obvious doctrine is not absolute" under Oklahoma law,[175] and concluded that "under the peculiar facts of this case, Mercedes-Benz owed a duty to take remedial measures to protect [the plaintiff] from the icy conditions surrounding the entry to its facility."[176]

In contrast to cases like *Spirgis* and *Roper*, *Wood's* rejection of summary judgment was not due to a conclusion that the danger was not, clearly and as a matter of law, open and obvious. Rather, *Wood* seems to have adopted limits on the doctrinal scope of the open and obvious danger rule, changing the nature of its influence on the landowner's duty. But the precise nature of these limits is unclear. Nevertheless, a few key themes emerge when looking closely at the Court's analysis.

The Court's analysis began by reiterating the basics of Oklahoma premises liability doctrine, including its consistent adherence to the traditional tripartite land entrant classification scheme, with invitees owed a duty of ordinary care.[177] It then noted that this duty is eliminated where the danger is open and obvious.[178] According to the Court, the reason for this relates to foreseeability. Where the danger is open and obvious, landowners can expect potential plaintiffs to detect and avoid the danger themselves, thereby rendering unforeseeable the risk of injury.[179]

However, the Court then observed that the open and obvious danger rule is not absolute. The question of duty in negligence cases is largely a function of foreseeability.[180] According to *Wood*, a landowner "does have

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174. *See id.* ¶ 10, 336 P.3d at 460 (concluding that the defendant "had a duty to take precautionary measures for the [plaintiff]," and that "there is a question of fact regarding whether Mercedes-Benz breached its duty toward Wood," which precluded summary judgment for the dealership).

175. *Id* ¶ 7, 336 P.3d at 459-60.

176. *Id.* ¶ 9, 336 P.3d at 460.

177. *See id.* ¶ 5, 336 P.3d at 459 (noting the landowner's obligation to "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 . . . traps, snares or pitfalls." (quoting Martin v. Aramark Servs., Inc. 2004 OK 38, ¶5, 92 P.3d 96, 97)).

178. *See id.* ¶ 6, 336 P.3d at 459 (observing that the Court's jurisprudence has "generally eliminated a landowner's duty to protect a third-party" from open and obvious dangers).

179. *See id.* (explaining that "an open and obvious danger relates directly to the foreseeability of a danger, and therefore, affects a landowner's duty").

180. *See id*. ¶ 7, 336 P.3d at 459-60. The Court stated:

One of the most important considerations in establishing a duty is foreseeability. . . . Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probably consequences of his act, another person will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises.

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*."[181] This language appears to suggest that there are cases in which it is reasonably foreseeable to the landowner that a dangerous condition on the land could pose an unreasonable risk to a visitor, despite its open and obvious character.

But then in the next paragraph of its opinion, the Court seemed to shift gears, leaving behind its foreseeability argument in order to discuss prior cases dealing with naturally-occurring dangerous conditions.[182] Acknowledging that prior cases had rejected landowner liability for naturally occurring hazards, such as snow or ice,[183] the Court observed that where a hazardous accumulation of ice had been caused by or enhanced by the landowner's actions, liability may be appropriate. Here, the Court appeared to suggest that *Wood* was similar to *Krokowski v. Henderson National Corp.*,[184] another ice-related slip and fall case, in which the Court

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(quoting Weldon v. Dunn, 1998 OK 80, ¶ 11, 962 P.2d 1273, 1276) (citations omitted).

181. *Id.* (quoting Brown v. Alliance Real Estate Grp., 1999 OK 7, ¶ 6, 976 P.2d 1043, 1045 (citations omitted) (emphasis in original)). *Brown*, like *Wood*, involved a slip and fall on ice. The *Brown* Court reversed the lower courts' imposition of summary judgment for the Defendant, issued on open and obvious danger grounds. The Court reasoned that the patch of ice upon which Brown slipped was, according to the evidentiary record in that case, not visible to her, and therefore presented the type of "deceptively innocent appearance" that rendered the open and obvious danger doctrine inapplicable. *See Brown*, ¶¶ 5-6, 976 P.2d at 1045.

182. *Id.* ¶8, 336 P.3d at 460. It's not clear what arguments the Court is responding to here, but it appears that this discussion may have been prompted by the confusing confluence of open and obvious danger cases, and cases rejecting liability for natural accumulations of ice and snow (which may or may not have been partially grounded in the idea that naturally-occurring icy conditions are generally obvious). This problem sometimes arises in open and obvious danger jurisprudence. *See* Dobbs, *supra* note 7, at 604 (noting the interaction between open and obvious danger jurisprudence, and cases rejecting liability for natural accumulations of snow or ice).

