
MARTINEZ V. ANGEL EXPLORATION, LLC: AN
EXAMINATION OF OKLAHOMA’S EVOLVING OPEN
AND OBVIOUS DOCTRINE

Martin J. Lopez III*

I. INTRODUCTION

Negligence, typically one of the first legal concepts that newly minted law students explore, requires a duty, a breach of that duty, and causation.¹ In a premises liability case, “the duty of care which an owner or occupier of land has towards one who comes upon his or her land . . . varies with the status occupied by the entrant,” which could be that of a “trespasser, licensee or invitee.”²

Generally, a landowner’s duty to an invitee is to “exercis[e] reasonable care to keep the premises in a reasonably safe condition for the reception of the visitor.”³ A common exception to the landowner’s duty to exercise reasonable care arises when a danger is “known or obvious” to the invitee on the property.⁴ The primary rationale behind this exception is based in common sense: “[O]bvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves.”⁵ Simply put, a conclusion that “under similar or like circumstances an ordinary prudent person would have been able to see the defect in time to avoid being injured” virtually

* Martin (Tripp) Lopez is a 2018 J.D. Candidate at the Oklahoma City University School of Law and currently serves as the Student Bar Association President. He would like to thank his wonderful wife, Whitney, for her unwavering love and support. He would also like to thank his parents, Marty and Kathy, and his siblings, Darian and Ty. Without his family, he would not be where he is today.

1. See *Scott v. Archon Grp., L.P.*, 2008 OK 45, ¶ 17, 191 P.3d 1207, 1211.
2. *Id.* ¶ 18, 191 P.3d at 1211.
3. See *id.* ¶ 19, 191 P.3d at 1211–12 (quoting *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶ 10, 951 P.2d 1079, 1083–84).
4. RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. LAW INST. 1965).
5. *Id.* § 51 cmt. k.

absolves the landowner from liability.⁶ For over a century, Oklahoma adhered to the general rule that an open and obvious danger precludes liability of the landowner.⁷ However, the recent Oklahoma Supreme Court case *Wood v. Mercedes-Benz of Oklahoma City*⁸ carved a substantial exception into the core of the previously untouchable open and obvious doctrine.⁹

This Comment begins with the general history and development of the open and obvious doctrine, providing insight into the policies and theories underlying the doctrine. Next, the Comment inspects Oklahoma's specific interpretation of the open and obvious doctrine in a pre-*Wood* legal environment. The Comment then analyzes *Wood* and the fundamental shift in premises liability law that it represents. The Comment proceeds to discuss the facts, procedural history, relevant testimony, and judicial analysis of *Martinez v. Angel Exploration, LLC*,¹⁰ a case that hangs in the balance: its outcome dependent on the reach of *Wood's* exception to the doctrine. Finally, the Comment will discuss how the Tenth Circuit properly employed procedural mechanisms to ensure that *Martinez* was decided consistently with Oklahoma's newly established exception to the open and obvious doctrine.

II. THE HISTORY AND DEVELOPMENT OF OKLAHOMA'S OPEN AND OBVIOUS DOCTRINE

A. *The Open and Obvious Doctrine, Generally*

1. Background

Throughout the development of our legal system, landowners have been afforded substantial protections.¹¹ However, the courts eventually had to address the conflict between landowners' protections and the

6. See *Scott*, 2008 OK 45, ¶ 19, 191 P.3d at 1212 (quoting *Pickens*, 1997 OK 152, ¶ 10, 957 P.2d at 1084).

7. See *Chicago, R. I. & P. Ry. Co. v. McIntire*, 29 Okla. 797, 119 P. 1008 (1911).

8. 2014 OK 68, 336 P.3d 457.

9. *Id.* ¶¶ 8–10, 336 P.3d at 460.

10. 798 F.3d 968 (10th Cir. 2015).

11. Ann K. Dittmeier, Note, *Premises Liability: The Disappearance of the Open and Obvious Doctrine*, 64 MO. L. REV. 1021, 1023 (1999) (citing 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.1, at 131–32 (2d ed. 1986)).

increasingly prevalent negligence law.¹² Regarding negligence law, landowners have the highest duty of care to their invitees.¹³ According to the *Second Restatement of Torts*, there are two classifications of invitees;¹⁴ however, for our purposes, we need only analyze the second: “A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.”¹⁵ One rationale underlying this duty is that a landowner might benefit economically from the invitee’s presence on her land, so she must keep her premises in a safe condition.¹⁶

2. The Fundamentals of the Open and Obvious Doctrine

The open and obvious doctrine finds no obligation for a landowner to take affirmative precautions to protect an invitee from dangers which “are so apparent and readily observable that one would reasonably expect them to be discovered.”¹⁷ The essential theory behind the doctrine is that the dangerous condition is a warning in itself, to the extent that the invitee should take precautions to protect himself.¹⁸

B. The Open and Obvious Doctrine in Oklahoma, Pre-Wood v. Mercedes-Benz of Oklahoma City

The open and obvious doctrine recently celebrated its centennial anniversary in Oklahoma. Beginning in 1911, the Oklahoma Supreme Court recognized the general doctrine.¹⁹ In its reasoning, the Court considered the established law of Minnesota, Virginia, Iowa, and California; “the general rule being that an employee who contracts for the performance of hazardous duties assumes such risks as are incident to

12. *Id.* (citing 5 HARPER ET AL., *supra* note 11, § 27.1, at 129).

13. Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612 (1954).

14. RESTATEMENT (SECOND) OF TORTS § 332(1)–(3) (AM. LAW INST. 1965).

15. *Id.* § 332(3).

16. Dittmeier, *supra* note 11, at 1023 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 61, at 420 (5th ed. 1984)).

17. *Scott v. Archon Grp., L.P.*, 2008 OK 45, ¶ 19, 191 P.3d 1207, 1212 (quoting *Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶ 10, 951 P.2d 1079, 1084).

18. *Id.* (citing *Pickens*, 1997 OK 152, ¶ 10, 951 P.2d 1079, 1084).

19. *See Chicago, R. I. & P. Ry. Co. v. McIntire*, 29 Okla. 797, 807, 119 P. 1008, 1012–13 (1911).

their discharge from causes open and obvious, the dangerous character of which causes he had an opportunity to ascertain.”²⁰

The Oklahoma Supreme Court bolstered its interpretation of the open and obvious doctrine with concrete examples from Oklahoma cases detailing what it thought the doctrine meant.²¹ In *Nicholson v. Tacker*,²² the Court interpreted an open and obvious danger as “akin to the defendant nailing a ‘Danger’ sign on the premises.”²³ Further, the Oklahoma Court of Civil Appeals has rejected the argument that the open and obvious doctrine conflicts with its legally similar counterpart, comparative negligence.²⁴ In *Southerland v. Wal-Mart Stores, Inc.*,²⁵ the appellant “attempt[ed] to impeach the continued validity of the open and obvious doctrine,” contending that the doctrine “conflict[s] with the concept of comparative negligence.”²⁶ The Court distinguished the two principles:

The threshold question in any negligence case is whether the defendant had a duty to the plaintiff alleged to be harmed. The open and obvious doctrine relieves the landowner of a duty to the plaintiff, thereby absolving the defendant of primary negligence. . . . [W]here there is no duty, there can be no negligence. . . . [C]omparative negligence is not properly invoked here, because under the finding of the trial court there was no negligence on the part of the defendant.²⁷

Overall, Oklahoma courts largely left the open and obvious doctrine

20. *Id.* (quoting W.F. BAILEY, THE LAW OF MASTER’S LIABILITY FOR INJURIES TO SERVANT 171 (St. Paul, Minn., West Publishing Co. 1894) (citing *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 33 N.W. 908 (1887); *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S.E. 123, 126 (1887); *Mayes v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa 562, 14 N.W. 340 (1882); *McGlynn v. Brodie*, 31 Cal. 378 (1866)).

21. *See Nicholson v. Tacker*, 1973 OK 75, ¶¶ 12–18, 512 P.2d 156, 158–59.

22. 1973 OK 75, 512 P.2d 156.

23. *Id.* ¶ 18, 512 P.2d at 159.

24. *Southerland v. Wal-Mart Stores, Inc.*, 1993 OK CIV APP 12, ¶ 6, 848 P.2d 68, 70.

25. 1993 OK CIV APP 12, 848 P.2d 68.

26. *Id.* ¶ 6, 848 P.2d at 69–70.

27. *Id.* ¶ 6, 848 P.2d at 70 (citations omitted) (citing *Rose v. Sapulpa Rural Water Co.*, 1981 OK 85, ¶ 17, 631 P.2d 752, 756).

unchanged for over a century.²⁸ The courts' rationale reflected that of the *First Restatement of Torts*: “[N]o landowner liability for an injury caused by a dangerous condition if the entrant knew of the condition and realized the risk posed by the condition—no exceptions.”²⁹

C. *Wood v. Mercedes-Benz of Oklahoma City: Changing the Game*

In Oklahoma, the rule in its original form survived for 103 years; however in 2014, the Oklahoma Supreme Court proclaimed “the open and obvious doctrine is not absolute.”³⁰ In *Wood*, the Court concluded that despite an open and obvious danger, a landowner nonetheless owes a duty to warn or otherwise protect an invitee from dangers that are reasonably foreseeable.³¹ Historically, there have been two types of landowner foreseeability that can impose a duty on the landowner for the benefit of an invitee: actual notice and constructive notice.³²

In *McKinney v. Harrington*,³³ the Oklahoma Supreme Court explained that “[t]he courts will not impose upon a landowner the duty to warn a business invitee of a hidden danger when there is no evidence that the landowner knew or should have known of the danger.”³⁴

In *Wood*, the plaintiff slipped on a layer of ice outside of the car dealership where she was to work as a caterer for an event.³⁵ Despite freezing temperatures the night before the incident, the car dealership's sprinkler system activated, creating the sheet of ice on which the plaintiff slipped.³⁶ The plaintiff claimed to have seen the ice and appreciated the danger of traversing the ice.³⁷ After her fall, an employee of the car dealership acknowledged, “[Y]eah, I should have [put salt down] when I got here.”³⁸

The Oklahoma Supreme Court found that although the ice was, by

28. See *Tucker v. ADG, Inc.*, 2004 OK 71, ¶¶ 18–21, 102 P.3d 660, 668–69.

29. *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 976 (10th Cir. 2015) (citing RESTATEMENT (FIRST) OF TORTS § 340 (AM. LAW INST. 1934)).

