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THE OPEN AND OBVIOUS DANGER DOCTRINE: WHERE DOES IT BELONG IN OUR COMPARATIVE NEGLIGENCE REGIME?

I. INTRODUCTION

The open and obvious danger doctrine, available in situations in which a plaintiff acts in a manner that disregards ordinary caution in the face of a "known or obvious" danger, is standing on uncertain grounds in Wisconsin. The doctrine originated from the common-law notion that landowners have no duty to warn or protect invitees from open and obvious dangers because: (1) "invitees are, in most circumstances, expected to protect themselves from obvious dangers," and (2) imposing liability for obvious dangers would unfairly burden landowners by requiring them to inspect and improve their land. As a result of this original rule, a voluntarily confrontation of an open and obvious danger barred recovery for any injury that may have ensued as a result of a plaintiff's own actions. Confronting an open and obvious danger was an absolute bar to recovery.

Wisconsin has not limited the application of the open and obvious danger doctrine to premises liability cases. For example, there is a version of the doctrine found in products liability cases, and like the traditional landowner application, the doctrine has acted as an absolute bar to recovery if a defect in a product is obvious. Additionally,
Wisconsin has applied the open and obvious danger doctrine in ordinary negligence cases. Application of the doctrine in ordinary negligence cases, however, has differed from the traditional application. In ordinary negligence cases, the open and obvious qualities of dangers are only elements a jury may consider in its apportionment of negligence.

The different situations in which the open and obvious danger doctrine has been applied have confused Wisconsin courts. This Comment addresses the appropriate application of the open and obvious danger doctrine in Wisconsin. First, some of Wisconsin’s historical tort law changes are discussed and analyzed to help better understand the current and appropriate standing of the open and obvious danger doctrine. Second, this Comment explores Wisconsin case law to show the disparate treatment of the open and obvious danger doctrine by the court of appeals and the Supreme Court of Wisconsin. Next, the supreme court decisions of Antoniewicz v. Reszcynski, Pagelsdorf v. Safeco Insurance Co. of America, Rockweit

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10. Courts have applied the doctrine to premises liability claims, strict products liability claims, negligent products liability claims, and ordinary negligence claims. Ordinary negligence is defined as the following:

A person is negligent when [he or she] fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.


12. The author first inquired into the appropriate application of the open and obvious danger doctrine after reading Westlund v. Werner Co., 971 F. Supp. 1277 (W.D. Wis. 1997). This case analyzed Wisconsin’s application of the doctrine and concluded it only acts within the parameters of contributory negligence. See id. at 1281. According to Westlund, landowner-invitee and manufacturer-consumer relationships would not alter the application of the open and obvious danger doctrine; rather, Wisconsin’s “supreme court would treat all open and obvious danger doctrine cases under a comparative negligence scheme rather than as an absolute defense to liability.” Id.
13. See infra Part II.
15. 236 N.W.2d 1 (Wis. 1975).
16. 284 N.W.2d 55 (Wis. 1975).
v. Senecal," and Strasser v. Transtech Mobile Fleet Service, Inc. are discussed in depth to determine the supreme court's intended use of the doctrine.

Finally, this Comment demonstrates that the Supreme Court of Wisconsin has already expressed its view that the open and obvious danger doctrine should not be an absolute defense in landowner cases, products liability negligence cases, and ordinary negligence cases. In these situations, the open and obvious qualities of a dangerous condition should be used only as elements when apportioning negligence. However, the fact that a danger is obvious may still bar strict products liability claims and claims based upon a failure to warn.

II. CONTRIBUTORY NEGLIGENCE, COMPARATIVE NEGLIGENCE, AND ASSUMPTION OF RISK: WISCONSIN'S HISTORICAL BACKGROUND

A. The Change to Comparative Negligence

In 1931, the Wisconsin Legislature drastically changed Wisconsin tort law by altering the impact of a plaintiff's contributory negligence. Prior to 1931, contributory negligence acted as an absolute defense in Wisconsin by barring recovery on claims in which a plaintiff was found to have been causally negligent. However, as a result of the Legislature's enactment of section 331.045 of the Wisconsin Statutes,

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17. 541 N.W.2d 742 (Wis. 1995).
18. 2000 WI 87, 613 N.W.2d 142.
20. See Rockweit, 541 N.W.2d at 748-49 (stating that Pagelsdorf and Antoniewicz have "abrogated the common law immunity by subsuming the concept of open and obvious danger into the consideration of common law negligence" in which the open and obvious danger is "merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery").
21. See infra Part IV.C.
22. See, e.g., Crane v. Weber, 247 N.W. 882, 882 (Wis. 1933) ("The collision occurred before enactment by the Legislature of the comparative negligence statute, so that contributory negligence is an absolute defense to the action.").
23. See 1931 Wis. Laws 242. This act created section 331.045 of the statutes, which read in pertinent part:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering.
the absolute defense of contributory negligence was pushed aside to welcome in the more claim-friendly doctrine of comparative negligence, which allows a plaintiff to recover damages in some situations in which negligence has been apportioned to the plaintiff. In other words, under the comparative negligence regime, a plaintiff's negligence does not automatically bar the plaintiff from recovery. Instead, the comparative negligence scheme allows for a defense known as "contributory negligence," which decreases the amount a plaintiff can recover based on the proportion of the plaintiff's causal negligence.

Id. Wisconsin was only the third state to adopt comparative negligence principles. See Carol A. Mutter, Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee, 57 Tenn. L. Rev. 199, 227 n.127 (1990). By 1965, only seven states and Puerto Rico adhered to comparative negligence. See Victor E. Schwartz & Evelyn F. Rowe, Comparative Negligence § 1-1, at 2 (3d ed. 1994). However, since 1970, comparative negligence has become the norm, with contributory negligence acting as an absolute defense in only four states by 1994. Id.

24. See Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 727 (Wis. 1934) ("Now, by virtue of sec[tion] 331.045, Stats., the instances in which there is a right to recover have been increased... ").

25. The current statute that governs comparative negligence is section 895.045 of the Wisconsin Statutes, which is entitled "Contributory negligence." Wis. Stat. Ann. § 895.045 (West 1999). This statute reads:

(1) Comparative negligence. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

(2) Concerted action. Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85(5).

Id.

26. See § 895.045(1). Wisconsin utilizes a modified rather than a pure comparative negligence approach. Contributory negligence in modified comparative negligence jurisdictions acts as a bar to recovery if the plaintiff's negligence reaches a certain threshold. See Muter, supra note 23, at 229. In Wisconsin, contributory negligence does not bar recovery unless a plaintiff's negligence is greater than that of a defendant. See infra notes 29-30 and accompanying text. A pure approach allows a plaintiff to recover damages in proportion to a defendant's negligence despite a finding that a plaintiff is more negligent than a defendant. See Schwartz & Rowe, supra note 23, § 2-1(a).

27. See Wis. JI-Civil 1007. This jury instruction spells out the standard contributory
Wisconsin's comparative negligence statute details the comparisons to be made when determining liability.\footnote{28} A plaintiff can recover damages so long as the plaintiff's negligence does not exceed\footnote{29} that of a particular defendant,\footnote{30} but the plaintiff's negligence is subtracted from the total award in proportion to the plaintiff's percentage of negligence.\footnote{31} For example, assume there is a special verdict that awards $100,000 in damages, but renders the plaintiff ten percent causally negligent, Defendant A forty percent causally negligent, and Defendant

negligence defense:

Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself. Id. 28. § 895.045(1).

29. Id. (stating that "[c]ontributory negligence does not bar recovery . . . if [a plaintiff's] negligence was not greater than the negligence of the person against whom recovery is sought" (emphasis added)). The majority of states that adhere to a modified comparative negligence scheme follow this "fifty percent rule," in which contributory negligence acts as a bar to recovery only if the plaintiff's negligence is greater than that of a defendant's. See Mutter, supra note 23, at 229. In 1990, there were nine states that used the "forty-nine percent rule," which allows a plaintiff to recover only if the plaintiff's negligence is less than a defendant's negligence. Id. Wisconsin is one of seven states to move from the forty-nine percent rule to the fifty percent rule. Id. at 255 & n.254. See also McGowan v. Story, 234 N.W.2d 325, 330 (Wis. 1975) ("Under the legislation as it now exists, and has existed since 1971, a plaintiff . . . who has been found 50 percent negligent, may recover 50 percent of his damages. Under the law as it existed at the time of the accident [in] 1970, a plaintiff whose negligence was equal to that of the defendant was foreclosed from any recovery."); 1971 Assembly Bill 50, 1971 Wis. Law. 47 (changing section 895.045 to read "not greater than," as opposed to "not as great as").

30. See § 895.045(1) ("The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent."). This sentence, which was added in 1995 to codify the manner in which Wisconsin courts had been interpreting the comparative negligence statute, "determines the responsibility of each defendant to the plaintiff." John J. Kircher, Wisconsin's Modified, Modified Comparative Negligence Law, Wis. Law., Feb. 1996, at 18, 20 (emphasis added). See also Walker v. Kroger Grocery & Baking Co., 252 N.W. 721, 727-28 (Wis. 1934) (comparing negligence of plaintiff to negligence of each particular tortfeasor). For example, a plaintiff who is found to be 20% negligent is barred from recovering from a defendant who has been attributed 10% negligence. However, the plaintiff can recover from two other defendants who are each held 35% negligent. This aspect of the statute differs from the majority of states that utilize a modified comparative negligence approach. See Mutter, supra note 23, at 258. Most states follow the "unit rule," also called the "Arkansas rule," which allows a plaintiff to recover if the plaintiff is less negligent than (or in some jurisdictions, equal to or less than) the combined negligence of all defendants. Id. The minority approach is sometimes called the "Wisconsin rule" or the "individual rule." Id.

31. See § 895.045(1) (West 1999) ("[A]ny damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.").
B fifty percent causally negligent.\textsuperscript{32} It is immediately evident that the plaintiff would be entitled to recover part of the award in this case because the plaintiff's negligence does not exceed the individual negligence of either defendant.\textsuperscript{33} However, the plaintiff's ten percent contributory negligence would be deducted from the total award so that the maximum recovery is ninety percent of the $100,000 award ($90,000). Defendant A would be responsible for forty percent of the award ($40,000), and Defendant B would be liable for fifty percent of the award ($50,000).

Under the comparative negligence regime, the plaintiff in this example would be able to recover $90,000\textsuperscript{34} despite a finding of contributory negligence on the plaintiff's part. Under the old contributory negligence regime, the plaintiff would have been barred from recovery due to the causal negligence (ten percent) apportioned to the plaintiff. This example illustrates the effect of comparative negligence: namely, a plaintiff still can recover despite some negligence apportioned to the plaintiff by the jury.

As illustrated above, comparative negligence theory is centered on the apportionment of negligence.\textsuperscript{35} This requisite apportionment can be performed in two manners: by the fact-finder or by law.\textsuperscript{36} When the jury\textsuperscript{37} apportions negligence, it can use "inferences . . . draw[n] from the evidence" and can freely apportion negligence to any person or entity it believes is negligent.\textsuperscript{38} On the other hand, courts have limited powers when apportioning negligence as a matter of law.\textsuperscript{39} First, unlike a jury, which can apportion negligence into specific percentages, a court may apportion negligence only by finding that a plaintiff's negligence

\textsuperscript{32} If a defendant is found to be 51\% or more causally negligent, then that defendant "shall be jointly and severally liable for the damages allowed." § 895.045(1).

\textsuperscript{33} The plaintiff's 10\% portion is less than Defendant A's 40\% and Defendant B's 50\%.

\textsuperscript{34} This is calculated by subtracting the plaintiff's proportion of negligence (10\% of $100,000) from the total award of $100,000.

\textsuperscript{35} Professor Michael McChrystal has written that "[t]he mainstay of Wisconsin comparative negligence law is the principle that whether a victim may recover depends upon whether the victim's contributory negligence in causing his injuries is greater than the causal negligence of another party from whom recovery is sought." Michael K. Mc Chrystal, Seat Belt Negligence: The Ambivalent Wisconsin Rules, 68 MARQ. L. REV. 539, 539 (1985).

\textsuperscript{36} See Peters v. Menard, Inc., 589 N.W.2d 395, 404 (Wis. 1999).

\textsuperscript{37} In most tort cases, a jury, rather than a judge, is the fact-finder. Therefore, I substitute "jury" for "fact-finder" out of convenience and familiarity.