183. *See id.* ¶ 8, 336 P.3d at 460 n.7. In this footnote, the Court observed that prior case law differentiated between naturally-occurring hazards and those created or aggravating by the defendant's conduct. *See id* (citing Dover v. W.H. Braum, Inc., 2005 OK 22, ¶¶ 7-8, 12, 111 P.3d 243, 245-46, 247 in which the Court affirmed summary judgment for the defendant landowner, where the hazards were created by icy conditions not increased by any actions done by the defendant).

184. Krokowski v. Henderson Nat'l Corp., 1996 OK 57, 917 P.2d 8. In *Krokowski*, the Plaintiff, a tenant fell on the icy sidewalk of the defendant's apartment building. The plaintiff claimed that the danger from naturally-accumulated ice was exacerbated by the defendant's negligent installation of a drain pipe which caused freezing water to drain onto the sidewalk. The defendant argued that Oklahoma law precluded premises liability for

rejected summary judgment for the landowner.[185] The Court suggested that in *Wood*, as in *Krokowski*, evidence had been presented suggesting that the accumulation of ice on the walkway was not naturally occurring, but was a product of the defendant landowner's own conduct.[186]

After its brief digression into the discussion of naturally-occurring versus landowner-created conditions, the Court resumed its discussion of the foreseeability of harm to the plaintiff, and its significance for determining the existence of a duty of care, in cases where the danger is obvious. The Court stated:

> We agree with Wood that *under the peculiar facts of this case*, Mercedes-Benz owed a duty to take remedial measures to protect her from the icy conditions surrounding the entry to its facility. . . . The dealership had notice of the icy conditions surrounding the entire building and knew that Ned's Catering was sending its employees to the facility to cater the business' scheduled event. As such, *it was foreseeable* that Ned's Catering employees would encounter the icy hazards created by the sprinkler system and *would likely proceed through the dangerous condition in furtherance of their employment*.[187]

At the end of this paragraph, the Court dropped a footnote, which is also worth quoting in its entirety. That footnote stated:

> Our opinion should not be construed as abrogating the open and obvious defense in all cases. The icy condition is not dispositive of Mercedes-Benz' duty in this case because *Wood was required to cross the hazardous condition in furtherance of her employment*. As opposed to a random customer appearing at the dealership, Mercedes-Benz knew that employees of Ned's Catering

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injuries arising from the natural accumulation of ice and snow. The *Krokowski* Court agreed with that characterization of the legal rule, but rejected its applicability to the case, reasoning that there were genuine issues of material fact regarding whether the defendant's conduct added to the natural risks.

185. *See* Wood v. Mercedes-Benz of Oklahoma, 2014 OK 68, ¶ 8, 366 P.3d 457, 460.
186. *See id.* ¶¶ 8-9, 336 P.3d at 460.
187. *See id.* ¶ 9 (emphasis added).

> would be arriving and *would be required to enter the building.*[188]

This concluded the Court's analysis in *Wood*, with the next paragraph merely stating the Court's conclusion that the defendant had a duty to exercise reasonable care, leaving a fact question for the jury as to whether that duty was breached, which precluded summary judgment in the case.[189]

B. Interpreting Wood *– Courts' Efforts to Discern a Principle*

In short, it appears that *Wood* recognized some sort of limitation on the open and obvious danger rule, but its precise scope was not clear. Is the doctrine inapplicable any time it is foreseeable that a plaintiff might encounter such a danger? Or is this the case only if the landowner knows that a plaintiff would be required to encounter the dangerous condition in order to perform her job responsibilities? And what about the role of natural versus man-made conditions? Courts applying *Wood* have reached divergent conclusions about the operative principle adopted in that case. Some, including the United States Court of Appeals for the Tenth Circuit, have embraced an expansive interpretation of *Wood*, viewing it as consistent with the principles of the *Restatement (Second)*, and thus representing the embrace of a general, foreseeability-based exception to the traditional no-duty rule.[190] Others have taken a much narrower view of *Wood,* limiting its reach to cases in which the plaintiff was obligated, by the requirements of her employment, to encounter the risk.[191]

188. *Id.* ¶ 9 n.8 (emphasis added). This language echoed a comment that the Court had made earlier, in conjunction with its general discussion of the duty owed to invitees under the land entrant classification scheme. The Court had noted that Wood "was not a customer of the dealership, but was present to fulfill her employer's contractual duty to provide service for an event sponsored by the dealer." Therefore, unlike a customer, who could presumably avoid the hazard by leaving, "Wood's presence and exposure to the hazardous icy conditions was compelled to further a purpose of the dealership."

189. *See id.* ¶ 10.