30. *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 7, 336 P.3d 457, 459.

31. See *id.* ¶ 6, 336 P.3d at 459.

32. See *Rogers v. Hennessee*, 1979 OK 138, ¶ 9, 602 P.2d 1033, 1035.

33. 1993 OK 88, 855 P.2d 602.

34. *Id.* ¶ 11, 855 P.2d at 605.

35. *Wood*, 2014 OK 68, ¶¶ 1–2, 336 P.3d at 458.

36. *Id.* ¶ 1, 336 P.3d at 458.

37. *Id.* ¶ 2, 336 P.3d at 458.

38. *Id.* (second alteration in original) (quoting *Wood* Dep. 21:21–25).

the plaintiff's own admission, an open and obvious danger, the car dealership owed "a duty [to the plaintiff] to take precautionary measures."³⁹ The Court reasoned,

In the typical case, the invitee can protect herself by leaving the premises when an open and obvious hazard is encountered or by avoiding the premises altogether. In this case, neither of these choices was available to [the plaintiff]. She 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. [Plaintiff's] presence and exposure to the hazardous icy condition was compelled to further a purpose of the dealership.⁴⁰

The Court concluded that because the dealership had actual notice of the dangerous condition, "it was foreseeable that [the plaintiff] would encounter . . . and would likely proceed through the dangerous condition in furtherance of [her] employment."⁴¹ Because of this foreseeability, the Oklahoma Supreme Court imposed a duty upon the dealership to take precautionary measures to protect the plaintiff.⁴²

This highly controversial abrogation of the established open and obvious doctrine split the Oklahoma Supreme Court five to four.⁴³ In his dissent, Justice Taylor argued, "The [majority's] decision shows a lack of judicial restraint as well as disrespect for this Court's long-standing jurisprudence and the rule of law."⁴⁴ To support this rationale, Justice Taylor cited another Oklahoma Supreme Court case *Lohrenz v. Lane*,⁴⁵ in which the Court stated, "As judges, we are accountable for interpreting the law according to precedent and sound public policy. We are not afforded the luxury of indulging in sympathetic tendencies at another's expense."⁴⁶ In his deconstruction of the majority's opinion, Justice Taylor explained that the scope of the doctrine is relatively

39. *Id.* ¶¶ 9–10, 336 P.3d at 460.

40. *Id.* ¶ 5 n.6, 336 P.3d at 459 n.6.

41. *Id.* ¶ 9, 336 P.3d at 460.

42. *Id.* ¶ 10, 336 P.3d at 460.

43. *Id.* ¶¶ 11–12, 336 P.3d at 461.

44. *Id.* ¶ 4, 336 P.3d at 461 (Taylor, J., dissenting).

45. 1990 OK 18, 787 P.2d 1274.

46. *Wood*, 2014 OK 68, ¶ 11, 336 P.3d at 463 (Taylor, J., dissenting) (quoting *Lohrenz*, 1990 OK 18, ¶ 9, 787 P.2d at 1277).

unlimited given that the Oklahoma Supreme Court has consistently rejected attempts to narrow the doctrine and craft exceptions.⁴⁷ He concluded his departure from the majority by stating, “The Court has failed to articulate any valid reason for shifting the balance to favor an invitee. . . . [W]e should follow our precedents in the absence of sound public policy for abandoning the current rule of law.”⁴⁸

III. *MARTINEZ V. ANGEL EXPLORATION, LLC*

A. *Facts of the Incident*

The plaintiff, Jesus Martinez, was hired by Smith Contract Pumping in October 2010 as a “pumper.”⁴⁹ As a pumper, Martinez maintained oil wells, checked pump jack engine functionality, monitored oil output from the wells, “and when necessary, tighten[ed] loose belts on the pump jack.”⁵⁰ Smith Contract Pumping provided services to Angel Exploration, LLC.⁵¹ Pumpers like Martinez drove designated routes on which they would service various pump jack operations.⁵²

Martinez had been employed by Smith Contract Pumping for three months when he arrived at Angel’s pump site “Woodbury 2-2” on January 24, 2011.⁵³ Martinez had frequently worked on the Woodbury 2-2 pump; in fact, Martinez had worked on that specific pump “between ten and twenty times.”⁵⁴ During his work at the Woodbury 2-2 location, Martinez noticed a discrepancy between the Woodbury 2-2 site and other such pump jacks—specifically, the lack of a safety guard on the Woodbury 2-2 pump jack.⁵⁵ Although Martinez provided routine maintenance on Angel Exploration’s pump jacks, “[i]t was not [his] responsibility to replace any parts on the well;” rather, “Smith Pumping would call Natural Gas Specialists to do the mechanical

47. *Id.* ¶¶ 5–9, 336 P.3d at 462–63.