\textsuperscript{39} "Courts" in this section includes the supreme court and the court of appeals as well as trial judges not acting as the primary finder of fact.
exceeds that of a defendant. Second, Wisconsin case law supports the proposition that the jury is generally the body that apportions negligence. Ever since the first supreme court comparative negligence opinion, the courts have stated the limitations upon their power to bar recovery as a matter of law. Standard language found in Wisconsin case law states that the court may rule that the negligence of a plaintiff is greater, "as a matter of law," in "extremely rare" cases in which it is "clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary."
B. Assumption of Risk

The Legislature's enactment of the comparative negligence statute in 1931 immediately eliminated use of contributory negligence as a per se bar to recovery. Although the direct scope of the statute pertains to the effects of negligence allocation, its ramifications on tort law are far-reaching. For example, the supreme court relied heavily on comparative negligence principles when it abrogated assumption of risk. Assumption of risk acted very similarly to the modern contributory negligence defense in that both defenses limited recovery due to a plaintiff's actions. However, unlike the modern contributory negligence defense, which allows a plaintiff to recover at least part of an award if a plaintiff's negligence is less than that of a defendant, assumption of risk completely barred recovery.44

Prior to the enactment of comparative negligence, there was generally no great need to distinguish between assumption of risk and contributory negligence because both acted as complete bars to a plaintiff's recovery.45 However, after the adoption of comparative negligence, a distinction between the two doctrines became paramount because assumption of risk often barred claims whereas contributory negligence did not.46

Assumption of risk focused on a plaintiff's consent, which could be implied "from the injured party's willingness to proceed in the face of a hazard to his safety, known and appreciated by him."47 When a person assumed the "risk of ... particular conduct," liability could not be imposed on those who may have acted negligently but for the assumed risk.48 The implied consent to a known danger acted as a complete bar to recovery.49

Assumption of risk originally applied in master and servant50 cases

44. See, e.g., Colson v. Rule, 113 N.W.2d 21, 22-23 (Wis. 1962).
46. See id.
47. McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14, 16 (Wis. 1962). See also Harbinson, supra note 45, at 464 (stating that "the court has required both a 'consensual relationship' and the traditional elements of: (1) hazard or danger inconsistent with the safety of the plaintiff, (2) knowledge and appreciation of the danger by the plaintiff, (3) acquiescence or a willingness to accept the danger") (footnote omitted).
48. McConville, 113 N.W.2d at 16 ("[T]he law has declined to impose liability on the actor for conduct which would constitute negligence but for the implication that the injured party has assumed the risk of the particular conduct.").
49. See id.
50. These cases are also described as employer-employee cases. See Harbinson, supra
and cases that involved expressed contractual assumption of risk. The reasoning behind the doctrine can be expressed by the Latin maxim, "Volenti non fit injuria," which means, "To the willing, there is no injury." In addition to master-servant cases, the supreme court extended assumption of risk to automobile host-guest cases. One of the reasons for imposing the defense within the host-guest relationship is that an automobile host owed a limited duty to a guest similar to the limited duty a landowner owed a licensee. Additionally, Wisconsin courts considered guests to be in a position where they could effectively protest a driver's negligent acts.

The Supreme Court of Wisconsin eliminated the assumption of risk doctrine from Wisconsin jurisprudence in the early 1960s as it moved away from absolute defenses and focused more on comparative negligence principles. McConville v. State Farm Mutual Automobile Insurance Co. and Colson v. Rule, decided on the same day in January 1962, abolished assumption of risk as a defense in their respective fields

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51. See Jerome E. Gull, Note, Negligence-Abolition of the Doctrine of Assumption of Risk in Host-Guest Cases, 46 MARQ. L. REV. 119, 120 (1962). See also Switzer v. Weiner, 284 N.W. 509, 511 (Wis. 1939) ("In this state it has been held that the doctrine of assumption of risk does not obtain except where there is a contractual relationship between the parties.").

52. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 587 (9th ed. 1994). See also Gull, supra note 51, at 120.


54. The automobile host had a duty of "not increasing the danger or creating a new one naturally resulting from the acceptance by the guest of the invitation extended by the host." Haines v. Duffy, 240 N.W. 152, 153 (Wis. 1931).

55. See Gull, supra note 51, at 120. For an explanation of a landowner's duty to a licensee, see infra text accompanying notes 95-96.

56. One commentator argued that the only true distinction between assumption of risk and contributory negligence was the "consensual relationship" between the parties. See Harbinson, supra note 45, at 468-71. The commentator argued that the court found consent only when the "association between the litigants... [was] sufficiently close that the plaintiff could protest effectively." Id. at 469. Courts have held host-guest relationships to entail such a close relationship that a guest had a duty to protest when a host began to drive negligently. See Haines, 240 N.W. at 153 ("The duty to protest grows out of the relation of host and guest, and it constitutes an essential element in the question of whether the guest may recover damages resulting from the negligence of the host."). Therefore, in cases other than employer-employee and host-guest, the court applied the contributory negligence defense rather than assumption of risk because the requisite consent for assumption of risk could not be found. See also Schiro v. Oriental Realty Co., 76 N.W.2d 355, 360 (Wis. 1956) ("Wisconsin has limited the application of the defense of assumption of risk to situations where there is a consensual relationship between the defendant and plaintiff such as host and guest, or master and servant.").

due to the view that comparative negligence principles would lead to less injustice than the total bar to recovery found in assumption of risk cases.\(^5\)

In *McConville*, the supreme court held that an automobile guest would no longer be subjected to the assumption of risk defense "implied from his willingness to proceed in the face of a known hazard."\(^5\) The court determined that the low duty of care an automobile host owed a guest did not adequately address the severe injuries inherent in automobile accidents.\(^6\) Furthermore, the court stated that public policy would not allow implicit consent to danger to act as an absolute bar to compensation.\(^6\) Consequently, the court imposed upon automobile hosts a duty of ordinary care toward automobile guests.\(^6\) With this duty of ordinary care, any implied assumption of risk by the plaintiff is to be analyzed as part of the contributory negligence defense under

\(^5\) *McConville*, 113 N.W.2d at 17; *Colson*, 113 N.W.2d at 22.

\(^6\) *McConville*, 113 N.W.2d at 16. This case abolished implied assumption of risk, but not express assumption of risk. *See Colson*, 113 N.W.2d at 22. The court adopted the following rules:

1. The driver of an automobile owes his guest the same duty of ordinary care that he owes to others;
2. A guest's assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard is no longer a defense separate from contributory negligence;
3. If a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute.

*McConville*, 113 N.W.2d at 16-17.

\(^6\) *See id.* at 19. The court reasoned,

> We feel that the limitation on the duty of the automobile host... is no longer consistent with sound policy.... The analogy to the licensor-licensee relationship... may have been validly applied to the relationship of automobile host-guest... [when] automobiles were fewer...[and] incapable of great speed.... The serious consequences following automobile accidents today are well known.... In view of the seriousness of many injuries, and the burdens falling upon the community as well as the individuals and families affected, it is doubtful whether the type of consent or acquiescence to danger, heretofore called assumption of risk, should be permitted to cut off completely the right to recover damages.

*Id.* *See also supra* notes 54-55 and accompanying text.

\(^6\) *McConville*, 113 N.W.2d at 19 ("Consent seems not to be a satisfactory basis for retaining the doctrine of assumption of risk. The consequences of an automobile accident to a guest may be so disastrous that it would be contrary to public policy to hold that an individual who consents by implication to a dangerous situation will go uncompensated for his injuries.").

\(^6\) *Id.* ("A driver of an automobile should be held to the full standard of duty of ordinary care to his guests, as he is to other users of the highways.").
comparative negligence.63

The court demonstrated in McConville that it believed comparative negligence to be the appropriate method for determining liability in host-guest cases for two reasons. First, comparative negligence focuses on reasonableness of actions.64 By abolishing assumption of risk, the court did not in turn grant immunity to automobile guests; rather, if a guest unreasonably faces a known danger, then the guest is guilty of contributory negligence,65 which mitigates damages66 or, occasionally, even acts as a complete bar to recovery.67 Second, the court believed that justice is better served by comparative negligence principles. In some cases, a guest might act reasonably when facing a known danger.68 Under assumption of risk, facing a known danger, whether reasonable or not, barred recovery. Comparative negligence, on the other hand, does not punish reasonable behavior, and a plaintiff who acts reasonably is not barred from bringing a claim. Since comparative negligence adequately mitigates damages and allows recovery for those not acting unreasonably, the court made "the policy judgment... that much more injustice will be avoided in the instances where acquiescence ceases to raise a complete defense and becomes a matter for comparison by the trier of the fact."69

The situation in Colson, albeit slightly different from McConville, produced a similar result. In Colson, the Supreme Court of Wisconsin addressed the issue of assumption of risk in master and servant cases.70 As in McConville, the supreme court declined to apply assumption of risk and instead relied on comparative negligence principles.71 One of the reasons the supreme court abandoned assumption of risk is that the

63. See id.
64. See id. at 16-17.
65. See id. at 19-20 ("Conduct which has heretofore been denominated assumption of risk may constitute contributory negligence as well. The unreasonable assumption of risk constitutes negligence. In the present case the jury should have been asked whether the [guest] was negligent for his own safety in riding with [the driver]." (footnote omitted)).
66. See supra note 31 and accompany text.
67. See supra notes 29-30 and accompanying text.
68. See McConville, 113 N.W.2d at 17 ("There may be circumstances where a guest's willingness to proceed in the face of a known hazard for which the host is responsible is not unreasonable.").
69. See id. at 17. The court further stated, "We are of the opinion that the new rule announced herein is more in harmony with the principle of comparative negligence adopted by our legislature than was [assumption of risk]." Id. at 20.
70. Colson v Rule, 113 N.W.2d 21, 22 (Wis. 1962).
71. See id.
doctrine "tends to immunize those employers from liability who are the greatest transgressors in providing safe [working conditions] for their employees."72 The court viewed assumption of risk as encouraging employers not to make the workplace as safe as possible, but to use clearly "defective" machines that would deem the requisite consent73 from the workers because any work would be "in the face of a hazard . . . known and appreciated."74

Finally, the Supreme Court of Wisconsin decided *Gilson v. Drees Bros.*,75 which abrogated assumption of risk in "all situations involving tacit assumption of risk."76 The court opined that in cases where there is not an "express assumption of a known risk," contributory negligence principles would bring "greater fairness" than would assumption of risk.77

As a result of this line of cases, it is evident that the supreme court favored the comparative negligence principles over assumption of risk, which acted as a total bar to recovery. Therefore, the doctrine known as assumption of risk is "no longer a bar to an action for negligence"78 and is "no longer a defense separate from contributory negligence."79

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72. *Id.*

73. See *supra* note 47 and accompanying text.

74. *McConville*, 113 N.W.2d at 16; *Colson*, 113 N.W.2d at 22. The court also considered the assumption of risk defense to be too similar to contributory negligence. *Colson*, 113 N.W.2d at 23 ("The attempted distinction between the assumption of risk and contributory negligence is highly technical and in many fact situations it is very difficult for trial courts to distinguish between the two."). Therefore, in master and servant situations, "where an employee assumes a risk more hazardous than ordinarily careful and prudent men similarly situated usually assume, such conduct ought to be deemed contributory negligence and subject to the comparative negligence statute." *Id.*

75. 120 N.W.2d 63, 67 (Wis. 1963).

76. Polsky v. Levine, 243 N.W.2d 503, 505 (Wis. 1976).

77. *Gilson v. Drees Bros.*, 120 N.W.2d 63, 67 (Wis. 1963). The court stated:

[I]t is our opinion that greater fairness will result if the claimed negligence . . . is couched in terms of contributory negligence rather than in terms of assumption of risk. This will be true whenever the alleged assumption of risk arises by implication, as here, as opposed to an express assumption of a known risk. This would serve to extend the rule adopted in the McConville and Colson Cases to all situations involving the tacit assumption of risk.

*Id.*

78. *Polsky*, 243 N.W.2d at 505.