190. *See, e.g.,* Martinez v. Angel Expl., LLC, 798 F.3d 968 (10th Cir. 2015); Fuqua v. Deer Run Apartments, No. 16–CV–0318–CVE–TLW, 2017 WL 1193061 (N.D. Okla. Mar. 28, 2017). *See infra* at notes 192-214.

191. *See* Bower v. Donley-Kirlin Joint Venture, No. CIV-16-308-M, 2017 WL 95406 (W.D. Okla. Jan. 10, 2017); Hoagland v. Okla. Gas & Elec. Co., NO. CIV-15-0751-HE, 2016 WL 3523755 (W.D. Okla. June 22, 2016); Husman v. Sundance Energy, No. CIV-14-1436-R, 2015 WL 9094936 (W.D. Okla. Dec. 16, 2015); Weaver v. Celebration Station Props., No. H–14–2233, 2015 WL 1932030 (S.D. Tex. Apr. 28, 2015); Norton v. Spring Operating Co., 2020 OK CIV. APP. 18, 466 P.3d 598.

1. The Broad View – Foreseeability and the Second Restatement

The broad view of *Wood* is represented by the Tenth Circuit's opinion in *Martinez v. Angel Exploration, LLC*.[192] In that case, Martinez was injured when his sleeve was caught in a piece of the defendant's oil production machinery with which he was working. Martinez sued, alleging that the lack of adequate safety guards on the machinery represented a failure on the defendant's part to maintain its premises in a reasonably safe condition.[193] The trial judge granted summary judgment for the defendant, on the ground that the danger of the unguarded machinery was open and obvious, and the plaintiff appealed[194]

The Tenth Circuit vacated the lower court's order and remanded for reconsideration in light of *Wood*.[195] Noting that "[t]he reach of Oklahoma's newly recognized exception to the open and obvious doctrine is yet to be determined,"[196] *Martinez* undertook a fairly close reading of *Wood*, in light of earlier Oklahoma premises liability law. While acknowledging the *Wood* Court's insistence that it was not abolishing the open and obvious danger doctrine,[197] the Tenth Circuit concluded that *Wood* represented "a significant shift in Oklahoma premises liability law."[198] *Martinez* concluded that *Wood* "aligns Oklahoma law with an emerging majority of states to reconsider the open and obvious doctrine,"[199] in a manner that is consistent with the *Restatement (Second)*'s approach.[200] It observed that section 343A of the *Restatement (Second)* recognizes the existence of a duty of ordinary care where plaintiffs may be distracted from otherwise open and obvious dangers,[201] or where a plaintiff might choose to encounter an open and obvious danger because she has no choice but to do so.[202] Specifically, *Martinez* concluded that the *Wood*

192. *Martinez*, 798 F.3d 968.
193. *See id.* at 971.
194. *See id.* at 973.
195. *See id.* at 982.
196. *Id.* at 978.
197. *Id.* at 975 (quoting Wood v. Mercedes-Benz of Oklahoma, 2014 OK 68, ¶9, 366 P.3d 457, 460 n.8, where the Court claimed that its opinion "should not be construed as abrogating the open and obvious defense in all cases").
198. *Id.*
199. *Id.* at 976.
200. *See id.* at 976-77.
201. *See id.* (discussing pre-*Wood* Oklahoma cases).
202. *See id*. (citing RESTATEMENT (SECOND) OF TORTS, §343A, cmt. f (AM. L. INST. 1965)).

Court's reasoning paralleled illustration 5, of section 343A, comment f.[203] According to *Martinez*, Wood was compelled to walk across the ice to get to her catering job in much the same way that a tenant in an office building might be forced to encounter a slippery waxed stairway to gain access to her office, and the risk that she would choose to risk crossing the icy pavement was similarly foreseeable to the dealership.[204]

Other courts have adopted a similar view of *Wood*'s reach. In *Fuqua v. Deer Run Apartments*.,[205] a judge in the United States District Court for the Northern District of Oklahoma denied a motion for summary judgment, brought on open and obvious danger grounds, filed by a landlord attempting to avoid liability for a tenant's injuries arising from a fall down the stairs. The plaintiff had alleged negligence in connection with the landlord's failure to maintain working safety lights on a stairway which provided the plaintiff's only access to her second-floor apartment.[206]

Fuqua followed the Tenth Circuit's lead, concluding that *Wood* brought Oklahoma law in alignment with the *Restatement (Second)*'s approach, creating an exception to the open and obvious danger rule based on broad considerations of foreseeability.[207] Under that logic, the court concluded that it was reasonably foreseeable that the plaintiff would choose to use an unlighted stairway, despite the obvious danger of doing so.[208] In the *Fuqua* court's view, just as in *Wood* it was foreseeable that the plaintiff would proceed to encounter the dangerous icy sidewalk to fulfill her employment obligations, so it was foreseeable that Fuqua would proceed to descend the dark stairway, in order to exit her apartment.[209]

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203. *See supra* notes 50-55 and accompanying text.