48. *Id.* ¶ 11, 336 P.3d at 463.

49. Appellant’s Opening Brief at 6, *Martinez v. Angel Expl. LLC*, 798 F.3d 968 (10th Cir. 2015) (No. 14-6086), 2014 WL 3386907.

50. *Martinez*, 798 F.3d at 972.

51. *Id.* at 980 & n.8.

52. *Id.* at 972.

53. *Id.*; Appellant’s Opening Brief, *supra* note 49, at 3.

54. *Martinez*, 798 F.3d at 972.

55. *Id.*

work.”⁵⁶

Upon arrival to Woodbury 2-2 that day, Martinez found that the engine was not running.⁵⁷ Martinez restarted the pump’s engine but noticed the belts were slipping.⁵⁸ Martinez returned to his truck to retrieve his crescent wrench, with which he tightened the belts.⁵⁹ After ensuring that the belts were no longer slipping, Martinez dropped the wrench and instinctively grabbed at it.⁶⁰ During this motion, his jacket became entangled in a nip point in a pulley system, instantly dismembering his right thumb.⁶¹

B. Procedural History and Relevant Testimony

Martinez brought suit against Angel Exploration, LLC in the United States District Court for the Northern District of Texas, Amarillo Division,⁶²

alleging that [Angel Exploration’s] lack of guarding [on the pump jack] was an unreasonably dangerous condition and that Angel was negligent in its failure to make a reasonable inspection of its property, to warn or take other precautions to protect Martinez, and to take action to reduce the risk posed by the dangerous condition.⁶³

Along with Martinez’s claims, “his wife brought derivative claims for loss of consortium and household services.”⁶⁴

Although Brady Smith of Smith Pumping testified that it would have been Mr. Martinez’s responsibility to report that a pumping unit had no guard, Mr. Martinez maintained that as a self-

56. Appellant’s Opening Brief, *supra* note 49, at 6–7. The Tenth Circuit stated that Natural Gas Specialists and Smith Contract Pumping were both assumed to be independent contractors. *Martinez*, 798 F.3d at 980 & n.8.

57. *Martinez*, 798 F.3d at 972.

58. Appellant’s Opening Brief, *supra* note 49, at 8.

59. *See id.*

60. *See id.*

61. *Id.*

62. *See id.* at 4.

63. *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 972 (10th Cir. 2015).

64. *Id.* at 973.

described ‘newbie’ on the job for approximately three months, he did not even know there were supposed to be guards on the pumping units.⁶⁵

Further, according to Martinez’s expert, pumpers such as Martinez are not responsible for providing safety advice or determining when a safety guard is necessary.⁶⁶

After the case was transferred to the United States District Court for the Western District of Oklahoma, Angel Exploration moved for summary judgment on the grounds that, *inter alia*, “the unguarded belt and pulley were open and obvious” dangers.⁶⁷ The district court granted Angel Exploration’s motion for summary judgment on the premises liability claim, finding that the unguarded pulley system was an open and obvious danger and thus imposed no duty on Angel “to warn or otherwise remedy the condition.”⁶⁸ “The court also found that . . . there was no genuine issue of material fact as to whether Angel acted with knowledge that Martinez’s injury was substantially certain to occur.”⁶⁹ However, note that the district court rendered its opinion in a pre-*Wood* legal environment, adhering to and applying the century-old open and obvious doctrine.⁷⁰

On appeal, Martinez argued four grounds on which the Tenth Circuit should reverse summary judgment on the premises liability claim:

(1) Angel’s failure to comply with an OSHA [Oklahoma Safety & Health Administration] regulation requiring safety guards constitutes negligence *per se*; (2) fact issues exist as to whether the unguarded belt was an open and obvious danger because circumstances existed distracting Martinez’s attention; (3) competing inferences as to whether the unguarded belt had a deceptively innocent appearance and whether Martinez fully appreciated the danger posed preclude a finding that the belt was an open and obvious danger as a matter of law; and (4) even if the danger was open and obvious, a duty nonetheless exists

65. Appellant’s Opening Brief, *supra* note 49, at 7.

66. *Id.*

67. *Id.* at 4.

68. *See Martinez*, 798 F.3d at 973.

69. *Id.*

70. *See id.* at 977.

because Angel should have anticipated the harm.⁷¹

The appellate court framed its discussion of *Martinez* by recognizing the Oklahoma Supreme Court's newly established exception to the open and obvious doctrine, as seen in *Wood*.⁷²

C. The Tenth Circuit's Analysis

Judge Tymkovich delivered the opinion for the Tenth Circuit Court of Appeals, with Judges Gorsuch and Bacharach joining.⁷³ The court began its analysis by establishing the framework in which the court based its decision: "We review a district court's grant of summary judgment de novo, and because this is a diversity case, 'we ascertain and apply [Oklahoma] law such that we reach the result that would be reached by [an Oklahoma] court.'" ⁷⁴ The court proceeded to summarily address the four aforementioned issues on appeal, as raised by *Martinez*.⁷⁵ The court quickly disposed of *Martinez*'s first three arguments; however, the court stated, "We cannot dismiss the fourth argument . . . because Oklahoma now recognizes an exception to the open and obvious doctrine where the landowner should have reasonably foreseen the harm."⁷⁶

1. Negligence Per Se

The court first analysed the negligence per se argument in which *Martinez* alleged that Angel Exploration failed to adhere to an Occupational Safety and Health Administration (OSHA) regulation, specifically 29 C.F.R. § 1910.212(a)(1).⁷⁷ In relevant part, the regulation provides that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip

71. *Id.* at 973.