79. *McConville*, 113 N.W.2d at 16.
III. THE OPEN AND OBVIOUS DANGER DOCTRINE: ITS PRECARIOUS POSITION IN WISCONSIN LAW

Part II of this Comment briefly demonstrates that Wisconsin courts have been drifting away from complete bars to recovery to a more flexible standard of comparing the negligence of a plaintiff and defendant. However, as the comparative negligence statute came to dominate Wisconsin law and assumption of risk faded into the past, the open and obvious danger doctrine, which may act as a total bar to a plaintiff's recovery, has lurked in Wisconsin case law up to date. Nevertheless, careful examination of Supreme Court of Wisconsin decisions suggests that this doctrine may not survive as an absolute bar to recovery much longer.

A. The Elements and Nature of the Open and Obvious Danger Doctrine

1. Landowners and Premises Liability

   Historically, landowners reigned supreme over their premises so that they were immune from liability relating to their land. Landowner sovereignty resulted from the belief that landowners possessed the right to use their land as they so chose. This belief originated in common-law feudalism, in which landowners possessed a high status in society. Feudal landowners possessed "vast estates," and it was difficult to maintain safe premises for the many entrants upon their property. Over time, landowners lost the luxury of complete immunity as common

80. See supra Part II.
81. See Hansen v. New Holland N. Am., Inc., 574 N.W.2d 250, 255 (Wis. Ct. App. 1997) ("While in the context of manufacturer-consumer strict liability and landowner cases[,] a defendant may still owe no duty to a plaintiff who confronts a danger that is open and obvious . . . .") (footnote omitted).
83. See Lucinda S. Ingram, Note, Missouri Retreats from the Known or Obvious Danger Rule in Premises Liability, 54 Mo. L. Rev. 241, 241 (1989).
84. See Ann K. Dittmeier, Note, Premises Liability: The Disappearance of the Open and Obvious Doctrine, 64 Mo. L. Rev. 1021, 1023 (1999); Ingram, supra note 83, at 243 ("English landlords were a powerful class and enjoyed a favored status in the law.").
85. Ingram, supra note 83, at 241 & n.3 ("The view that the owner or occupier was sovereign over his land was deeply rooted in common law feudalism.").
86. Id. at 241 n.3. ("[T]he special privilege these rules accord . . . sprang from the high place that land has traditionally held in England and America . . . . The common law view was based, in part, on the proposition that English manor lords would have difficulty regulating entries onto the lands of their vast estates." (citing F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1, at 131-32 (1986))).
law created landowner limited liability. Two examples of landowner limited liability are the different duties owed to entrants upon property and the open and obvious danger doctrine.

a. Common-Law Immunities and the Distinctions Between Entrants upon Property

Under common law, a landowner's duty of care depended on the status of the person who entered upon the property. An entrant could be a trespasser, a licensee, or an invitee. Trespassers received the most limited standard of care, while the duty owed to an invitee was that of ordinary care. The middle standard of care, which applied to licensees, restricted liability to two situations: "traps" on the premises and active negligence on part of the landowner. "Traps" were dangers known to a landowner but concealed to a licensee. Therefore, under the limited liability theory, landowners were not liable to licensees for any injuries that resulted from open and obvious dangers because such dangers could not be considered "traps." Landowners simply had no duty to protect or warn licensees of dangers on their premises that were not concealed. Similarly, as indicated in section 343A of the Restatement

87. See Dittmeier, supra note 84, at 1023. The supreme court described the distinctions as "common-law immunities of the owners and occupiers of land." Antoniewicz v. Reszczynski, 236 N.W.2d 1, 2 (Wis. 1975)
88. See Dittmeier, supra note 84, at 1023. The classifications generally are trespasser, licensee, and invitee. Id. See also infra Part III.A.1.a.
89. See Ingram, supra note 83, at 241.
90. See Szafranski v. Radetzky, 141 N.W.2d 902, 905 (Wis. 1966).
91. See generally Mark A. Peterson, Note, Liability of Owners and Occupiers of Land, 58 MARQ. L. REV. 609 (1975) (discussing the distinction between trespassers, licensees, and invitees).
92. See Szafranski, 141 N.W.2d at 905 ("If the person is a trespasser, the owner of land has the duty to refrain from wilful and intentional injury."). "A trespasser is one who enters another's premises without an express or implied invitation from the other person, and solely for his own pleasure, advantage or purpose." Peterson, supra note 91, at 610 (citing Wis. JI-CIVIL 8012).
93. Szafranski, 141 N.W.2d at 905. "A person who expressly or impliedly is invited upon another's premises for the purpose of aiding, transacting, assisting or furthering the business of the other, or who is on the premises for a purpose mutually beneficial to himself and to the possessor of the premises, is an invitee." Peterson, supra note 91, at 613 (citing Wis. JI-CIVIL 8010).
94. The supreme court defined "active negligence" as it related to licensor-licensee cases as "the carrying on of some operation or activity in a negligent manner." Terpstra v. Soilttest, Inc., 218 N.W.2d 129, 132 (Wis. 1974).
95. Szafranski, 141 N.W.2d at 905.
96. Id.
97. Scheeler v. Bahr, 164 N.W.2d 310, 312 (Wis. 1969) ("[I]f there is no concealed hazard
(Second) of Torts, landowners did not have a duty to protect invitees from obvious dangers on their premises.98

b. The Open and Obvious Danger Doctrine

The reasoning behind the open and obvious danger doctrine historically mirrored the landowner limited liability theory noted above. Occupiers of land had no duty to warn or protect invitees and licensees from dangers that the entrants knew existed on the property.99 The reason that landowners at common law had no duty to protect invitees from obvious conditions is that "invitees [were], in most circumstances, expected to protect themselves from obvious dangers."100 Furthermore, landowners possessed a privileged status in society and courts believed it would be unfair to place upon them the heavy "burden of inspecting and improving [their] primitive land."101 These two reasons outweighed the countervailing argument that landowners should be liable for unreasonable dangers on their premises because their "position of control" of their premises allowed them to be the ones best able to remedy hazardous conditions.102

In Scheeler v. Bahr,103 an early open and obvious danger case, the supreme court reaffirmed the notion that landowners owe no duty to protect licensees from observable dangers.104 The plaintiff in Scheeler argued that his knowledge of the danger should not affect the landowner's duty toward him but should only be used as an element of no duty is imposed upon the licensor to protect the licensee."). Further, a landowner was not liable for concealed dangers if such dangers were not known to the landowner. Szafranski, 141 N.W.2d at 905 (stating that a landowner has "no obligation to the licensee in regard to dangers that are unknown to [the landowner]").

98. See infra notes 112-28 and accompanying text.
102. See Waters, 369 N.W.2d at 758.
103. 164 N.W.2d 310 (Wis. 1969).
104. Id. at 311 ("In Wisconsin the duty owed by the possessor of land to a licensee is a limited one."). The plaintiff in Scheeler dove off of a pier that extended seventy feet from the shore of the lake. Id. The water at the end of the pier was only three feet deep, and the plaintiff struck his head on the bottom of the lake and was injured. Id. The plaintiff alleged the shallow water was a "trap," i.e., a concealed danger known to the landowner, of which the landowner failed to warn. Id.
his contributory negligence. The court rejected the argument and instead stated that even in instances where a duty to warn ordinarily would exist, a landowner's duty to warn is relieved by a plaintiff who confronts an obvious hazard. At this stage of Wisconsin law, a plaintiff's confrontation of an open and obvious danger acted as an absolute bar to recovery.

Wisconsin has viewed the open and obvious danger doctrine as consisting of the elements of section 343A of the Restatement (Second) of Torts. Section 343A is entitled "Known or Obvious Dangers" and it applies to "possessor[s] of land." Generally, section 343A mandates that landowners are not liable for any harm arising out of obviously dangerous conditions or activities on their land. However, there is liability if the harm should be anticipated by the landowner regardless of the obvious nature of the danger or if the injured person knew of the danger. Inherent in this rule are two tests, a subjective test and an

105. Id. at 312.
106. Id. at 313.
110. Section 343A reads:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

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

Id.
111. Id.
objective test.\textsuperscript{112}

First, the subjective test determines landowner liability by examining the individual plaintiff's knowledge of the dangerous condition. A landowner is not liable for injuries to an invitee if an invitee knows of the dangerous condition or activity.\textsuperscript{113} Wisconsin has not thoroughly analyzed this "known danger" test as of yet,\textsuperscript{114} but the \textit{Restatement} notes that the injured person must know of the "condition" and must also appreciate the danger that the condition involves.\textsuperscript{115}

The second test that can be applied is an objective test, and this is derived from the "obvious" half of "known or obvious dangers."\textsuperscript{116} As an objective test, a reasonable person must be likely to "recognize" both the condition and danger involved with the condition.\textsuperscript{117} In an odd reading of the \textit{Restatement}, the Supreme Court of Wisconsin determined that a reasonable person does not have to recognize "the gravity of the harm threatened by the open and obvious condition" because it is not a part of the objective test; rather, it is part of the subjective test found in comment \textit{b} of the \textit{Restatement}.\textsuperscript{118}

Finally, a general exception to the open and obvious danger doctrine can be found in Wisconsin case law and the wording of the \textit{Restatement}. A landowner may still be liable if the harm may be \textit{anticipated} regardless of whether the dangerous condition is known or obvious.\textsuperscript{119} This language and comment 1, illustration 5 of the \textit{Restatement} form the

\begin{itemize}
\item \textsuperscript{112} \textit{See} Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897, 900 (Wis. 1991). The supreme court acknowledges the existence of both the objective and subject test, but the court leaves analysis of the subjective test for another day. \textit{See id.}
\item \textsuperscript{113} \textit{See \textit{RESTATEMENT (SECOND) OF TORTS} § 343A.}
\item \textsuperscript{114} \textit{See Griebler, 466 N.W.2d at 900.}
\item \textsuperscript{115} \textit{RESTATEMENT (SECOND) OF TORTS § 343A cmt. b (1965).}
\item \textsuperscript{116} \textit{See Griebler, 466 N.W.2d at 900-01.}
\item \textsuperscript{117} \textit{RESTATEMENT (SECOND) OF TORTS § 343A cmt. b (1965).}
\item \textsuperscript{118} \textit{Griebler, 466 N.W.2d at 901 (emphasis added). Comment \textit{b} to section 343A reads,}
\end{itemize}

\begin{quote}
The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment. \textit{RESTATEMENT (SECOND) OF TORTS} § 343A cmt. b (1965).
\end{quote}

\textsuperscript{119} \textit{See \textit{RESTATEMENT (SECOND) OF TORTS} § 343A(1) (1965) (stating there is liability if "the possessor should anticipate the harm despite such knowledge or obviousness").}
basis for Maci v. State Farm Fire & Casualty Co.,120 in which the Court of Appeals of Wisconsin suggested that this exception be added to the Wisconsin civil jury instructions.121 In Maci, the plaintiff slipped on an icy path leading to a garage door, which was the only path available for the plaintiff.122 The court of appeals determined that the defendant landowner should have known that the plaintiff would have to traverse the icy property in order to lock the garage door after taking out his car; therefore, the landowner did have a duty to make his land reasonably safe for the plaintiff.123 Subsequent court decisions interpret the Maci exception as imposing liability upon landowners only when the obvious danger is unavoidable to the injured person or when a person's attention is likely to be distracted from the danger.124

2. Products Liability

Although the common-law origin of the open and obvious danger doctrine applied to landowners, Wisconsin courts have used open and obvious danger principles in other fields of tort law, particularly in products liability cases.125 Generally speaking, products liability claims may be based on two different theories: strict liability and/or negligence.126 Both strict liability and negligence claims are similar in that they impose liability upon manufacturers for producing dangerous products, but strict liability allows a plaintiff to recover without

121. Id. at 918-19. The court of appeals suggested Wis. JI-Civil 8020 should be changed to include:

However, where a known and obvious condition or defect exists on the premises and is unavoidable by the person on the premises, a possessor of premises is not relieved of liability for physical harm to said person arising from said defect or condition merely by warning such person of the condition or defect.

