Features

What Now? The Fall of the 'Open and Obvious' Doctrine

Kari L. Melkonian And Laura A. Alton

On July 28, the Michigan Supreme Court overturned its long-standing rule that property owners have no duty to protect against open-and-obvious dangers.[1] For the past 20-plus years, the "open and obvious" doctrine was a go-to defense for premises-liability defendants because it e□ectively eliminated a premises owner's duty to protect against conditions that were visible upon casual inspection or otherwise objectively known to a reasonably prudent person.[2] Historically, premises owners owed no duty to protect against or warn of open-and-obvious conditions because such conditions, by their nature, provide individuals with notice of, and an opportunity to avoid, potential risks.[3] Now, the "open and obvious" doctrine is relevant only to whether the premises owner breached a duty of care and to the issue of the plaintiff 's comparative fault.

OVERVIEW OF PREMISES-LIABILITY PRINCIPLES

In Michigan, premises-liability cases are similar to other negligence cases in that the plaintiff must prove (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) an injury proximately resulting from that breach; and (4) damages.[4] Duties owed by premises owners depend on a visitor's status.

There are three common-law categories for persons who enter the land or premises of another: trespasser, licensee, and invitee.[5] Each of these categories corresponds with a different standard of care that the owner owes to a person injured on the premises.[6]

A "trespasser" is a person who enters another's land without the landowner's consent. A landowner owes no duty to a trespasser, except to refrain from injuring them by "willful and wanton" misconduct.[7]

Licensees, on the other hand, are those privileged to enter the land of another by virtue of the owner's consent.[8] Adult social guests fall into this category.[9] Owners owe only a limited duty to social guests.[10] they owe no duty to make the premises safe for a licensee, other than to warn of concealed defects known to them and to refrain from willful and wanton misconduct that may injure a licensee.[11] A premises owner has no duty to inspect the premises or to take affirmative steps to make the premises safe for the licensee's visit.[12]

An invitee is a person who enters the land of another upon an invitation that carries "an implied representation, assurance, or understanding that reasonable care has been used" to make the premises safe.[13] To establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose.[14] A property owner/possessor owes an invitee a duty to fix, guard against, or warn of unreasonable risks of harm posed by dangerous conditions that the possessor knows, or should know, about.[15] Put another way, invitees are owed the highest duty of care.

Regardless of a plaintiff 's status, comparative fault is a consideration for the trier of fact in premises-liability cases. Michigan follows the doctrine of "pure comparative negligence," which distributes responsibility according to the proportionate fault of the parties.

Under Michigan's comparative-fault statute, MCL 600.2959, a party's claim for economic damages is reduced proportionately to their fault. Importantly, if a plaintiff 's percentage of fault is "greater than the aggregate fault of the other" parties to the action, then the plaintiff is barred from recovering noneconomic damages.[16]

ORDINARY NEGLIGENCE VS. PREMISES LIABILITY

Though the same elements apply, there is a distinction between claims that sound in "ordinary negligence" and those that sound in premises liability.

If the injury arises from a condition of the premises rather than an activity on the premises, the claim sounds in premises liability — rather than ordinary negligence — even if the plaintiff alleges that the premises owner created the condition.[17]

This distinction is important because certain premises-liability defenses (e.g., open and obvious) are not available in ordinary negligence claims. So plaintiffs often attempt to avoid premises-liability defenses by labeling their claims as "ordinary negligence." However, courts are not bound by the label attached to the plaintiff 's claim; rather, a court must look beyond the label of the claim and read the claim as a whole.18

THE OPEN-AND-OBVIOUS DANGER DOCTRINE (AS IT WAS)

The open-and-obvious danger doctrine has been around for the better part of a century, at least in some form. But it became a key consideration in premises-liability jurisprudence after the Michigan Supreme Court decided *Lugo v. Ameritech Corp.* in 2001.[19]

Until now, the "open and obvious" doctrine was a useful tool for defendants in obtaining summary dismissals of premises-liability claims. Lugo and the cases that followed made clear that premises owners owed no duty to protect against open-and-obvious conditions on the land (absent limited exceptions addressed below).