72. *See id.*

73. *See id.* at 971.

74. *Id.* at 973 (alterations in original) (quoting *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993)).

75. *Id.*

76. *Id.*

77. *Id.*

points, [and] rotating parts Examples of guarding methods are—barrier guards”⁷⁸ However, as the court noted, Martinez did not identify 29 C.F.R. § 1910.212(a)(1) or include a negligence per se theory in his case at the district court level.⁷⁹ For this reason, the court noted that it “can hardly fault the district court for failing to discern a negligence *per se* argument.”⁸⁰ Noting that Martinez did not properly raise the negligence per se theory at the district court level, the Tenth Circuit held, “We generally do not consider theories raised for the first time on appeal, and because Martinez makes no argument for how he can satisfy the plain error standard of review, we go no further.”⁸¹

2. The Court’s Treatment of the Open and Obvious Doctrine

The court began its discussion of the open and obvious doctrine with a generalized inspection of Oklahoma negligence law.⁸² The court echoed the Oklahoma Supreme Court’s elemental requirements to establish a prima facie negligence case: “proof of a duty, a breach of that duty, and causation.”⁸³ It then discussed a landowner’s specific duty to an invitee, which is a duty to “exercis[e] reasonable care to keep the premises in a reasonably safe condition for the reception of the visitor.”⁸⁴ The court proceeded to recite Oklahoma’s historic open and obvious doctrine: “[T]he duty to keep the premises in a reasonably safe condition only extends ‘to conditions or defects in the nature of hidden dangers, traps, snares or pitfalls that are not known or readily observed by the invitee.’”⁸⁵ Further, the court noted that in the pre-*Wood* legal landscape, a duty “does not extend to ‘dangers which are so apparent and readily observable that one would reasonably expect them to be discovered.’”⁸⁶

78. 29 C.F.R. § 1910.212(a)(1) (2016).

79. *Martinez*, 798 F.3d at 973.

80. *Id.*

81. *Id.* at 974 (citing *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (“[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.”)).

82. *See id.* at 974–77.

83. *Id.* at 974 (citing *Scott v. Archon Grp., L.P.*, 2008 OK 45, ¶ 17, 191 P.3d 1207, 1211).

84. *Id.* (alteration in original) (quoting *Scott*, 2008 OK 45, ¶ 19, 191 P.3d at 1212).

85. *Id.* (quoting *McKinney v. Harrington*, 1993 OK 88, ¶ 9, 855 P.2d 602, 604).

86. *See id.* (quoting *Scott*, 2008 OK 45, ¶ 19, 191 P.3d at 1212).

The court concluded its introduction to its doctrinal analysis by noting the Oklahoma Supreme Court's holding in *Wood*, finding the open and obvious doctrine not to be "absolute" where a landowner reasonably could have foreseen that an open and obvious danger may injure an invitee.⁸⁷

The court delivered a succinct synopsis of the facts in *Wood* and then an in-depth review of the Oklahoma Supreme Court's rationales for crafting an exception to the doctrine.⁸⁸ The court gave credence to the *Wood* dissenters' assertion that the majority in *Wood* "ignore[d] . . . long-standing laws regarding the open-and-obvious doctrine and the duty in a premises-liability action."⁸⁹ The Tenth Circuit agreed with the *Wood* dissenters in that the outcome in "*Wood* appears to represent a significant shift in Oklahoma premises liability law."⁹⁰ In doing so, the Tenth Circuit recalled Oklahoma cases in which Oklahoma courts rejected modifications to the rigid doctrine.⁹¹

After this recognition of the Oklahoma Supreme Court's decision-making process, the Tenth Circuit delved into an interpretation of the current state of negligence law regarding premises liability.⁹² In doing so, the court acknowledged the increasingly prevalent decision of states to retool their open and obvious doctrines.⁹³ The Tenth Circuit concedes that although the Court in *Wood* failed to cite the *Second Restatement of Torts*, the relevant language in the *Second Restatement* closely mirrors the newly crafted exception in Oklahoma.⁹⁴ The *Second Restatement* 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.*"⁹⁵ Lastly,

87. See *id.* at 975 (citing *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 7, 336 P.3d 457, 459–60).

88. See *id.*

89. *Id.* (alteration in original) (quoting *Wood*, 2014 OK 68, ¶ 1, 336 P.3d at 461 (Taylor, J., dissenting)).