Id. (emphasis omitted).
122. Id. at 916, 918.
123. See id.
124. See Colip v. Travelers Ins. Co., 415 N.W.2d 525, 527-28 (Wis. Ct. App. 1987) (stating that the "exception [to the open and obvious danger doctrine] is recognized only: (1) where the injured person was somehow distracted; and (2) where the injured person was unable to avoid the danger" (citations omitted)). See also Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897, 898 n.1 (Wis. 1991); Taft v. Derricks, 2000 WI App. 103, ¶ 26, 613 N.W.2d 190, 197 ("If the plaintiff, despite the obviousness of the danger, is faced with no reasonable alternative, the plaintiff does not 'voluntarily confront' the danger.").
requiring proof of a manufacturer's specific acts of negligence.\textsuperscript{127} Strict liability may apply to defective manufacturing claims as well as defective design claims.\textsuperscript{128} However, negligence claims require a plaintiff to show that a manufacturer breached the standard of ordinary care in its production of a product.\textsuperscript{129} A manufacturer may be liable for claims such as negligent manufacturing or negligent design of a product.\textsuperscript{130} When strict liability and negligence claims are separated and analyzed, it is evident that the open and obvious danger doctrine in strict products liability cases is derived from the consumer-contemplation test.\textsuperscript{131} However, for products liability claims that sound in negligence, the doctrine originates from \textit{Griebler v. Doughboy Recreational, Inc.}, which improperly analyzed negligence claims within the same discussion as strict liability.\textsuperscript{132}

\textit{a. Strict Liability and the Consumer-Contemplation Test}

Generally, strict liability in Wisconsin requires proof of two initial elements: first, a product must be defective at the time it left the control of a seller, and second, a defective product must pose an unreasonable danger to an average consumer.\textsuperscript{133} Open and obvious dangers act as a complete defense to strict liability claims because Wisconsin courts have held that defects that are open and obvious cannot be unreasonably

\begin{itemize}
  \item \textsuperscript{127} Dippel \textit{v. Sciano}, 155 N.W.2d 55, 63 (Wis. 1967). In \textit{Dippel}, Wisconsin adopted strict products liability consistent with section 402A of the \textit{Restatement (Second) of Torts}. The elements to be proven in strict products liability are:
  \begin{enumerate}
    \item that the product was in defective condition when it left the possession or control of the seller,
    \item that it was unreasonably dangerous to the user or consumer,
    \item that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages,
    \item that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller,
    \item that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.
  \end{enumerate}
  \begin{itemize}
    \item \textsuperscript{128} See Arbet \textit{v. Gussarson}, 225 N.W.2d 431, 435 (Wis. 1975); Schuh \textit{v. Fox River Tractor Co.}, 218 N.W.2d 279, 284 (Wis. 1974).
    \item \textsuperscript{129} See \textit{Greiten v. Ladow}, 235 N.W.2d 677, 685 (Wis. 1975).
    \item \textsuperscript{130} See, e.g., \textit{id.} at 683.
    \item \textsuperscript{131} See infra Part III.A.2.a.
    \item \textsuperscript{132} See infra Part III.A.2.b.
  \end{itemize}
\end{itemize}
dangerous to the consumer.\textsuperscript{134}

The open and obvious danger doctrine utilized in strict liability cases hinges on an objective standard: a product is not unreasonably dangerous "[i]f the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury."\textsuperscript{135} This is generally known as the consumer-contemplation test,\textsuperscript{136} and a jury generally decides whether an average consumer would appreciate the risk of injury.\textsuperscript{137} The fact that a consumer may or may not have actually known of the danger is not a factor in whether the product was unreasonably dangerous.\textsuperscript{138} Instead, a consumer's actual knowledge of a dangerous defect is accounted for under the contributory negligence defense found in the comparative negligence statute.\textsuperscript{139}

Manufacturers are not strictly liable for injuries caused by open and obvious defects, and accordingly, manufacturers have no duty to warn of open and obvious dangers inherent in a product.\textsuperscript{140} However, when defects are hidden or latent, a manufacturer must adequately warn consumers of such dangers.\textsuperscript{141} A warning is adequate only if it heightens

\textsuperscript{134} See Tanner, 596 N.W.2d at 812 ("In order for a defective design to render a product unreasonably dangerous the defect must be hidden from the ordinary consumer, that is, not an open and obvious defect.").

\textsuperscript{135} See Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 798 (Wis. 1975).

\textsuperscript{136} Sumnicht, 360 N.W.2d at 15. In Arbet v. Gussarson, 225 N.W.2d 431 (Wis. 1975), the supreme court adopted comment i of section 402A of the Restatement (Second) of Torts, which states that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Id. at 435. Additionally, the court has also adopted comment g, which defines "defective condition" as "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Vincer, 230 N.W.2d at 797-98. Therefore, Wisconsin follows the "consumer-contemplation test," and a product is not unreasonably dangerous unless the defect is such that an average consumer would not reasonably expect it. Sumnicht, 360 N.W.2d at 15.


\textsuperscript{138} Vincer, 230 N.W.2d at 798 ("This is an objective test and is not dependent upon the knowledge of the particular injured consumer . . . .").

\textsuperscript{139} Id. at 798-99 (stating that "knowledge [of the danger] may be evidence of contributory negligence under the circumstances").

\textsuperscript{140} Estate of Schilling v. Blount, Inc., 449 N.W.2d 56, 59 (Wis. Ct. App. 1989) (holding that inherent danger of cocking the hammer of a gun containing live bullets constitutes an open and obvious danger that the average consumer would recognize; thus, there is no duty to warn of inherent danger that is open and obvious to the community at large).

\textsuperscript{141} See, e.g., Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915, 922 (Wis. 1979); Schuh v. Fox River Tractor Co., 218 N.W.2d 279, 285 (Wis. 1974) ("The duty to warn . . . is a
a consumer's awareness of the defect to a degree "that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger." Therefore, if a jury determines a defect is not obvious to an average consumer, the question arises as to whether there is an adequate warning that makes a hidden defect known to the average consumer. Without such a warning, a product will likely be defective and unreasonably dangerous.

b. Griebler Extends the Open and Obvious Danger Doctrine into all Aspects of Products Liability

Although the open and obvious danger doctrine in products liability originated in strict liability cases, the supreme court extended the doctrine to all products liability claims in Griebler v. Doughboy Recreational, Inc. The plaintiff in Griebler sustained injuries while diving into a pool manufactured by Doughboy Recreational. As a result, Griebler sued both the landowner for negligence and Doughboy for claims based on strict products liability and negligence. The court, relying on a string of landowner open and obvious danger diving cases, held that diving headfirst into waters of unknown depth constituted a confrontation of an open and obvious danger. Then, in one sweeping sentence, the court stated that the open and obvious danger doctrine applies to products liability cases sounding in either strict liability or negligence. In doing so, the court intertwined years of landowner open duty to give a warning which is adequate and appropriate under the circumstances." (quoting Annotation, Products Liability—Duty to Warn, 76 A.L.R.2d 15 (1961)); Schilling, 449 N.W.2d 56.

142. Kozlowski, 275 N.W.2d at 922-23. Not only is there a duty to warn of hidden dangers, but a manufacturer must also reasonably try to place the warning in an area that is likely to attract the users' attention. See Schuh, 218 N.W.2d at 284.

143. See Kozlowski, 275 N.W.2d at 921; Tanner v. Shoupe, 596 N.W.2d 805, 812 (Wis. Ct. App. 1999).

144. See Kozlowski, 275 N.W. 2d at 920 ("Were this court able to conclude that the evidence in this case demonstrated an obvious defect not unreasonably dangerous, the manufacturer would not be automatically relieved from liability.").

145. 466 N.W.2d 897 (Wis. 1991).

146. Id. at 899.

147. Id.


149. Griebler, 466 N.W.2d at 898-99.

150. Id. at 902 ("The open and obvious danger defense is available to defendants in products liability actions in this state whether the actions sounds in negligence or strict products liability." (citing Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230
and obvious danger doctrine decisions with strict liability cases based upon the consumer-contemplation test. Furthermore, it also entangled strict products liability claims with products liability claims sounding in negligence. In *Griebler*, the open and obvious danger doctrine did not differentiate between claims based upon strict products liability and those claims sounding in negligence, such as negligent manufacturing or negligent design.

3. Ordinary Negligence

Finally, Wisconsin courts have applied the open and obvious danger

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N.W.2d 794 (Wis. 1975)). In *Vincer*, the court dismissed products liability claims based on strict liability and negligence. *Vincer*, 230 N.W.2d at 797. The court focused on strict liability under section 402A of the *Restatement (Second) of Torts*, but in regards to the negligence claims, it merely stated that "even under negligence law, the plaintiff still must prove that the product causing the injury was dangerous and defective." *Id.* In its strict liability analysis, the court concluded that the product was not unreasonably dangerous, and without further discussion as to the negligence claim, the court dismissed the plaintiff's entire case. *Id.* at 799. *Griebler's* reliance on *Vincer* is misplaced due to previous supreme court decisions that criticized and even withdrew part of *Vincer's* cursory negligence analysis. In *Greiten v. LaDow*, 235 N.W.2d 677 (Wis. 1975), Justice Robert Hansen's "majority" opinion cited and quoted *Vincer* for the proposition that a plaintiff must prove a product is unreasonably dangerous in order to recover under either strict liability or negligence. *Id.* at 682 (R. Hansen, J., concurring) (quoting *Vincer's* language that stated, "However, even under negligence law, the plaintiff still must prove that the product causing the injury was dangerous and defective...".) However, due to a three-one-three split between the justices, Justice Heffernan's "concurring opinion" is actually the opinion of the court. See *Howes v. Deere & Co.*, 238 N.W.2d 76 (Wis. 1976) ("[Justice Heffernan's] opinion, in fact, represents the decision of a majority of the court and it is, therefore, the opinion of this court. The opinion of Mr. Justice Robert W. Hansen is the concurring opinion."). Justice Heffernan's opinion disagreed with *Vincer's* analysis that a plaintiff must first prove, in either strict liability or negligence, that a product was unreasonably dangerous. See *id.* at 684-85. According to Justice Heffernan, strict liability is "not intended to modify or limit a plaintiff's right to recover." *Id.* at 684. Rather, "there may be recovery for the negligent design of a product even though it is not unreasonably dangerous in the 402 A sense. All that is necessary to prove is that the product is designed with a lack of ordinary care and that lack of care resulted in injury." *Id.* at 685.

Additionally, soon after *Greiten*, the supreme court continued to distinguish strict liability from negligence by specifically withdrawing *Vincer's* troublesome negligence language. See *Howes v. Deere & Co.*, 238 N.W.2d 76, 80 (Wis. 1976). ("The statement ['However, even under negligence law, the plaintiff still must prove that the product causing the injury was dangerous and defective'] is not relevant to the ultimate decision in *Vincer* and is herewith withdrawn."). Therefore, *Griebler's* reliance on *Vincer* for the proposition that the open and obvious danger doctrine bars claims in either strict liability or negligence is an improper application of Wisconsin law. Strict liability under *Dippel* and section 402A of the *Restatement* is "totally irrelevant" to negligence actions. *Greiten*, 235 N.W.2d at 684.

151. Wisconsin law is clear that a plaintiff may recover for "the negligent design of a product even though the product is not unreasonably dangerous in a strict product liability sense." *Sharp v. Case Corp.*, 595 N.W.2d 380, 383 (Wis. 1999). *See also supra* note 150.
doctrine in ordinary negligence cases.\textsuperscript{152} Basically, these cases encompass negligence claims not falling within premises or products liability. For ordinary negligence cases, courts have refused to apply the open and obvious danger doctrine as an absolute bar to recovery.\textsuperscript{153}

**B. Application of the Open and Obvious Danger Doctrine**

1. Different Applications of the Doctrine

Over the years, Wisconsin courts have treated the open and obvious danger doctrine in disparate fashions.\textsuperscript{154} First, courts addressed the doctrine in "duty" considerations.\textsuperscript{155} Next, some courts utilized the doctrine as a complete bar within the structure of comparative negligence by holding that a plaintiff who confronts an open danger is automatically more negligent than the defendant.\textsuperscript{156} Finally, sometimes courts refused to apply the doctrine as a complete bar to recovery, and open and obvious dangers became mere elements in the apportionment of negligence.\textsuperscript{157}

When the courts first treated the open and obvious danger doctrine as an absolute bar to recovery, the courts analyzed the doctrine in terms of "duty," saying that a "defendant had no duty to warn or otherwise protect" a plaintiff who chooses to act in the face of an obvious danger.\textsuperscript{158} The absence of a duty on a defendant's part prohibited comparison of the defendant's negligence with the plaintiff's negligence, so integral in the comparative negligence scheme, because a defendant must first have a "duty of care" in order to be found negligent.\textsuperscript{159}


\textsuperscript{153} See infra notes 167-70 and accompanying text.