204. *See Martinez*, 798 F.3d at 977 (citing the RESTATEMENT (Second) OF TORTS, §343A cmt. f, illus. 5 (AM. L. INST. 1965) (describing Restatement's Illustration 5 as representing the "same reasoning the *Wood* court employed to take the otherwise obvious danger of the ice out of the general no-duty category of open and obvious dangers").

205. Fuqua v. Deer Run Apartments, L.P., No. 16–CV–0318–CVE–TLW, 2017 WL 1193061 (N.D. Okla. Mar. 29, 2017).

206. *See id.* at *2-3.

207. *See id.* at *6-8 (explaining that in Wood v. Mercedes-Benz of Oklahoma, 2014 OK 68, 366 P.3d 457, the Oklahoma Supreme Court created an exception to the open and obvious doctrine based on foreseeability).

208. *See id.* at *10. Indeed, the court explained that an "argument that it is not reasonably foreseeable that a tenant will use [a] stairway that is the only means of exiting her apartment building after dark is ludicrous."

209. *See id.*

Finally, in *Shank v. Whiting-Turner Contracting Co.*,[210] a different judge of the United States District Court for the Northern District of Oklahoma appeared to follow *Martinez* in denying summary judgment for a contracting firm in a worksite trip-and-fall by a subcontractor's employee.[211] In support of its open and obvious danger argument, the defendant claimed that *Wood* was inapplicable to the case, because the plaintiff was not required to walk across the area of the floor where hazards were present.[212] Rejecting this argument, *Shank* held that fact questions remained about whether the defendant should have foreseen the risks to the plaintiff despite the obviousness of the danger.[213] This, along with the Court's earlier observation that *Wood* created an exception to the open and obvious danger doctrine where a plaintiff's injury would be "reasonably foreseeable" to the landowner,[214] shows that *Shank's* interpretation of *Wood* echoed the Tenth Circuit's view in *Martinez*. It should be acknowledged, however, that the disposition in *Shank* could possibly be justified on the narrower ground that the plaintiff was required to encounter the risk in order to fulfill job obligations.

In short, *Martinez*, *Fuqua*, and *Shank* each interpret *Wood* as adopting the *Restatement (Second)*'s approach to open and obvious dangers, creating exceptions to the traditional no-duty rule when it is foreseeable to the landowner that unreasonable risks of harm to visitors remain, despite the obviousness of the dangerous conditions. Other courts, however, have interpreted *Wood's* reach more narrowly.

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210. Shank v. Whiting-Turner Contracting Co., No. 17-CV-446-JED-FHM, 2018 WL 6422466 (N.D. Okla. Dec. 6, 2018).

211. *See id.* at *1-3. While attempting to retrieve work supplies, Plaintiff tripped over the upturned corners of some Masonite panels that had been placed across a newly-finished floor in order to protect it. Because Plaintiff was aware of the presence of the panels and their potential hazards, Defendant argued that because the risks were obvious, it owed no duty to exercise reasonable care to keep the premises safe. *See id.*

212. *See id.* at *7-8 (noting the defendant's argument that Plaintiff was "not required to walk in the areas where he had seen the Masonite panel[] lifted off the floor" and that Plaintiff had a "full ability to navigate around any hazard").

213. *See id.* at *8-9 (observing that "it will be up to the jury to determine whether Defendant should have anticipated Plaintiff's injury in spite of the open and obvious condition o[n] the Masonite panels").

214. *Id.* at *9.

2. The Narrow View – Work-Related Obligation to Encounter the Risk

Among the earliest cases adopting a narrow interpretation of *Wood* is *Weaver v. Celebration Station Properties, Inc*.[215] In *Weaver*, a United States District Court Judge, applying Oklahoma law, granted summary judgment for an amusement park in a personal injury case brought by a park patron involved in a go-kart accident. The defendant successfully argued that the risks associated with the operation of a go-kart were open and obvious, so it owed no duty to take steps to prevent such injuries.[216] *Weaver* rejected the plaintiff's argument that *Wood* created an applicable exception to the no-duty rule, stating:

> Here, unlike in *Wood*, Weaver was under no obligation to expose herself to the inherent risks of go-kart driving. Like the baseball spectator in *Tucker*, Weaver was aware of the obvious risks of contact or collision while riding a go-kart on a track with other go-karts traveling at approximately 18 to 20 miles per hour.[217]

The *Weaver* court thus appeared to limit the reach of *Wood* to those cases in which a land entrant is required by her employment to encounter the risk.[218] Several subsequent cases from the United States District Court for the Western District of Oklahoma adopted a similar reading of *Wood*.