90. *Id.*

91. See *id.* at 975–76 (citing *Scott*, 2008 OK 45, ¶ 28, 191 P.3d at 1213; *Sutherland v. Saint Francis Hosp. Inc.*, 1979 OK 18, ¶ 5, 595 P.2d 780, 781; *Gobble v. Chesapeake Energy Corp.*, 2013 OK CIV APP 89, ¶ 7, 311 P.3d 454, 457).

92. See *id.* at 976.

93. *Id.*

94. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. LAW INST. 1965)).

95. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. LAW INST. 1965)).

the court cited *Prosser and Keeton on the Law of Torts*: “[T]he obvious danger [may not] bar recovery where the invitee is forced, as a practical matter, to encounter a known or obvious risk in order to perform his job.”⁹⁶

The Tenth Circuit concluded its overview of the development and comparison of historic and modern notions of premises liability negligence law by stating,

[A]fter *Wood*, the open and obvious doctrine is no longer a complete bar to liability in Oklahoma. A landowner’s duty to keep the premises in a reasonably safe condition for invitees extends to both latent dangers and at least some obvious dangers with foreseeable harms to a class of visitors required to be on the premises.⁹⁷

Having established the legal structure on which to base its analysis, the Tenth Circuit diverted its attention to the present case.⁹⁸

3. Applying *Wood* to *Martinez*

The Tenth Circuit first noted that the district court correctly analyzed the case under the previous iteration of the open and obvious doctrine once it found the unguarded belt and pulley system to be an open and obvious danger.⁹⁹ The court proceeded to articulate the requirement to apply newly established state law at the time of the appellate decision, even if the district court arrived at a divergent decision with previously correct state law.¹⁰⁰ The court conceded that it does not know the scope of the exception in *Wood* but stated with certainty that the exception:

clearly applies in situations like *Wood* where a business invitee is

(emphasis added) (first citing *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 119 (2d Cir. 2000); and then citing 2 DAN B. DOBBS ET AL., *DOBB’S THE LAW OF TORTS* § 276, at 84 (2d ed. 2014))).

96. *Id.* at 977 (quoting *KEETON ET AL.*, *supra* note 16, § 61, at 427).

97. *Id.*

98. *See id.*

99. *See id.*

100. *Id.* at 977 n.5 (first citing *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941); and then citing *Jones v. Hess*, 681 F.2d 688, 695 n.9 (10th Cir. 1982)).

“present to fulfill [his or] her employer’s contractual duty to provide service;” the invitee’s “presence and exposure to the hazardous . . . condition was compelled to further a purpose of the [defendant];” and the invitee was “required” to encounter “the hazardous condition in furtherance of [his or] her employment.”¹⁰¹

With this frame of reference, the Tenth Circuit quickly drew a parallel between the plaintiffs in *Wood* and *Martinez*, going so far as to state, “Viewing the evidence in the light most favorable to Martinez, we see no way to distinguish the *Wood* plaintiff’s position with respect to the open and obvious icy condition from Martinez’s with respect to the open and obvious unguarded pump jack.”¹⁰²

The court completed its analysis of *Wood* and how it applies to *Martinez* by examining a distinction between the two cases.¹⁰³ Specifically, it deliberated the role that actual notice plays in imposing a duty on the part of the landowner.¹⁰⁴ The court juxtaposed Martinez’s concession that he had “no evidence [of] Angel [Exploration’s]. . . actual notice of the lack of guarding” with the *Wood* Court’s justification of its newly crafted exception to the open and obvious doctrine.¹⁰⁵ The *Wood* Court stated,

The [defendant] had notice of the icy conditions surrounding the entire building and knew that [the employer] was sending its employees to the facility to cater the business’ scheduled event. As such, it was foreseeable that [the employer’s] employees would encounter the icy hazards created by the sprinkler system and would likely proceed through the dangerous condition in furtherance of their employment.¹⁰⁶

Given that the defendant had notice of the conditions, the Tenth

101. *Id.* at 978 (alterations in original) (quoting *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 5 n.6, ¶ 9 n.8, 336 P.3d 457, 459 n.6, 460 n.8).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (emphasis omitted) (quoting *Wood*, 2014 OK 68, ¶ 9, 336 P.3d at 460).

Circuit delved into a general discussion of negligence law.¹⁰⁷ The court discussed the landowner's duty with respect not only to dangerous conditions but also to those conditions that the landowner should discover through the exercise of reasonable care.¹⁰⁸ Specifically, the court cited the Oklahoma Supreme Court case *McKinney v. Harrington*, which stated that "courts will not impose upon a landowner the duty to warn a business invitee of a hidden danger when there is no evidence that the landowner knew or should have known of the danger."¹⁰⁹

The court noted that Angel Exploration's "lack of actual notice might be an insufficient ground on which to distinguish *Wood* and affirm the district court's no-duty holding."¹¹⁰ The court then listed three reasons why the two cases are not distinguishable on the ground that Angel Exploration had no actual notice:

Because (1) Martinez was required to encounter the unguarded belt as part of his job responsibilities, (2) Angel knew [Smith Contract Pumping's] pumpers would be working on the well, and (3) evidence suggests that by the exercise of ordinary care, Angel would have known of the dangerous condition, the exception recognized in *Wood* might still apply.¹¹¹

The court quickly disposed of Martinez's other two arguments: (1) that the belt and pulley system presented a deceptively innocent appearance, thus making the open and obvious doctrine inapplicable to the case, and (2) that Angel Exploration's actions, or lack thereof, amounted to an intentional tort against Martinez.¹¹² Regarding the latter, the court stated, "There must be more than knowledge of foreseeable risk, high probability, or substantial likelihood; there must be knowledge of the substantial certainty of injury."¹¹³ Along those lines, the court found that Angel Exploration did not act with knowledge of a substantial

107. *See id.* at 979.