\textsuperscript{155} See infra notes 158-59 and accompanying text.

\textsuperscript{156} See infra notes 163-66 and accompanying text.

\textsuperscript{157} See infra notes 167-70 and accompanying text.

\textsuperscript{158} Hertelendy, 501 N.W.2d at 906. See, e.g., Scheeler v. Bahr, 164 N.W.2d 310 (Wis. 1969).

\textsuperscript{159} Rockweit v. Senecal, 541 N.W.2d 742, 747 (Wis. 1995). The general rule in Wisconsin is:

In order to maintain a cause of action for negligence in this state, there must exist: (1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.
However, the general rule in Wisconsin is that every person has a duty "of due care to refrain from any act which will cause foreseeable harm to others." Cases in Wisconsin that have analyzed duty based upon the nature of the relationship between a plaintiff and defendant have been deemed to be incorrect. In Wisconsin, negligence is not dependent on relationships, but rather negligence is defined as conduct that creates a foreseeable, unreasonable risk to the world at large.

Since the "no duty" analysis frustrates comparative negligence principles and contradicts the general rule that everyone owes a duty of reasonable care to the world, the Wisconsin court of appeals began to alter open and obvious danger analysis in order to conform with Wisconsin's general tort law principles. As a result, courts shifted from "no duty" analysis to an application of the open and obvious danger doctrine tailored to the needs of comparative negligence.

Under comparative negligence, the court of appeals has interpreted the open and obvious danger doctrine to be "tantamount to a determination that the plaintiff's negligence exceeds the defendant's negligence as a matter of law." Upon such a finding, contributory negligence bars recovery. This interpretation is consistent with comparative negligence principles on the surface, but it clearly ignores a defendant's conduct and focuses solely on the conduct of the plaintiff.

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161. Some Wisconsin cases have followed the rule proclaimed in section 314 of the Restatement (Second) of Torts that a person has no duty to take affirmative action to help or protect another person unless a special relationship exists. In Gritzner v. Michael R., 2000 WI 68, 611 N.W.2d 906, the supreme court stated that limiting liability in terms of duty "is incorrect under Wisconsin law." Id. ¶ 24 n.4, 611 N.W.2d at 913 n.4. Instead, "failure to take an affirmative action may constitute negligence when it is inconsistent with the duty to exercise ordinary care." Id. ¶ 23, 611 N.W.2d at 913. Basically, "the crucial question ... is not whether [a person] had any 'duty' to take affirmative actions but whether [a person's] alleged failure to take certain actions was consistent with his duty to exercise a reasonable degree of care." Id. ¶ 25, 611 N.W.2d at 913.
164. Kloes, 487 N.W.2d at 81. See also supra notes 29-30 and accompanying text.
165. Wisnicky illustrates that no comparison needs to be made. In Wisnicky, the safe place statute, section 101.11 of the Wisconsin Statutes, imposed the standard of care upon the defendant. Wisnicky, 473 N.W.2d at 524. The standard of care owed under the safe place
For example, courts have held that diving into waters of unknown depth is an open and obvious danger as a matter of law.\textsuperscript{166} Under this interpretation, if a plaintiff were to dive into water of unknown depth, thereby confronting an open danger, the plaintiff's negligence would be necessarily greater than the landowner's as a matter of law. There is no discussion of the defendant's actions in the analysis, and the landowner would be free from liability even if his or her actions created a foreseeable risk of harm. A landowner could place a diving board at the end of a pier that extended one hundred feet from the shoreline and would be immune from liability even if the landowner knew there were cement blocks lying a foot below the water's surface. Once a plaintiff confronted the obvious danger (diving into water of unknown depth), the plaintiff's action would immunize any wrongdoing of the defendant. Examination of only one party's negligence is certainly not consistent with comparative negligence principles.

Regardless of which application controls the open and obvious danger doctrine, Wisconsin courts in the 1990s were reluctant to use the doctrine as a complete bar. One decision acknowledged the doctrine's power to bar claims, then ruled that it only applies "where there is a high degree of probability that the condition or danger confronted will result in harm."\textsuperscript{167} Generally, courts imposed the doctrine as an absolute bar only in premises or products liability cases.\textsuperscript{168} For "ordinary negligence cases," the doctrine "should not be used to resolve liability issues... even where the plaintiff engaged in conduct that would be foreseen as subjecting a party to a high risk of injury."\textsuperscript{169} Instead, the openness and the obviousness of a danger are used as elements when apportioning negligence.\textsuperscript{170}

2. Supreme Court of Wisconsin Decisions and Theory

The open and obvious danger doctrine only has acted as an outright bar to a plaintiff's recovery in situations in which the "special legal

\textsuperscript{166} See Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897 (Wis. 1991).

\textsuperscript{167} Kloes, 487 N.W.2d at 81 (stating that playing baseball in inadequate light is not a "danger that presents a high degree of probability of harm so as to constitute an open and obvious danger").

\textsuperscript{168} See Hertelendy, 501 N.W.2d at 907-08.


\textsuperscript{170} See Hertelendy, 501 N.W.2d at 907.
relationships" exist of landowner-invitee and manufacturer-consumer. The court of appeals has reasoned that the open and obvious danger doctrine has been limited to those situations because there is "a strong public policy ... to justify such a direct abrogation of comparative negligence principles." Analysis of supreme court cases suggests that the possible public policy reasons for applying the open and obvious danger doctrine as an absolute defense to premises and products liability cases may be antiquated.

a. Antoniewicz v. Reszcynski and Pagelsdorf v. Safeco Insurance Co. of America

One of Wisconsin's earliest cases that challenged the application of the open and obvious danger doctrine as an absolute bar to recovery was Antoniewicz v. Reszcynski. As discussed above, the notion that a landowner may not be liable for injuries resulting from open and obvious dangers originated during a time when there was a distinction between licensees and invitees. A landowner generally owed a less stringent duty to a licensee than it did to an invitee on the premises; however, the supreme court in Antoniewicz abolished any distinction between duties owed to those who entered upon one's property. The supreme court reasoned that "[t]here is no reason why one who invites a guest to a party at his home should have less concern for that guest's safety than he has for the welfare of an insurance man who may come to the home to deliver a policy." As a result, the court held that "[t]he duty toward all persons who come upon property with the consent of the occupier will be that of ordinary care .... [N]egligence is to be determined by ascertaining whether the defendant's exercise of care..."
foreseeably created an unreasonable risk to others."\textsuperscript{178}

A reasonable argument can be made that \textit{Antoniewicz} should not affect the application of the open and obvious danger doctrine. The duty owed to an invitee prior to \textit{Antoniewicz} was "that of ordinary care under the circumstances."\textsuperscript{179} Since \textit{Antoniewicz} held that the duty toward all who enter upon property is that of "ordinary care," it can be argued that the court merely abolished landowner immunity in relation to licensees but did not alter any law regarding landowners' duty toward invitees.\textsuperscript{180} Prior to \textit{Antoniewicz}, the duty of ordinary care owed to an invitee did not require landowners to protect or warn invitees of open dangers.\textsuperscript{181} Therefore, if \textit{Antoniewicz} merely increased the standard of care toward licensees to the same standard of care owed to invitees, then landowners would remain immune from liability related to open dangers upon their premises. However, there is much discussion in \textit{Antoniewicz} to suggest that the court did more than just increase the duty owed to licensees to the same level as that owed to invitees.

First, language in \textit{Antoniewicz} contradicts the argument that the duty of ordinary care previously owed to invitees is the same as the duty of ordinary care newly imposed by the \textit{Antoniewicz} decision. In express language, the court "abolish[ed] the special immunities that heretofore applied to licensees \textit{and} invitees."\textsuperscript{182} Thus, the duty of "ordinary care under the circumstance" previously owed to an invitee necessarily possessed "special immunities" apart from other negligence cases.\textsuperscript{183} The court did not announce that the newly imposed standard of ordinary care is that which had originally applied to invitees; rather the court stated that "[b]y such standard of ordinary care, we mean the standard that is used in all other negligence cases in Wisconsin."\textsuperscript{184}

\textsuperscript{178} \textit{Id.} at 11.

\textsuperscript{179} \textit{E.g.,} \textit{id.} at 4.

\textsuperscript{180} Justice Robert Hansen's dissenting opinion expressed this view. Justice Hansen interpreted the majority decision as abolishing the distinction between licensee and invitee and imposing "not the lower duty owed to a [licensee], but the broader duty, heretofore owed only to business invitees." \textit{Id.} at 13 (R. Hansen, J., dissenting).

\textsuperscript{181} \textit{See supra} notes 98, 108-124 and accompanying text.

\textsuperscript{182} \textit{Antoniewicz}, 236 N.W.2d at 11 (emphasis added).

\textsuperscript{183} In \textit{A.E. Investment Corp. v. Link Builders, Inc.}, 214 N.W.2d 764 (Wis. 1974), the supreme court noted that landowner cases "are concerned with special types of legal relationships [and] are out of the mainstream of negligence law in Wisconsin. . . . Unless the landowner, by his conduct, places himself within an exception of the common law, he has an immunity from liability for negligence to one who comes upon his land." \textit{Id.} at 767-68.

\textsuperscript{184} \textit{Antoniewicz}, 236 N.W.2d at 11. The supreme court has stated that \textit{Antoniewicz} imposes upon a landowner the same duty of care as found in the ordinary negligence case. \textit{Shannon v. Shannon}, 442 N.W.2d 25, 30 & n.2 (Wis. 1989).
Additionally, the court in a footnote specifically rejected the argument that its decision merely "merged" landowners' duty toward licensees with the higher standard of care owed to invitees.\textsuperscript{185}

Second, once it is clear that the newly imposed duty of ordinary care is separate from the duty originally owed to invitees, it is evident that the court preferred comparative negligence principles rather than discussion of limited duty. For example, the court analogized to the \textit{McConville}\textsuperscript{186} decision, which abrogated assumption of risk in automobile guest cases,\textsuperscript{187} and determined that comparative negligence principles are capable of handling landowner cases.\textsuperscript{188} The court stated that "both the occupier of land and one who comes upon it are charged with the duty of ordinary care, and even though the owner be found negligent, his liability may well be reduced by the negligence of the plaintiff under the familiar principles of our comparative-negligence law."\textsuperscript{189}

Further, the court gave a concise example of the intended effect of the newly imposed ordinary care standard by comparing it with the reasoning of \textit{Scheeler v. Bahr},\textsuperscript{190} an open and obvious danger case.\textsuperscript{191} According to the court,

\begin{quote}
\textit{[u]nder the licensor-licensee, invitor-invitee rationale heretofore prevailing, were there a legal finding that there was no violation of duty of any kind to the entrant on the property, the question of contributory negligence did not arise . . . Under the ordinary-care standard, which we hold to be applicable to the occupier of land, a duty of ordinary care falls also upon the entrant, and his negligence must be considered by the jury as in any other negligence case.}\textsuperscript{192}
\end{quote}

Therefore, under the old "no duty" reasoning, contributory negligence analysis was irrelevant because the landowner violated no duty, but under the new standard, contributory negligence is paramount

\begin{footnotes}
\item[185] Id. at 12 n.5 ("The result of what the court does is not a merger of the licensee or invitee categories but the abolition of them as relevant legal distinctions. No category of licensee-invitee is created . . . Ordinary tort law applies.").
\item[187] See supra notes 59-69 and accompanying text.
\item[188] Antoniewicz, 236 N.W.2d at 10.
\item[189] Id.
\item[190] See supra notes 103-06 and accompanying text.
\item[191] Antoniewicz, 236 N.W.2d at 11-12.
\item[192] Id. (citations omitted)
\end{footnotes}
because it acts as an appropriate safeguard for defendants by reducing or even barring plaintiffs' recovery. The effect of *Antoniewicz* is that landowner "special immunities" are destroyed and landowner liability is placed within the context of ordinary negligence.

The language of *Antoniewicz*, like the passage of the comparative negligence statute and the abrogation of assumption of risk, stresses the comparative negligence principles such as allowing the jury to apportion negligence. These principles are corroborated in *Pagelsdorf v. Safeco Insurance Co. of America.*

In *Pagelsdorf*, the Supreme Court of Wisconsin utilized negligence principles when it analyzed liability in landlord-tenant situations. Prior to *Pagelsdorf*, landlords had no duty to maintain their premises with ordinary care to avoid injury to tenants or tenants' visitors. The basis for this traditional rule was that a landlord transfers possession and control over the property to the tenant upon conveyance of the lease. Therefore, the court again faced a situation in which landowners were protected due to their relationship with the injured person. Similar to *Antoniewicz*, the court eliminated the general rule of landlord immunity and instead mandated that landlords must maintain their premises within a standard of ordinary care.