Husman v. Sundance Energy, Inc.[219] involved a plaintiff who tripped and fell over a hose left across her rural driveway, while retrieving mail from her mailbox. The hose was used by the defendant to supply water to a fracking operation.[220] The *Husman* court granted the defendant's motion

215. Weaver v. Celebration Station Props. Inc., No. H-14-2233, 2015 WL 1932030 (S.D. Tex. Apr. 28, 2015).

216. *See id.* at *4-5.

217. *Id.* at *5. The *Tucker* case mentioned in *Weaver* is *Tucker v. ADG, Inc.,* 2004 OK 71, 102 P.3d 660. In *Tucker*, the Oklahoma Supreme Court reaffirmed long-standing precedent, holding that a spectator injured by a foul ball at a baseball game could not recover against the baseball club, because the risks posed by such balls are "open and obvious to a spectator at a baseball game as a matter of law, for which defendants have no duty to warn." *See id.*, ¶ 15, 102 P.3d at 666.

218. *See Weaver,* 2015 WL 1932030 at *5 (noting that Wood did not have the option of avoiding the hazard or leaving the premises altogether, because she was required to fulfill her employer's contractual service obligation to the landowner).

219. Husmann v. Sundance Energy, Inc., No. CIV-14-1436-R, 2015 WL 9094936 (W.D. Okla. Dec. 16, 2015).

220. *See id.* at *1.

for summary judgment on plaintiff's negligence claim, explaining that the hose was a readily observable obstruction, the presence of which the plaintiff had actually been aware.[221] The court rejected the argument that *Wood* and *Martinez* created an exception to the open and obvious doctrine that should preclude summary judgment in the case. In the court's view, those cases were limited to situations in which "the injured party was required to be on the premises for purposes of employment."[222]

Two other cases explicitly adopted similarly narrow interpretations of *Wood* in the context of evaluating summary judgment motions that had been based on open and obvious danger arguments. In *Hoagland v. Oklahoma Gas & Electric Co.*,[223] the plaintiff, a flatbed truck driver, was injured at the defendant's power plant while trying to secure a cargo load with a tarp. The plaintiff alleged that OG&E had been negligent in requiring him to tarp his load outside the plant's gate, rather than permitting him to use the facility's relatively safer tarping station, causing him to be injured when he fell off his trailer.[224] The defendant moved for summary judgment, on the ground that the danger to the plaintiff was open and obvious.

Addressing the implications of *Wood* and *Martinez*, the *Hoagland* court acknowledged that, in comparison to the traditional no-duty rule, those cases "appear to have broadened the landowner's duty somewhat."[225] However, *Hoagland* concluded that this broader duty was limited to situations in which visitors are required to encounter the hazardous condition in order to fulfill their employment obligations.[226] Nevertheless, because the facts of *Hoagland* fit this narrow "employment obligations" exception, summary judgment was found to be inappropriate.[227]

Similarly, in *Bower v. Donley-Kirlin Joint Venture*,[228] the court denied summary judgment to a construction contractor sued by a pedestrian who

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221. *See id.* at *4-5.
222. *Id.* at *4.
223. Hoagland v. Okla. Gas & Elec. Co., No. CIV-15-0751-HE, 2016 WL 3523755 (W.D. Okla. June 6, 2016).
224. *See id.* at *2.
225. *Id.*
226. *See id.* (noting that the reach of the *Wood* rule appears merely to "extend to situations where a business invitee is on the premises to fulfill a contractual duty for his employer and where the nature of the work requires the plaintiff to be exposed to the hazardous condition").
227. *See id.*
228. Bower v. Donley-Kirlin Joint Venture, No. CIV-16-308-M, 2017 WL 95406 (W.D.

tripped over some orange construction netting protruding into a walkway outside her place of employment. As in *Hoagland*, the *Bower* court interpreted *Wood* narrowly, rejecting the argument that the defendant owed a duty of care with respect to the obvious danger posed by the construction netting.[229] However, the court denied summary judgment, on the ground that genuine issues of material fact existed as to whether the netting was, in fact, an open and obvious danger.[230]

Finally, the Oklahoma Court of Civil Appeals adopted an even more restrictive view of the scope of *Wood* in its 2020 decision in *Norton v. Spring Operating Co*.[231] In *Norton*, the plaintiff was a truck driver who, in connection with his job for a purchaser of crude oil, was picking up a load of crude oil from the defendant, a supplier. As part of his job, the plaintiff had to go up and down a set of stairs to test and measure the crude oil in the defendant's tank before loading it, and hauling it away.[232] Norton fell and injured himself descending the stairs, which he alleged to be defective. The *Norton* court affirmed a verdict for the defendant, ruling that the defendant did not owe a duty of ordinary care, in light of the open and obvious nature of the potential hazards posed by injury-producing stairs.[233]