108. *See id.*

109. *Id.* (alteration in original) (emphasis added) (quoting *McKinney v. Harrington*, 1993 OK 88, ¶ 11, 855 P.2d 602, 605).

110. *Id.* at 980.

111. *Id.*

112. *Id.* at 981–82.

113. *Id.* at 982 (quoting *Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 605 (10th Cir. 2012)).

certainty and therefore held that Martinez could not proceed with his intentional tort theory.¹¹⁴

The Tenth Circuit eventually reached its conclusion regarding the disposition of the open and obvious issue stating, “In the end, we do not resolve this question here. . . . [W]e conclude it better for the parties on remand to brief and argue the scope of *Wood* and how Oklahoma courts might resolve the notice question.”¹¹⁵ Having stated that, the court vacated the grant of summary judgment on the premises liability claim and remanded the case for consideration under Oklahoma’s new exception to the open and obvious doctrine.¹¹⁶

IV. ANALYSIS

In this case, the Tenth Circuit correctly reversed the summary judgment in favor of Angel Exploration regarding the premises liability issue. Although the district court may have arrived at the correct conclusion under pre-*Wood* jurisprudence, the appellate court correctly applied the current state law at the time of its decision.¹¹⁷

A. *Wood: Making Oklahoma’s Premises Liability Law Right for the Martinezes of the World*

In his treatise on tort law, Professor Dan B. Dobbs examines the *Second Restatement’s* treatment of the open and obvious doctrine and its common exceptions.¹¹⁸ He notes that the *Second Restatement* provides that “when the allegedly dangerous condition is open and obvious, the landowner is not liable to invitees for harm from known or obvious dangers *except where the landowner should anticipate harm in spite of the knowledge or obviousness.*”¹¹⁹ Professor Dobbs then inverts the language of exception in such a way that makes clear the intended effect of this departure from the long established doctrine: “[T]he landowner is subject to liability if he can foresee harm in spite of the fact that the

114. *Id.*

115. *Id.* at 980–81.

116. *Id.* at 982.

117. *Id.* at 977.

118. See 2 DOBBS ET AL., *supra* note 95, § 276, at 88.

119. *Id.* at 88 (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. LAW INST. 1965)).

danger was obvious.”¹²⁰ Based on his study of relevant case law, Professor Dobbs asserts that the modern trend of the foreseeability exception “has commanded substantial acceptance where it has been expressly considered.”¹²¹ With that being said, he is of the opinion that “[w]hether a defendant should have foreseen the plaintiff’s encounter with a particular ‘obvious’ hazard will present a jury issue where reasonable people can differ.”¹²²

In *Wood*, the Oklahoma Supreme Court adopted an approach to the open and obvious doctrine in line with the view of Dobbs and the *Second Restatement*.¹²³ By doing so, the Court aligned Oklahoma’s premises liability law with a growing number of states.¹²⁴ Even eighteen years ago, in *Michalski v. Home Depot, Inc.*,¹²⁵ the Second Circuit found that “[a] clear trend has developed in other jurisdictions rejecting the traditional rule that had provided a full defense to landowners subject to premises liability.”¹²⁶ This softening of the otherwise intransigent rule was recognized as early as 1943.¹²⁷ Professor Fleming James, Jr. noted that “in negligence cases . . . the invitor may be held [liable for]. . . failure to take reasonable precautions to protect invitees from dangers foreseeably attendant on the arrangement or the use of the premises.”¹²⁸ He expounded the topic, finding that “[t]here may be negligence in creating or maintaining [an open and obvious] condition even though it is physically obvious.”¹²⁹

Justice Taylor in his dissent in *Wood* claimed that the majority opinion demonstrated disrespect and unnecessary departure from the long-standing rule of law;¹³⁰ however, *Wood* is not the first case in which the Oklahoma Supreme Court acknowledged the general principle of

120. *Id.*

121. *Id.*

122. *Id.* at 88–89.

123. See *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460.

124. See 2 DOBBS ET AL., *supra* note 95, § 276, at 88; *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 119 (2d Cir. 2000).

125. 225 F.3d 113.

126. *Id.* at 119.

127. See *Seelbach, Inc. v. Mellman*, 293 Ky. 790, 170 S.W.2d 18 (1943).

128. James, *supra* note 13, at 621–22 (footnote omitted).

129. *Id.* at 626.