At trial, the court applied the landowner-licensee jury instruction because the events of the case occurred before *Antoniewicz* abolished the distinctions between duties owed to a licensee as opposed to an invitee. The supreme court recognized that the traditional landlord

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193. *See supra* notes 29-31 and accompanying text.
194. *Antoniewicz*, 263 N.W.2d at 11. This duty of ordinary care that *Antoniewicz* imposes upon a landowner is the same duty of care as found in the ordinary negligence case. Shannon v. Shannon, 442 N.W.2d 25, 30 & n.2 (Wis. 1989).
195. 284 N.W.2d 55 (Wis. 1979).
196. *See id.* at 59. The plaintiff in *Pagelsdorf* was injured when he fell through a railing and off of a porch that was located on the defendant's property. *Id.* at 57. The defendant had leased the property, and the plaintiff was a visitor of the tenant. *Id.* at 56-57.
197. *Id.* at 58. There were some exceptions to this rule. *Id.* at 59. First, a landlord was liable to a tenant or visitor if the landlord contracted to repair the defect by which a tenant or visitor was injured. *Id.* Second, a landlord was liable for injury caused by a defect that the landlord knowingly concealed. *Id.* Third, leases for public use mandated ordinary care from a landlord. *Id.*
198. *Id.* at 58-59.
199. The holding in *Antoniewicz*, that landowners have a duty of ordinary care to all who enter their property, did not control this case because the events occurred prior to the *Antoniewicz* decision. *See id.* at 58.
200. *See id.* at 59.
201. *See id.* at 57-58. Prior to *Antoniewicz*, a landowner was liable to a licensee only if
Immunity rule would generally warrant such a jury instruction, but the court insisted that public policy required the abolishment of the ancient landowner immunity established in the "dark ages" of "agrarian England." The court reasoned that "[w]hatever justification the rule might once have had, there no longer seemed to be any reason to except landlords from a general duty of exercising ordinary care to prevent foreseeable harm." In yet another example of the supreme court utilizing comparative negligence principles, the court stated that negligence principles now determine landlord liability. Any evidence of obvious dangers should be examined as elements in the determination of negligence.

Interestingly, the decisions of Antoniewicz and Pagelsdorf did not put an end to the use of the open and obvious danger doctrine as an absolute bar to a plaintiff's recovery. Despite the supreme court's strong language ordering that landowners have a duty of reasonable care to all who enter upon their premises, the court of appeals continued to give the open and obvious danger doctrine force by agreeing that Antoniewicz did not "abolish[] all former Wisconsin case law involving the open and obvious danger exception to ordinary negligence."

The Supreme Court of Wisconsin first noted the apparent "split of authority" in Shannon v. Shannon. The court referred to its language from Pagelsdorf that stated that landowners owe a duty of ordinary care to anyone on their premises and that obvious dangers and defects are "relevant only insofar as they bear on the ultimate question: Did the landowner failed to warn the licensee of hidden dangers, otherwise known as "traps." See id. at 58.

See id. at 59.

See id.

See id. ("Accordingly, a landlord's conduct should be appraised according to negligence principles. Questions of control, hidden defects, and common use would be relevant only as bearing on the general determination of negligence, including foreseeability and unreasonableness of the risk of harm.").

See Davenport v. Gillmore, 431 N.W.2d 701, 705 (Wis. Ct. App. 1988) ("Although Antoniewicz abrogated the distinction between licensees and invitees, we still recognize the open and obvious danger exception to the duty of ordinary care."); Waters v. United States Fid. & Guar. Co., 369 N.W.2d 755, 758-59 (Wis. Ct. App. 1985) ("We conclude that prior to Antoniewicz there was no obligation to protect the invitee against open and obvious dangers that the invitee may reasonably be expected to discover and that post-Antoniewicz this rule remains the same."); Maci v. State Farm Fire & Cas. Co., 314 N.W.2d 914, 918 (Wis. Ct. App. 1981) ("We conclude that Antoniewicz and Pagelsdorf did not abrogate the 'warning/open and obvious' limitations on liability.").

Waters, 369 N.W.2d at 756.

442 N.W.2d 25 (Wis. 1989).
landlord exercise ordinary care in the maintenance of the premises under all the circumstances?" However, the court appeared to be confused that the court of appeals had not interpreted this language as putting an end to the landowner open and obvious danger doctrine. Nevertheless, the court chose not to directly reconcile the apparent split because the parties in Shannon had not briefed the issue.

b. Griebler v. Doughboy Recreational, Inc.

However, in 1991, the supreme court in Griebler v. Doughboy Recreational, Inc.212 appeared to accept the validity of the open and obvious danger absolute defense once again. Following the reasoning of a pre-Antoniewicz case, Scheeler v. Bahr,213 the court concluded that the act of diving into water of an unknown depth was an "open and obvious danger as a matter of law."214 The court clearly utilized the doctrine as an absolute bar when it dismissed the plaintiff's entire case and held that "the open and obvious danger defense applies whenever a plaintiff voluntarily confronts an open and obvious condition and a reasonable person in the position of the plaintiff would recognize the condition and the risk the condition presents."215

c. Rockweit v. Senecal

Finally, the Supreme Court of Wisconsin addressed the application of the open and obvious danger doctrine in Rockweit v. Senecal,216 but unfortunately the court's language was not strong enough to immediately put any questions about the doctrine to rest. The plaintiff in Rockweit, an eighteen-month-old child, fell into a fire pit at the campground where his family was staying.217 The defendant, a camper who neglected to extinguish the hot embers of the fire,218 argued that she

209. Id. at 31 (quoting Pagelsdorf v. Safeco Ins. Co. of Am., 284 N.W.2d 55, 61 (Wis. 1979)).
210. See id.
211. See id.
212. 466 N.W.2d 897 (Wis. 1991).
213. 164 N.W.2d 310, 313 (Wis. 1969) (holding that "the plaintiff must be held to knowledge and appreciation of the risk likely to be encountered by plunging head first into the unplumbed depths of the murky lake").
215. Id. at 898 (footnote omitted). However, Griebler does not affect the Maci exception or instances in which a person is likely to be distracted. Id. at 898 n.1.
216. 541 N.W.2d 742 (Wis. 1995).
217. Id.
218. Id. at 744.
had no duty to remedy the situation because the fire was an open and obvious danger.\textsuperscript{219}

The court of appeals analyzed the different applications of the open and obvious danger doctrine at length.\textsuperscript{220} According to the court of appeals, the doctrine acts as a complete bar to recovery in cases in which landowner-invitee or manufacturer-consumer relationships exist; in these situations, the defense acts as a complete bar because the defendant is absolved of any duty to the plaintiff.\textsuperscript{221} On the other hand, the second application is based on comparative negligence principles and is utilized in ordinary negligence cases.\textsuperscript{222} Negligence is weighed as "a matter of law" and the open and obvious danger defense acts as a bar to recovery in accordance with the comparative negligence statute.\textsuperscript{223}

After all the discussion about the application of the open and obvious doctrine by the court of appeals, the supreme court decided \textit{Rockweit} on public policy grounds rather than utilizing the open and obvious danger doctrine.\textsuperscript{224} Nevertheless, the court took the opportunity to address the doctrine because of "the apparent conflict of authority among the court of appeals."\textsuperscript{225}

The first thing the court did was "expressly reaffirm [its] prior holding in \textit{Pagelsdorf v. Safeco Ins. Co.} that a landlord owes his or her tenant or anyone else on his or her premises a duty to exercise ordinary care... '[N]otice of the defect, its obviousness... are all relevant only insofar as they bear on" the determination of whether landlords maintained their premises using ordinary care.\textsuperscript{226} The supreme court further stated,

\footnotesize

\begin{itemize}
\item \textsuperscript{219} \textit{Id.} at 748. The plaintiff responded by arguing that the defendant could not utilize the open and obvious danger doctrine as an absolute bar because the defendant "lacked the requisite 'owner' or 'possessor' status." \textit{Id.}
\item \textsuperscript{220} \textit{See} Rockweit v. Senecal, 522 N.W.2d 575 (Wis. Ct. App. 1994), \textit{rev'd}, 541 N.W.2d 742 (Wis. 1995).
\item \textsuperscript{221} \textit{See id.} at 580 ("This meaning of the open and obvious danger doctrine—that the defendant owes no duty to the plaintiff—is limited to those situations involving a landowner's duty to invitees or other special legal relationships, such as the manufacturer-consumer relationship."). This application of the defense could not be utilized because \textit{Rockweit} involved campers who all "had the same relationship to one another." \textit{Id.} at 581.
\item \textsuperscript{222} \textit{See id.} at 581.
\item \textsuperscript{223} \textit{Id.} The court did not use this application of the defense because a comparison of negligence was not possible because in Wisconsin a child under the age of seven cannot be found negligent. \textit{See id.}
\item \textsuperscript{224} Rockweit v. Senecal, 541 N.W.2d 742, 748-51 (Wis. 1995).
\item \textsuperscript{225} \textit{Id.} at 748.
\item \textsuperscript{226} \textit{Id.} (citation omitted).
\end{itemize}
Our decisions in Pagelsdorf and Antoniewicz v. Reszczynski abrogated the common law immunity by subsuming the concept of open and obvious danger into the consideration of common law negligence. In the ordinary negligence case, if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery.\(^{227}\)

The language from Rockweit, although dictum, strongly implies that the distinction made by the court of appeals was erroneous. The supreme court reiterated that the open and obvious danger doctrine is subsumed into common-law negligence. In common-law negligence, the doctrine is not to be used as an absolute defense, but rather as merely one element meriting the jury's consideration in the comparative negligence scheme.

3. The Application of the Open and Obvious Danger Defense Since Rockweit

Despite the supreme court's attempt to clarify the "conflict of authority" regarding open and obvious dangers, the court of appeals has interpreted Rockweit inconsistently. The court of appeals first noted the conflict between Grieben and Rockweit in a 1997 products liability case, Hansen v. New Holland North America, Inc.\(^{228}\) According to the court, Grieben implies that the open and obvious danger doctrine serves as an "absolute defense" in manufacturer-consumer cases\(^{229}\) while Rockweit questions that notion.\(^{230}\) Instead of relying on Rockweit's language to determine the proper method for open and obvious danger analysis, Hansen, in dicta,\(^ {231}\) focused on the public policy argument that

\(^{227}\) Id. at 748-49 (citation omitted).

\(^{228}\) 574 N.W.2d 250, 254 (Wis. 1997).

\(^{229}\) Id.

\(^{230}\) Id. (footnotes omitted).

\(^{231}\) The court chose not to resolve the apparent Grieben-Rockweit conflict because the
"[c]oncentrating only on the user's conduct ignores the manufacturer's responsibility for producing that danger, and indeed creates an incentive for manufacturers to ensure that hazards are in fact open and obvious." Since the court found it was not good policy to focus solely on a plaintiff's conduct, the court determined that comparative negligence principles, with the jury comparing the negligence of both the plaintiff and the defendant manufacturer, are better suited to solve open and obvious issues.

Similarly, the court of appeals decision of Wagner v. Wisconsin Municipal Mutual Insurance Co. implies that there are still two different applications of the open and obvious danger doctrine. The first application utilizes the comparative negligence statute as an absolute bar because facing an open and obvious danger "is tantamount to a determination that the plaintiff's negligence exceeds the defendant's negligence as a matter of law." The second application is governed by the comparative negligence principle of allowing the jury to apportion negligence, and courts apply this use of the doctrine in ordinary negligence cases. As the cases illustrate, Rockweit did not adequately convince Wisconsin courts that there should be only one application of the open and obvious danger doctrine, with the obviousness of a danger merely being an element used when apportioning negligence.

4. Strasser v. Transtech Mobile Fleet Service, Inc.—The Supreme Court's Latest Decision

In the supreme court's most recent discussion of the open and obvious danger doctrine, Strasser v. Transtech Mobile Fleet Service, Inc. the court distinguished the open and obvious danger doctrine from issue of whether the danger was actually open and obvious had yet been answered. See id. ("[B]ecause there is an issue of fact regarding whether the circumstances presented an open and obvious danger, it is not necessary at this point to determine whether Griebler mandates immunity.").