Norton discussed *Wood*, as well as the federal cases interpreting it, at some length. It concluded that *Wood* should be viewed as a limited exception to the open and obvious danger doctrine, highlighting language in *Wood* which emphasized that in a typical open and obvious danger situation, the plaintiff can protect herself by avoiding the hazard or leaving the premises.[234] *Norton* viewed *Wood* as distinguishable, because evidence presented at trial suggested that Norton's employer permitted its employees to refuse to work in premises they considered to be unsafe.[235]

Okla. Jan. 10, 2017).

229. *See id.* at *2 n.5 (explaining that "the facts of this case do not fit within the narrow exception created in *Wood* as plaintiff was on a smoke break from work and, thus, it would not be likely that she would 'proceed through the dangerous condition in furtherance of [her] employment'").

230. *See id.* at 3 (stating that "reasonable people could differ as to whether under similar or like circumstances an ordinary prudent person would have been able to see the hazard posed by the construction netting in time to avoid being injured").

231. Norton v. Spring Operating Co., 2020 OK CIV APP 18, 466 P.3d 598.

232. *See id.* ¶ 2, 466 P.3d at 601.

233. *See id.* ¶ 11, 466 P.3d at 602 (concluding that "no duty to remediate was owed under the facts of this case").

234. *See id.* ¶ 15, 466 P.3d at 603.

235. *See id.* ¶ 17, 466 P.3d at 604 (emphasizing that Norton was not required by his employer to "work []in premises [he] considered to be unsafe" and that Norton therefore "could have avoided the known danger presented by the allegedly dangerous staircase").

In response, Norton argued that the factual differences with *Wood* were irrelevant, in light of *Wood*'s foreseeability language, and in light of the fact that Norton's encounter with the allegedly defective steps was done in furtherance of his employment.[236] The *Norton* court then analyzed several of the federal cases interpreting *Wood*, including the Tenth Circuit's decision in *Martinez*. It explicitly rejected *Martinez*'s view that *Wood* adopted the *Restatement (Second)*'s approach to the open and obvious danger doctrine, noting that *Wood* "conspicuously failed to cite to the Restatement or to any authority that adopted the Restatement section in support of the rule it recognized."[237] It also pointed to the Oklahoma Supreme Court's language in *Wood* which "explicitly limited the rule in *Wood* to the 'particular' facts before it that involved an employee required to be on defendant's premises to fulfill her job responsibilities."[238] It then pointed out that the fact pattern in *Martinez* itself also involved a plaintiff required to encounter the danger to fulfill his job responsibilities,[239] and cited several of the federal cases which had adopted narrow views of the reach of *Wood* and *Martinez*.[240]

The *Norton* court concluded its review of the state of the law after *Wood* with the following observation:

> We agree with those federal courts that have restricted the reach of the foreseeability rule recognized in *Wood* to factual circumstances like those in *Wood*. Based on the Oklahoma Supreme Court's analysis in *Wood*, an owner or occupier of land owes a duty to invitees to take remedial measures to correct open and obvious dangers or dangers known by the invitee where the invitee was not a customer of the owner of the premises, but was present to fulfill his or her employer's contractual duty to provide service for the owner of the premises such that the invitee's presence and exposure to the dangerous condition was required to further a purpose of the owner of the premises.[241]

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236. *See id.* ¶ 18, 466 P.3d at 604.
237. *Id.* ¶ 22, 466 P.3d at 605 n.7.
238. *Id.*
239. *See id.* ¶ 24, 466 P.3d at 606.
240. *See id.* ¶ 24, 466 P.3d at 606 n.8.
241. *Id.* ¶ 25, 466 P.3d at 606.

Applying this rule, the court characterized Norton as a customer, stated that he was, unlike the plaintiff in *Wood*, not required by his employer to encounter the danger, and concluded that the trial court committed no error in instructing the jury on the open and obvious danger doctrine.[242]

IV. NOW WHAT? POSSIBLE PATHS FORWARD FOR THE OPEN AND OBVIOUS DANGER DOCTRINE

It is apparent that the Court's opinion in *Wood* has created some confusion about the scope of the open and obvious danger doctrine, and that further guidance from the Court would be helpful. Examining *Wood* in light of the current state of that doctrine outside Oklahoma, it seems that the Court must choose among three plausible paths: (1) interpret *Wood* narrowly acknowledging a limited exception to the traditional open and obvious danger no-duty rule for cases in which the visitor is compelled by employment obligations to encounter the risk; (2) adopt a broader foreseeability-related exception to the traditional no-duty rule, along the lines of section 343A of the *Restatement (Second)*; or (3) adopt a view more like that of the Kentucky Supreme Court in *Shelton*, and treat the obviousness of the risk as a breach issue, rather than a duty issue. Each of these approaches is defensible, in light of relevant Oklahoma case law and relevant policy considerations.