130. *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 1, 336 P.3d 457, 461 (Taylor, J., dissenting).

foreseeability as the touchstone of negligence.¹³¹ In *Brown v. Alliance Real Estate Group*,¹³² a case where the landowners knew of invisible “black ice” on their sidewalk, the Oklahoma Supreme Court found that “a premises owner does have 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.”¹³³ In this light, *Wood* is not so much an abandonment of established law as it is an adherence to conventional negligence law standards. In his dissent, Justice Taylor asserted that the abandonment of the traditional doctrine will “ha[ve] far-reaching implications.”¹³⁴ He provided the following illustration:

If, for example, a pile of bananas falls in the middle of a grocery store floor, a customer sees the banana pile and is aware of the risk of slipping on the bananas, and the customer walks back and forth over the bananas until the customer finally falls and is injured, the store may now [be] liable under the Court’s new rule. I cannot abide a new rule of law that would allow an invitee to recover when she ignores an open-and-obvious risk¹³⁵

Justice Taylor rightfully fears that such an exception will lead to questionable policy; however, the majority didn’t create a bright-line test as to the reach of the exception.¹³⁶ Rather, the *Wood* Court found the exception only clearly applies in a relatively narrow factual situation.¹³⁷ In fact, from a commonsense perspective, the exception crafted by *Wood* creates good policy. When a business invitee is injured while performing his or her employer’s contractual obligations to the landowner, he or she should have a course of action against the landowner, despite the danger being open and obvious. *Martinez*, deliberating the early iterations of the

131. See *Brown v. All. Real Estate Grp.*, 1999 OK 7, ¶ 6, 976 P.2d 1043, 1045 (citing *Bradford Sec. Processing Servs., Inc. v. Plaza Bank & Tr. Co.*, 1982 OK 96, ¶ 10, 653 P.2d 188, 191).

132. 1999 OK 7, 976 P.2d 1043.

133. *Id.* ¶ 6, 976 P.2d at 1045 (footnote omitted).

134. *Wood*, 2014 OK 68, ¶ 10, 336 P.3d at 463 (Taylor, J., dissenting).

135. *Id.*

136. See *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 978 (10th Cir. 2015).

137. *Wood*, 2014 OK 68, ¶ 9, 336 P.3d at 460.

foreseeability exception, gives credence to this assertion, finding that the “absolute bar to liability came under fire . . . as courts and commentators reconsidered tort law in light of modern economic conditions and the rise of premises liability insurance.”¹³⁸

V. CONCLUSION

Prior to July 16, 2014, Oklahoma’s open and obvious doctrine for premises liability stood largely unchanged for 103 years.¹³⁹ In essence, the prior rule in Oklahoma was, as stated by the *Martinez* Court, that there is “no landowner liability for an injury caused by a dangerous condition if the entrant knew of the condition and realized the risk posed by the condition—no exceptions.”¹⁴⁰ Through *Wood*, the Oklahoma Supreme Court carved an exception into this previously steadfast rule.¹⁴¹

Because the district court exercised its authority pursuant to diversity jurisdiction, the Tenth Circuit had to “ascertain and apply [Oklahoma] law such that [it] reach[es] the result that would be reached by [an Oklahoma] court.”¹⁴² Summary judgment is properly granted when “there is no genuine issue as to any material fact.”¹⁴³ The newly minted foreseeability requirement from *Wood* inherently creates a question of fact that will likely prove to be dispositive of the premises liability issue in *Martinez*: whether Angel Exploration had constructive knowledge of the lack of a safety guard on the Woodbury 2-2 pump jack.

The long-term application of *Martinez* will rely on future courts’ interpretations of the breadth of the exception: Is *actual knowledge* the necessary evidentiary bar, or will *constructive knowledge* of the open and obvious danger suffice? Because of the emergent trend towards a foreseeability exception to the open and obvious doctrine, it should come

138. *Martinez*, 798 F.3d at 976–77 (citing 5 HARPER ET AL., *supra* note 11, § 27.13, at 279).

139. *See generally* Chicago, R. I. & P. Ry. Co. v. McIntire, 29 Okla. 797, 119 P. 1008 (1911); *Wood*, 2014 OK 68, 336 P.3d 457.

140. *Martinez*, 798 F.3d at 976 (citing RESTATEMENT (FIRST) OF TORTS § 340 (AM. LAW INST. 1934)) (explaining that the *First Restatement* was consistent with Oklahoma pre-*Wood* jurisprudence).

141. *Wood*, 2014 OK 68, ¶¶ 9–10, 336 P.3d at 460.

142. *Martinez*, 798 F.3d at 973 (alterations in original) (quoting McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 253 (10th Cir. 1993)).

143. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)).

as no surprise if these future courts hold *constructive* knowledge of the open and obvious danger to be the standard. After all, the Oklahoma Supreme Court has previously stated that “[d]uty [can] evolve . . . from notice, actual or imputed.”¹⁴⁴

144. *Rogers v. Hennessee*, 1979 OK 138, ¶ 14 n.10, 602 P.2d 1033, 1035 n.10.