232. Id. Cf. supra notes 72-74 and accompanying text (stating a similar reason for abolishing assumption of risk in master and servant cases).

233. See Hansen, 574 N.W.2d at 254.

234. 601 N.W.2d 856 (Wis. Ct. App. 1999).

235. See id. at 859-60.

236. See id. at 860. Illustrative of its view that there are different applications of the rule, the court of appeals stated, "We are addressing the 'open and obvious danger' doctrine only as it applies to cases involving ordinary negligence." Id. at n.4.

237. 2000 WI 87, 613 N.W.2d 142. In Strasser, a crane operator slipped on a ladder fabricated by the defendant. Id. ¶ 1, 613 N.W.2d at 145. The plaintiff sued for negligent
use of open and obvious dangers in the determination of negligence.\textsuperscript{238} According to the court, the "\textit{doctrine} operates as an affirmative defense that allows a jury to allocate a plaintiff's contributory negligence."\textsuperscript{239} However, using the doctrine as an affirmative defense did not prevent the court from analyzing open and obvious dangers in its initial determination of negligence.\textsuperscript{240} For the failure to warn claim, the court held that a manufacturer's standard of ordinary care is not breached by failing to warn of dangers that consumers are expected to notice and realize.\textsuperscript{241} Since it was reasonable for the defendant to believe the consumer would realize the risk, the failure to warn was not negligence.\textsuperscript{242} As for the negligent manufacturing and design claims, the court added that, upon a finding of negligence, a jury may "consider whether [the plaintiff] confronted an open and obvious danger in its negligence allocation."\textsuperscript{243} It is evident from this decision that a court analyzing failure to warn claims may consider the open and obvious nature of a danger when determining if negligence exists.\textsuperscript{244} Once a defendant is held to be negligent, then a plaintiff's confrontation of an open and obvious danger is an element properly considered in a contributory negligence determination by the jury.

IV. WHERE DOES THE OPEN AND OBVIOUS DANGER DOCTRINE BELONG IN WISCONSIN?

The most recent supreme court decisions discussing the open and obvious danger doctrine have not been the model of consistency. If a manufacturing, negligent design, and negligent failure to warn of a defect. \textit{Id.} \textsuperscript{245} ¶ 22, 613 N.W.2d at 148. A large part of the decision involves the issue of whether the defendant was a manufacturer of the ladder or merely a reconditioner, but this discussion is irrelevant to this Comment.

\textsuperscript{238} See \textit{id.} ¶ 60, 613 N.W.2d at 156 ("The issue of ordinary care . . . is distinct from the open and obvious danger doctrine.").

\textsuperscript{239} Id. ¶ 60, 613 N.W.2d at 156 (emphasis added).

\textsuperscript{240} Id. ¶¶ 60-63, 613 N.W.2d at 155-56.

\textsuperscript{241} Id. ¶¶ 58-59, 613 N.W.2d at 154-55. The court cited section 388 of the \textit{Restatement (Second) of Torts}, which says that one who supplies chattel to another must warn of defects only if there is "'no reason to believe' that the user 'will realize' the item's dangerous condition." \textit{Id.} ¶ 58, 613 N.W.2d at 155.

\textsuperscript{242} Id. ¶ 59, 613 N.W.2d at 155.

\textsuperscript{243} Id. ¶ 61, 613 N.W.2d at 156.

\textsuperscript{244} Id. ¶ 60, 613 N.W.2d at 155 ("Strasser argues that the question whether ordinary care required Transtech to warn him about the ladders should be presented to the jury because whether a plaintiff confronted an 'open and obvious danger' is an element to be considered by the factfinder in apportioning negligence and will not entirely preclude the plaintiff's recovery. We disagree.") (citation omitted).
court were to follow Rockweit's broad proclamation, open and obvious dangers would "merely" be an element a jury could consider in its apportionment of negligence. However, this cannot represent the sole use of the doctrine because the supreme court in Strasser further analyzed open and obvious dangers within its discussion of duty and negligence as a matter of law. After reviewing Wisconsin case law and the principles behind comparative negligence, it is evident that the open and obvious danger doctrine does not act as an absolute bar for ordinary negligence, premises liability, and claims against manufacturers based upon negligence rather than strict liability. However, it is likely that open and obvious dangers will continue to bar strict products liability claims and claims based upon a failure to warn.

A. Premises Liability

The reason why Rockweit controls landowner cases is simple: the court relied on Antoniewicz and Pagelsdorf, both premises liability cases, for the idea that the open and obvious danger doctrine has been incorporated into ordinary negligence consideration. Since Rockweit expressly cited the landowner and landlord cases, it is practically unquestionable that the court intended to abrogate the open and obvious danger doctrine as a complete defense in premises liability cases.

Additionally, the idea of limited duty or immunity based upon open and obvious dangers does not comport with the traditional concepts of negligence law in Wisconsin. As stated above, people in Wisconsin have a duty of ordinary care to all people they encounter, and comparative negligence principles are designed to appropriately manage breaches of such care. An injured person does not gain an undue advantage for his or her own negligence because the contributory negligence defense decreases any award in proportion to the injured person's negligence. Analyzing liability in terms of duty is likely to render the comparative negligence statute useless because a jury is unable to apportion any liability to a party who owes no duty of reasonable care. Likewise, if a

245. See supra notes 226-27 and accompanying text.
246. See supra Part III.B.4.
247. See Rockweit v. Senecal, 541 N.W.2d 742, 748 (Wis. 1995).
249. See supra notes 160-62 and accompanying text.
250. See supra note 31 and accompanying text.
251. The Court of Appeals of Utah held that the enactment of its comparative
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confrontation of an open and obvious danger is tantamount to a finding that a plaintiff's negligence necessarily exceeds that of a defendant, then the jury's role of apportioning negligence is threatened.

Finally, in addition to the contributory negligence defense, a defendant is always safeguarded with the possibility that liability may be limited on the basis of public policy. In Wisconsin, public policy rather than duty or causation limits liability when imposing liability would be unjust or impractical. Public policy issues are questions of law that are best answered by a court after a jury has apportioned negligence. However, a court may limit liability before a trial when a complaint clearly presents public policy issues and when the facts of a case are simple. Public policy limitations may not be the ideal way to address landowner negligence, but the limitations can protect those cases in

negligence statute in effect abrogated the open and obvious danger doctrine as an absolute defense. Donahue v. Durfee, 780 P.2d 1275, 1279 (Utah Ct. App. 1989) ("We hold that by . . . establishing a comparative negligence system, the Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery."). The court based its decision on two grounds: "First, the open and obvious danger rule is fundamentally incompatible with a comparative negligence scheme . . . ." Id:

In its reasoning, the court quoted an Idaho case that stated,

[I]f the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the landowner's duty, then there would be no negligence to compare—and, therefore, no recovery. The effect would be to resurrect contributory negligence as an absolute bar to recovery in cases involving a land possessor's liability to invitees. Id. (quoting Keller v. Holiday Inns, Inc., 671 P.2d 1112, 1119 (Idaho Ct. App. 1983)). Second, the court held that the open and obvious danger doctrine too closely resembled assumption of risk, which had been expressly abrogated. Id. at 1279-80.


253. See Rockweit, 541 N.W.2d at 750. The public policy factors generally recognized are the following:

(1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point.


254. Morgan v. Penn. Gen. Ins. Co., 275 N.W.2d 660, 667 (Wis. 1979) ("The court's position is that it is generally better procedure to submit the negligence and cause-in-fact issues to the jury before addressing the public policy issue.").

255. Bowen, 517 N.W.2d at 443 (Wis. 1994).
which imposition of liability is unjust or not in the best interest of society.

B. Products Liability

Strong policy reasons support the idea that manufacturers should not be absolutely immune solely because product defects are obvious to the average consumer. For example, manufacturers are in the best position to make products reasonably safe.\(^{256}\) If a danger is obvious to the average consumer, it is also obvious to a manufacturer. When a manufacturer sees an obvious danger inherent in its product, it is in the public's best interest that the manufacturer does something to remedy the hazard. Manufacturers may try to eliminate a defect by utilizing a safer design, or they may provide adequate protections against the defect. If it is unreasonable to do either of those, the manufacturer should adequately warn the consumer of the danger. By granting immunity for obvious defects, manufacturers are not encouraged to design and produce their products as safe as reasonably possible. On the contrary, immunity for open and obvious dangers provides an incentive for manufacturers to make hazards as openly dangerous as possible.\(^{257}\)

Many states have rejected the open and obvious danger doctrine for similar policy reasons.\(^{258}\) New York was one of the first states to subsume the doctrine\(^{259}\) into comparative negligence analysis, and the

\(^{256}\) See Dippel v. Sciano, 155 N.W.2d 55, 58 (Wis. 1967).

\(^{257}\) The court of appeals accepted this argument in dicta in Hansen v. New Holland North America, Inc., 574 N.W.2d 250, 254 (Wis. Ct. App. 1997). The court agreed that the open and obvious danger doctrine is best applied by the jury when apportioning negligence. Id. The court stated,

We agree with the Hansens' contention that focusing solely on the user's conduct will frustrate public policy considerations underlying product liability law. A danger that is open and obvious to a consumer is equally apparent to the manufacturer. Concentrating only on the user's conduct ignores the manufacturer's responsibility for producing that danger, and indeed creates an incentive for manufacturers to ensure that hazards are in fact open and obvious, possibly minimizing needed safeguards and exposure to liability for designing dangerous products.

Id.

\(^{258}\) See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporters' note IV.C (1998) ("A strong majority of courts have rejected the 'open and obvious' or 'patent danger' rule as an absolute defense to a claim of design defect.").

\(^{259}\) New York referred to the doctrine as the "patent-danger doctrine." See Micallef v. Miehle Co., 348 N.E.2d 571, 578 (N.Y. 1976). A concise statement of the patent-danger doctrine is:
court reasoned that increasing manufacturers' responsibility promotes the public interest. Florida, noting the nation's "modern trend" to analyze the doctrine under comparative negligence, followed New York's lead and refused to utilize the doctrine as an absolute bar because it encourages hazardous designs and places "the entire accidental loss on the injured plaintiff, notwithstanding the fact that the manufacturer was partly at fault." Indeed, widespread criticism of the open and obvious danger doctrine is noted in the *Restatement (Third) of Torts*.

The *Restatement (Third) of Torts* analyzes design defects differently than manufacturing defects. According to the *Restatement*, manufacturing defects disappoint a consumer's reasonable expectations by causing a product to stray from its intended design. Holding manufacturers strictly liable for manufacturing defects provides an incentive for manufacturers to ensure that a product is being manufactured consistent with its design. On the other hand, a claim that a design is defective attacks the very standards to which products are intended to conform. Instead of analyzing whether a product met the standards imposed by its own design, courts must examine whether the design itself was unreasonably dangerous. According to the *Restatement*, the best method for determining whether a design is unreasonably dangerous is to utilize a risk-utility test.

A risk-utility test is a flexible approach that weighs a product's danger versus a product's utility. Open and obvious dangers under risk-utility analysis are just one of many factors a jury may consider

"If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. . . ."

*Id.* (quoting Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950)).

260. *See id.* at 577 ("A casting of increased responsibility upon the manufacturer, who stands in a superior position to recognize and cure defects, for improper conduct in the placement of finished products into the channels of commerce furthers the public interest.").


262. *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2 reporters' note IV.C (1998) ("Academic commentators have been almost unanimous in their criticism of the 'open and obvious danger' rule.").


264. *See id.* § 2 cmt. a.

265. *See id.*

266. *See id.*

267. *See id.*

when deciding if a product is unreasonably dangerous.\textsuperscript{269} This flexible
test protects the consumer by imposing a duty upon manufacturers to
make products reasonably safe, without excepting obvious dangers.\textsuperscript{270}
On the other hand, the balancing test does not charge manufacturers
with the duty of creating a completely safe product.\textsuperscript{271} For example,
there may be situations in which dangers are so obvious that the
likelihood of a consumer facing such dangers is very low.\textsuperscript{272} The minimal
risk of injury weighed against factors such as the usefulness of the
product and the cost of making a product safer may result in a finding
that the product is not defective.

