Michigan Supreme Court Update

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Kandil-Elsayed v F&E Oil, Inc.
Pinsky v Kroger Co. of Michigan
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Summary of Opinion and Order

On July 28, 2023, in *Kandil-Elsayed v F&E Oil, Inc. and Pinsky v Kroger Co. of Mich* (Docket Nos. 162907 and 163430), the Michigan Supreme Court, in a 5-2 decision, overruled 22 years of Michigan premises liability case law since the landmark premises decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). The Court decided two cases, consolidated for appellate purposes, involving issues of the application of the open and obvious doctrine. In its Opinion and Order, our Supreme Court held that to the extent prior cases have held that the open and obvious nature of a condition on land should be analyzed as part of a land possessor's duty, those cases are overruled. Instead, the open and obvious nature, *i.e.*, whether an average person with ordinary intelligence would have discovered the condition upon reasonable inspection, is relevant to the defendant's breach and the plaintiff's comparative fault, not the land possessor's duty.

Open and Obvious is Relevant to Breach, Not Duty

In deciding both cases, our Supreme Court held that the open and obvious doctrine is no longer to be analyzed as part of a land possessor's duty to persons who enter on the land. Instead, the Court shifted the analysis of open and obvious from the element of duty to the element of breach. Indeed, the question of duty is a question of law for the judge to decide; whereas, the question of breach is a factual question for the jury's determination.

Open and Obvious is Relevant to Assessment of Comparative Fault

Further, the Court held that if liability is established (a plaintiff satisfies all four elements of a negligence claim: duty, breach, proximate cause and damages), juries are to consider whether a condition on the land is open and obvious as part of their assessment of comparative fault. In other words, "[w]hile the open and obvious nature of a condition remains relevant in a negligence case based on premises liability, it is analyzed as part of breach and comparative fault, not duty." *Kandil-Elsayed, supra*, slip op. at 2.

Legal and Practical Effect of Decision

The Supreme Court decision in *Kandil-Elsayad* is an incredibly significant holding as most premises cases will now be decided by juries, instead of judges. Indeed, the Supreme Court decision in *Lugo* has been the basis for more than two decades of trial courts granting defendant land possessors summary disposition of claims involving open and obvious conditions on the land. Now, trial courts are unlikely to decide whether a condition is open and obvious as a matter of law because the question is a factual one related to breach, not a legal question of duty.

This decision will significantly increase litigation in the State of Michigan related to premises claims. After more than two decades during which the plaintiffs' bar was deterred from filing and pursuing premises cases, we anticipate that there will be a substantial influx of premises claims and lawsuits.

Whether this decision will be applied retroactively to pending claims/lawsuits remains to be seen. There are good arguments in favor of and against retroactive application of the decision. The general rule is appellate judicial decisions are given full retroactive effect. However, prospective application of a judicial decision is appropriate when the holding overrules settled precedent. This Supreme Court decision would seem to fit in that category. Yet, there is a twist whereby if such decision does not announce a new rule of law, but merely returns the law to that which had previously existed, then it is applied retroactively. Thus, we anticipate that plaintiffs with pending cases will argue that the decision is not necessarily overturning settled precedent but rather returning the law as it previously existed pre-*Lugo* and thus, it should be applied retroactively. While we will certainly file the appropriate motions and advance arguments in all pending lawsuits in favor of prospective application of the decision, it is difficult to predict where the trial and appellate courts will come down on the issue.