In *Lugo*, the court held that the open-and-obvious danger doctrine and its exceptions addressed the duty element of a premises-liability claim. Specifically, open-and-obvious dangers negated a premises owner's duty to protect individuals from harm on their properties. Open-and-obvious conditions are "visible" conditions that present "a well known danger" or are "discernible by casual inspection."[20]

One of the most common open-andobvious risks addressed by our appellate courts since *Lugo* is slipping and falling on snow or ice during winter. With respect to the common Michigan phenomenon of "black ice," the Michigan Supreme Court previously pronounced that black ice is an open-and-obvious danger when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff 's fall."[21]

Other common conditions such as steps and uneven surfaces (potholes and other defects in pavement) were generally found to be open and obvious as a matter of law because they are an "everyday occurrence" that a reasonably prudent person will take precautions to avoid.[22]

Only "special aspects" could justify imposing a legal duty despite the open-and-obvious nature of the condition. These "special aspects" are divided into two categories: (1) unreasonable dangers (those that pose an unreasonably high risk of harm), and (2) effectively unavoidable conditions.

These principles shaped the law in favor of business and property owners for over two decades. The landscape of premises-liability law is now drastically different.

NOW COMES KANDIL-ELSAYED V. F & E OIL, INC.

In *Kandil-Elsayed v. F & E Oil* and *Pinsky v. Kroger*, the Michigan Supreme Court ordered briefing on whether the "open and obvious" doctrine set forth in Lugo is compatible with the comparative-negligence system adopted in *Placek v. Sterling Heights*[23] and later codified in the Revised Judicature Act.

In *Kandil-Elsayed*, the plaintiff slipped and fell on snow and ice at a gas station while walking from the pump to the store to pay for her gas. The path to the store was covered in snow and did not appear to have been plowed or salted. The defendants moved for summary disposition in the trial court, arguing that the condition was open and obvious and had no special aspects, and therefore no duty was owed to the plaintiff. The trial court granted the motion, and the Court of Appeals affirmed.

In *Pinsky*, the plaintiff tripped and fell inside a grocery store. At the checkout, the plaintiff realized that she had an open bag of flour and went to get a new one. She went down another checkout aisle that had a cable strung across it, signaling that the lane was closed. The plaintiff tripped over the cable and sustained injuries. The defendant moved for summary disposition, arguing that the condition was open and obvious with no special aspects. The motion was denied, but the Court of Appeals reversed.

Both plaintiffs sought review by the Michigan Supreme Court. The court granted leave to decide whether *Lugo* was consistent with Michigan's comparative-negligence framework and, if not, what approach should be adopted for analyzing premises-liability cases under this framework.

The court found that *Lugo* was wrongly decided in two respects. First, *Lugo* failed to address how the "open and obvious" doctrine applies in light of the adoption of comparative negligence in tort cases. The court held that considering the open-and-obvious nature of the danger under the duty element was incompatible with comparative negligence. Specifically, the doctrine placed the judge, and not the jury, in charge of deciding an issue that included an analysis of the plaintiff 's own negligence in situations involving open-and-obvious dangers.

Second, the court found that Lugo's "special aspects" exception to the "open and obvious" doctrine was unworkable. The court noted that it was unclear whether Lugo's two examples of special aspects — unreasonably dangerous and effectively unavoidable conditions — had become the litmus test for recovery. If the danger did not meet these two exceptions, courts commonly found no duty was owed. In addition, there was a lack of consistency in applying the "effectively unavoidable" exception. For example, a danger for a store employee who had to go to work was unavoidable, but the same danger was avoidable when faced by a customer.

The court noted that the traditional categories of plaintiffs in premises cases, and the respective duties, remain the same. The open-and-obvious nature of a danger is still a relevant consideration but must be analyzed under the context of breach of duty (not whether a duty exists in the first place) and the plaintiff 's comparative fault.The "special aspects" exception no longer applies. Instead, the unreasonableness or unavoidability of the danger is considered when deciding whether the harm should be anticipated.