Unlike the majority of states, Wisconsin is committed to analyzing
strict products liability claims under the consumer-contemplation test.
Arguing that \textit{Rockweit} abrogated the consumer-contemplation test is
likely to be futile because the basis of \textit{Rockweit}'s discussion pertained to

\textsuperscript{269} \textit{See}, e.g., \textit{Sperry-New Holland v. Prestage}, 617 So. 2d 248, 256 n.4 (Miss. 1993)
("Having here reiterated this Court's adoption of a 'risk-utility' analysis for products liability
cases, we hold, necessarily, that the [open and obvious danger doctrine] bar is no longer
applicable in Mississippi."). Some suggested factors are:

The usefulness and desirability of the product—its utility to the user and to the
public as a whole.
The safety aspects of the product—the likelihood that it will cause injury, and the
probable seriousness of the injury.
The availability of a substitute product which would meet the same need and not be
as unsafe.
The manufacturer's ability to eliminate the unsafe character of the product without
impairing its usefulness or making it too expensive to maintain its utility.
The user's ability to avoid danger by the exercise of care in the use of the product.
The user's anticipated awareness of the dangers inherent in the product and their
avoidability, because of general knowledge of the obvious condition of the product,
or of the existence of suitable warnings or instructions.
The feasibility, on the part of the manufacturer, of spreading the loss by setting the
price of the product or carrying liability insurance.

\textit{Id.} at n.3 (quoting John W. Wade, \textit{On the Nature of Strict Tort Liability for Products}, 44 Miss.
However, Mississippi's legislature most likely condemned the "risk-utility" test when it
passed a statute that imposed liability for design defects only when "the product 'failed to
(quoting MISS. CODE ANN. § 11-1-63(f)(11)).

\textsuperscript{270} \textit{Sperry}, 617 So. 2d at 256.

\textsuperscript{271} \textit{Id.} \textit{See also} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmr. a.
(1998) ("Society does not benefit from products that are excessively safe—for example,
automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits
from products that are too risky. Society benefits most when the right, or optimal, amount of
product safety is achieved.").

\textsuperscript{272} \textit{See} Halek \textit{v. United States}, 178 F.3d 481, 484-85 (7th Cir. 1999).
the abrogation of landowner immunity, which is quite distinct from strict-liability theory. In fact, a recent court of appeals decision applying the consumer-contemplation test does not even allude to Rockweit's discussion of the open and obvious danger doctrine.\(^{273}\) Accordingly, until the court clearly abrogates the consumer-contemplation test in strict-liability law, manufacturers will not be liable in strict liability for products whose defects are open and obvious.

However, the threat that manufacturers will be absolutely immune for creating obviously dangerous products is mitigated if consumers are allowed to bring claims for negligent manufacturing or negligent design of products.\(^{274}\) As this Comment indicates, the open and obvious danger doctrine is applicable to these negligence claims because of the Griebler decision, not because of the consumer-contemplation test.\(^{275}\) In Griebler, the supreme court improperly relied upon Vincer when it combined strict liability analysis with negligence analysis.\(^{276}\) Established Wisconsin law mandates that strict liability analysis and negligence analysis should not be combined.\(^{277}\) Additionally, a majority of the discussion in Griebler pertained to landowner open and obvious danger cases, which have been abrogated by Rockweit.\(^{278}\) Since Rockweit abrogated the landowner open and obvious danger doctrine and Griebler's reliance on Vincer is inconsistent with Wisconsin law, there is no existing basis for applying the open and obvious danger doctrine as an absolute bar in products liability negligence claims.\(^{279}\) Negligent design and negligent manufacturing claims should be treated under the same "well established rules of negligence" as found in ordinary negligence claims,\(^{280}\) and open and obvious dangers should be "mere[... element[s] to be considered by the jury in apportioning negligence and

\(^{273}\) See Tanner v. Shoupe, 596 N.W.2d 805, 811-12 (Wis. Ct. App. 1999). The court reiterated that a defective design claim is not unreasonably dangerous if the defect is open and obvious to the average consumer. \textit{Id.} at 812.

\(^{274}\) The risk-utility test "achieve[s] the same general objectives as does liability predicated on negligence." \textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2 cmt. a (1998).

\(^{275}\) \textit{See supra} Part III.A.2.b.

\(^{276}\) \textit{See supra} note 150 and accompanying text.

\(^{277}\) \textit{See} Sharp v. Case Corp., 595 N.W.2d 380, 383 (1999) (reinforcing "\textit{Greiten v. LaDow}, which allows recovery for the negligent design of a product even though the product is not even though the product is not unreasonably dangerous in a strict product liability sense.") (citation omitted). \textit{See also supra} note 150 and accompanying text.

\(^{278}\) \textit{See supra} Part IV.A.

\(^{279}\) Strasser supports the proposition that these negligence claims are not barred by a confrontation of an open and obvious danger. \textit{See supra} Part III.B.4.

\(^{280}\) \textit{Greiten v. LaDow}, 235 N.W.2d 677, 684-85 (Wis. 1975).
will not operate to completely bar the plaintiff's recovery.\textsuperscript{281}

C. Failure to Warn

The situation in which open and obvious dangers are likely to act as a bar to a plaintiff's recovery are those claims based solely on a failure to warn theory. As \textit{Strasser} makes clear, a manufacturer is not liable under a failure to warn theory if a product defect is open and obvious.\textsuperscript{282} The rationale behind such a rule is simple: the obvious danger acts as sufficient warning in and of itself.\textsuperscript{283} The purpose of imposing a duty to warn in the first place is to reduce a product's or condition's risk of injury.\textsuperscript{284} If the danger and condition are so obvious that the average person would realize the risk, warning of such danger would in no way reduce the risk of injury.\textsuperscript{285} On the contrary, imposing a duty to warn for all obvious dangers would likely lessen the impact of warnings associated with truly hidden and latent defects.\textsuperscript{286}

Consistent with prior case law developed under the theory that landowners and manufacturers owe no duty to warn of open and obvious dangers, liability may be imposed for failing to warn of obvious dangers in certain situations. For example, the standard of care might dictate that landowners have to warn of obvious dangers when situations arise in which a person is likely to be distracted or is likely to forget that a danger exists.\textsuperscript{287} In situations such as these, the fact that the danger may be obvious to the reasonable undistracted person should not prevent a claim. Rather, a rule similar to section 343A of the

\textsuperscript{281} Rockweit v. Senecal, 541 N.W.2d 742, 748-49 (Wis. 1995).
\textsuperscript{282} See supra notes 241-42 and accompanying text.
\textsuperscript{283} See \textit{Carr v. San-Tan, Inc.}, 543 N.W.2d 303, 306 (Iowa Ct. App. 1995). If a danger is truly open and obvious, then a warning will add nothing to an average person's knowledge and awareness. The logic is sound enough that the legislature in Mississippi reestablished the open and obvious danger doctrine for failure to warn actions in products liability after the courts had abolished it. See \textit{Materials Transp. Co. v. Newman}, 656 So. 2d 1199, 1203 \& n.1 (Miss. 1995). See also Daniels v. Bucyrus-Erie Corp., 516 S.E.2d 848, 849 (Ga. Ct. App. 1999) ("An open and obvious danger no longer bars design defect claims in Georgia, but may bar 'failure to warn' claims.") (citing Ogletree v. Navistar Int'l Transp. Corp., 500 S.E.2d 570 (Ga. 1998)); Thomas V. Van Flein, \textit{Prospective Application of the Restatement (Third) of Torts: Products Liability in Alaska}, 17 Alaska L. Rev. 1, 46 (2000) ("While obviousness of danger may be a defense to a failure to warn claim, it is not a recognized defense to a design claim.").
\textsuperscript{284} Puckett v. Oakfabco, Inc., 979 P.2d 1174, 1182 (Idaho 1999).
\textsuperscript{285} Id.
\textsuperscript{286} \textit{RESTATEMENT (THIRD) OF TORTS} § 2 cmt. j (1998).
\textsuperscript{287} \textit{RESTATEMENT (SECOND) OF TORTS} § 343A (1965). See also Lovick v. Wil-Rich, 588 N.W.2d 688, 700 (Iowa 1999) (stating that there is a duty to warn of open and obvious dangers when "harm can still be anticipated").
Restatement (Second) of Torts is appropriate: liability may be imposed for a failure to warn of obvious dangers when such dangers are likely to be encountered despite such knowledge of its obviousness.

However, even if the open and obvious danger doctrine bars a failure to warn claim, it should not necessarily bar additional negligence claims. In some situations, landowners or manufacturers should not be able to avoid culpability for unreasonable dangers simply by warning of such dangers. Instead, similar to the risk-utility test used in products liability cases, circumstances specific to the case should determine whether ordinary care has been breached. For example, if a simple cover could easily eliminate dangers associated with an old-fashioned, unused, (wishing) well, ordinary care might be breached if a landowner merely posts a warning sign. The fact that a warning accompanies a danger should not necessarily make a danger reasonable. If a warning disposes of liability, then the open and obvious danger doctrine would retain its original force because an adequate warning merely makes a danger obvious. In accord with the policy reasons behind abrogating the open and obvious danger doctrine, a claim should not be barred if a plaintiff can prove that the defendant acted in a manner that created an unreasonable, foreseeable risk to the world at large. Therefore, the open and obvious danger doctrine may bar a failure to warn claim, but it would not necessarily bar an accompanying negligence claim.

V. CONCLUSION

Wisconsin tort law has been gradually moving away from doctrines that absolutely bar a plaintiff from recovery. The Legislature took a
large step when it passed the comparative negligence statute in 1931. Under the comparative negligence regime, a plaintiff's negligence reduces an award in proportion to a plaintiff's negligence and does not necessarily act as a total bar to a plaintiff's recovery.

The Supreme Court of Wisconsin reinforced comparative negligence principles when it abrogated assumption of risk. Some of the same policy reasons the court used when it subsumed the assumption of risk doctrine into comparative negligence principles apply to the open and obvious danger doctrine. Namely, as the court noted about assumption of risk in *Colson*, the open and obvious danger doctrine detracts from the incentive to make premises and products as safe as reasonably possible. A defendant should not be immune from liability simply by creating obviously dangerous products or by allowing obvious dangers to exist upon land. Better policy is to have all people act with ordinary care under the circumstances to avoid foreseeable injuries. Case specific circumstances should dictate whether a person is liable for obvious dangers.

Additionally, common-law justifications and policy arguments that originally supported the landowner open and obvious danger doctrine no longer apply in Wisconsin. Typical landowners no longer possess "vast estates" that are burdensome to maintain safely. Landowner special immunities pertaining to duties owed to licensees and invitees have been destroyed, and landowners now have a duty to use reasonable

292. See supra notes 22-26 and accompanying text.
294. See supra Part II.B.
295. An argument can be made that the main difference between assumption of risk and the open and obvious danger doctrine is merely semantics. Compare Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897, 898 (Wis. 1991) ("[T]he open and obvious danger defense applies whenever a plaintiff voluntarily confronts an open and obvious condition and a reasonable person in the position of the plaintiff would recognize the condition and the risk the condition presents.") (footnote omitted), with McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14, 16 (Wis. 1962) ("[I]njured party has assumed the risk of the particular conduct . . . [by its] willingness to proceed in the face of a hazard to his safety, known and appreciated by him."). See also Donahue v. Durfee, 780 P.2d 1275, 1279-80 (Utah Ct. App. 1989) ("It would defy rationality to maintain the open and obvious danger rule as a complete bar to recovery where the essentially indistinguishable assumption of risk doctrine no longer compels such a result.").
298. See supra notes 99-102 and accompanying text.
care when maintaining their premises. With this duty or ordinary care, premises liability claims are governed by Wisconsin's general negligence analysis in which people are negligent when their actions or inaction cause an unreasonable risk of harm. Prior cases that discuss landowner's limited duties are no longer consistent with Wisconsin tort law.

Finally, the supreme court decisions allow for a fair evaluation of the law. Following the supreme court's broad proclamation in *Rockweit* and its discussion in *Strasser*, the open and obvious danger doctrine acts as a complete bar only in strict products liability cases and cases based upon a failure to warn. As for ordinary negligence cases, which include landowner cases and products liability negligence cases, open and obvious dangers should merely be elements that can be considered when apportioning negligence and should not act as an absolute bar to recovery.

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299. See Antoniewicz v. Reszcynski, 326 N.W.2d 1, 11 (Wis. 1975).

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