A. Taking the Narrow Path: The Limited Interpretation of Wood

One option for the Court is to essentially limit *Wood* to its facts, treating it as carving out a very limited exception to the traditional no-duty rule, applying exclusively to visitors required to encounter the danger in order to fulfill their job obligations. This is the view of *Wood* adopted by the Court of Civil Appeals in *Norton*, and in most of the post-*Wood* cases coming out of the U.S. District Court for the Western District of Oklahoma.[243] There are a couple of key advantages to this approach. First, it is consistent with the Oklahoma courts' consistent rhetorical adherence to the traditional no-duty rule. Even though Oklahoma courts have often rejected the applicability of the no-duty rule in particular cases, they have consistently recognized the ongoing viability of the rule.[244] In addition, the

242. *See id.* ¶¶ 26-31, 466 P.3d at 606-07.

243. *See supra* notes 215-42 and accompanying text (discussing *Weaver*, *Husman*, *Hoagland*, *Bower*, and *Norton*).

244. *See supra* notes 128-40 and accompanying text.

narrow interpretation gives credence to the language in *Wood*, which emphasized that the Court did not intend a radical reconfiguration of the traditional doctrine.[245]

On the other hand, this view is difficult to square with the broader foreseeability language in *Wood*.[246] What is the point of *Wood*'s discussion of the role of foreseeability in determining the existence of a duty of care if the only determining feature of that case is the plaintiff's employment obligation? And given the Court's description of the open and obvious danger doctrine as "not absolute," isn't it possible that a distraction exception scenario could similarly be characterized as an appropriate exception? The Court's emphasis on the fact that the dealership had notice of the conditions and the employees' presence seems consistent with the way a court applying the *Restatement (Second)* would approach a similar fact pattern.[247]

B. The Intermediate View: The Restatement (Second) *Approach*

As the Tenth Circuit concluded in *Martinez*, it is also possible to interpret *Wood* as an implicit adoption of the approach of section 343A of the *Restatement (Second)*. In this view, the traditional no-duty rule is retained, but exceptions to that rule are recognized for various classes of cases in which some foreseeable residual risk to the visitor remains. *Wood*'s facts are analogous to those in illustration 5, which recognizes a duty for landowners to exercise reasonable care where it is foreseeable that the visitor could have an overriding interest that would necessitate encountering the danger.[248] It hardly seems a stretch to conclude that the Court would recognize exceptions to the traditional no-duty rule analogously foreseeable residual risk settings contemplated in the *Restatement (Second)*.

One virtue of this approach is that it gives meaning to *Wood*'s otherwise mysterious foreseeability language. It also allows the courts to situate *Wood* within a broader doctrinal framework, allowing courts and

245. *See supra* note 187 and accompanying text (discussing *Wood*'s "peculiar facts of this case" language).

246. *See supra* notes 180-181, 188 and accompanying text (describing *Wood*'s analysis of the centrality of foreseeability in evaluating duty).

247. *See Wood* v. Mercedes-Benz of Oklahoma, 2014 OK 68, ¶ 9, 336 P.3d 457, 460 (noting that "it was foreseeable that Ned's Catering employees would encounter the icy hazards").

248. *See supra* notes 50-55 and accompanying text (discussing the Second Restatement's effectively unavoidable danger exception).

litigants in future cases to rely on the *Restatement (Second)*'s section 343A and cases from other jurisdictions applying those provisions make sensible predictions about treatment of different fact patterns. This would help systematize and structure the otherwise ad hoc exception to the no-duty rule that *Wood* created. Explicit adoption of the *Restatement (Second)* approach would also bring Oklahoma law in alignment with the widely prevailing modern approach to open and obvious dangers.[249] Very few jurisdictions continue to cling to the increasingly outdated, rigid common law no-duty rule.[250]

Admittedly, *Wood* did not actually cite the *Restatement (Second)*, nor has the Court done so in its prior open and obvious danger cases. On the other hand, the Court has often reached case results similar to those that would have accompanied adoption of section 343A. *Spirgis*, *Roper* and *Zagal* each look like classic distraction exception cases.[251] The Court analyzed them in terms of the threshold applicability of the obvious danger no-duty rule, looking at whether or not the risks were obvious as a matter of law. Adoption of the framework of section 343A might appear, rhetorically, to represent a significant change in the law, but it is not inconsistent with the outcomes of many of the pre-*Wood* cases

C. The Aggressive View: Abandonment of the Traditional Rule

Finally, the Court could embrace an even more radical change, and reject completely the no-duty rule interpretation of the open and obvious danger doctrine, in the manner of *Foster*, *Shelton*, and other relatively recent cases, treating a danger's obviousness exclusively as a component of analysis of breach and comparative negligence apportionment. This would represent the most significant deviation from prior cases (or, at least, the rhetoric of prior cases), so there may be some reluctance to adopt this view. However, it has become an increasingly popular approach in recent years for some good reasons.