WHY THE CHANGE, AND WHAT'S NEXT?

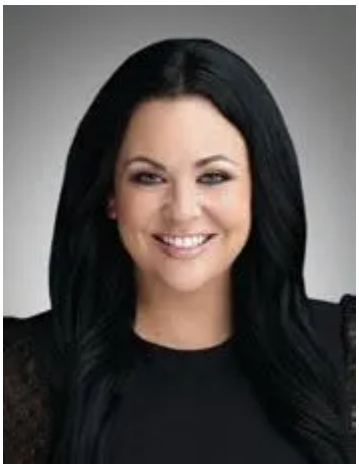
It seems the main problem for the *Kandil-Elsayed* court was the exception to the "open and obvious" doctrine, rather than the doctrine itself. The exception was the focal point of oral argument in this matter. The justices seemed aligned in their belief that, at the very least, the exception was in need of clarification. Some justices expressed a belief that the exception has been the source of confusion and inconsistent decisions.

Attorneys on both sides of the "v." have anticipated for some time that the court would do *something* with the doctrine. Now we know what that *something* is. So what's next (besides more trials)?

While trial courts may no longer see a high volume of dispositive motions based on "open and obvious" principles, there will certainly be an increase in premises-liability lawsuits. However, practitioners must be mindful that the *Kandil-Elsayed* decision does not transform premises liability into claims of strict liability. The mere fact of an injury on the land of another does not necessarily mean liability on the part of the property owner. There are still a number of defenses available to premises owners, and principles of "reasonableness" still apply. The court recognized that fact in footnote 2 of *Kandil-Elsayed*, which suggests that premises-liability claims may still be subject to summary disposition rulings.

Kandil-Elsayed represents the end of an era in Michigan law. It is still too early to tell how the decision will evolve in our appellate courts. In the meantime, it is probably safe to assume that trial courts will see an increase in filings and trials. Plaintiffs will have greater chances of getting their cases to a jury; defendants and their insurers may be more inclined to roll the dice at trial until there is more information on how juries view these claims.

For now, it is open and obvious that *Kandil-Elsayed* means significant changes are ahead for premises-liability claims in Michigan.



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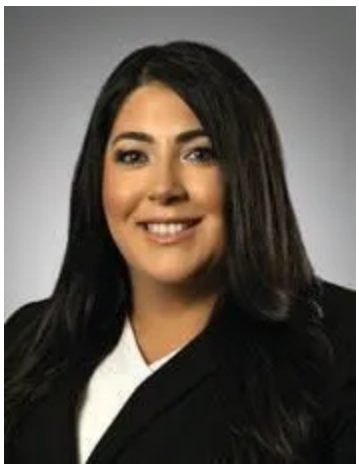

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Footnotes:

[1] *Kandil-Elsayed v F & E Oil, Inc*, __ Mich __ (July 28, 2023).

[2] *Glittenberg v Doughboy* Recreational Industries, 441 Mich 379, 392 (1992).

[3] *Hoffner v Lanctoe*, 492 Mich 450, 460-461 (2012).

[4] *Moning v Alfono,* 400 Mich 425, 437 (1977).

[5] *Stitt v Holland* Abundant Life Fellowship, 462 Mich 591, 596-597 (2000).

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Taylor v Laban,* 241 Mich App 449, 453 (2000).

[10] *Id*. at 455-456; *Stitt*, 462 Mich at 604.

[11] *Taylor*, 241 Mich at 455-456.

[12] *Stitt*, 462 Mich at 596.

[13] *Id*. at 597.

[14] *Id*. at 598.

[15] *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012).

[16] MCL 600.2959.

[17] *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692 (2012).

[18] *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33 (2005).

[19] *Lugo v Ameritech Corp*, 464 Mich 512 (2001).

[20] *Glittenberg*, 441 Mich at 392.

[21] *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010) (internal citations omitted).

[22] *Bertrand v Alan Ford, Inc,* 449 Mich 606, 616 (1995).

[23] *Placek v City of Sterling Heights*, 405 Mich 638 (1979).