First, a no-duty rule, even when subject to exceptions like those in section 343A, somewhat in tension with the principles of comparative negligence.[252] As many courts have concluded, where the danger is

249. *See supra* notes 74-76 and accompanying text (noting the widespread rejection of the traditional, comprehensive no-duty rule).

250. *See supra* note 76 and accompanying text.

251. *See supra* notes 146-160 and accompanying text.

252. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51, cmt. k (AM. L. INST. 2018) (observing that the "rule that land possessors owe no duty with regard to open and obvious dangers sits more comfortably – if not entirely

obvious, both the landowner and the visitor may bear some responsibility for the injury. In an era of comparative negligence jurisprudence, it may be more proper to apportion liability than to bar the plaintiff from recovery.[253]

Second, rejection of the no-duty rule locates the judgment of foreseeability of the risk in the most logical place, breach of duty, and with the appropriate institutional actor, the fact-finder. The Court's pre-*Wood* approach begins with a determination as to whether the danger is, as a matter of law, obvious. If so, no duty is owed. If fact questions remain about the danger's obviousness, the case proceeds to the jury to determine breach (and, if necessary, apportion liability). But deciding whether the danger is obvious or not can seem rather arbitrary. Is it really clear, for example, that the danger posed by the low-hanging parking garage beam in *Scott* was obvious,[254] in a way that the danger posed by the glass bowl protruding into the hotel seating area in *Phelps*[255] was not? In deciding whether to invoke the open and obvious danger no-duty rule, the Court has often recognized that the obviousness of the danger is a fact-contingent, evaluative judgment and denied summary judgment on that basis.[256] Yet, choosing to take on the obviousness/non-obviousness determination the Court has tended to ignore that it should generally be a judgment left to the fact-finder "unless no reasonable person could differ on the matter."[257] As a pair of prominent torts scholars have noted:

> [J]udicial decisions referring to matter-of-law decisions as "duty" decisions necessarily confuse the distinct issue of duty in its obligation sense with the breach issue. And this confusion imposes a cost . . . on lawyers and judges trying to litigate and resolve negligence cases. Moreover, it permits judges unwittingly to slide into the habit of taking negligence cases away from the jury through the

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congruently – with the older rule of contributory negligence as a bar to recovery").

253. *See supra* notes 84-100 and accompanying text (addressing various cases rejecting the no-duty rule as inconsistent with comparative negligence principles).

254. *See supra* notes 137-140 and accompanying text (discussing *Scott v. Archon* Grp., 2008 OK 45, 191 P.3d 1207).

255. *See supra* note 145 (mentioning *Phelps v. Hotel Mgmt*., 1990 OK 138, 925 P.2d 891).

256. *See supra* notes 145-162 and accompanying text.

257. Shelton v. Kentucky Easter Seals Soc'y, 413 S.W.3d 901, 913 (Ky. 2013).

> simple expedient of re-framing breach questions for the jury as duty questions for the court.[258]

Treating the foreseeability of residual risks to land entrants posed by obvious dangers as questions of breach—not duty—seems to be increasingly popular.[259] It is not, however, without controversy. Such an approach would tend, at the margin, to send to the jury more cases in which the defendant claims that the injury-causing danger was obvious, potentially increasing landowners' exposure to liability.[260] Nevertheless, the Court could consider this approach as it determines how to approach the legacy of *Wood* in the future.

CONCLUSION

The Oklahoma Supreme Court recognized in *Wood* that its long-standing open and obvious danger rule is not absolute. This recognition has created questions about when that rule should be invoked, and how courts interpreting Oklahoma law should approach its applicability. The Court should, at its earliest opportunity, attempt to clarify whether—and to what extent—*Wood* has changed the law. There are a variety of ways in which modern courts analyze negligence cases involving open and obvious dangers. Considering these different approaches may help the Court clarify its thinking about the best way to address these issues going forward.

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258. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 716-17 (2001).

259. *See supra* notes 85-103, 121-127 and accompanying text.

260. *See* Reynolds, *supra* note 104, at 162-64 (criticizing the Kentucky Supreme Court's modern jurisprudence on this ground).