Are There Any Liability Defenses to Premises Liability Claims, OR Should Possessors of Land Simply Prepare to Write Settlement Checks?

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With Plaintiff's attorneys statewide rejoicing "Hail, the Wicked 'Open and Obvious Doctrine' is Dead," you and your clients may be wondering whether there are any liability defenses to Premises claims. Luckily, defense attorneys and their clients can collectively breathe a sigh of relief, because the Great Wizard has declared "Yes."

Dorothy/Toto, let's follow the Yellow Brick Road…

I. WHAT IS THE LEVEL OF DUTY OWED?

First, let's assess what level of duty is owed. Before the defense of Open and Obvious was gutted in July 2023 by *Kandil-Elsayed v F & E Oil, Inc* and *Pinsky v Kroger Co of Mich.* ("*Kandil-Elsayed*")***[i]***, except in the most obvious of cases where the visitor of land was a trespasser, the knee jerk reaction, at least in the early stages of litigation, was to classify everyone as an invitee. Why not? An invitee wasn't owed any duty of care unless the alleged hazard was unreasonably dangerous (which Michigan's Courts of Appeal analogized to a six-foot pit in the middle of a parking lot, as if the average person has ever encountered that), or effectively unavoidable (described by the Courts of Appeal as similar to standing water that covered the floor of the only exit from a building, which would likely be against building code). But Scarecrow, in our Post-*Kandil* world, it's time to get a brain.

To determine what level of duty is owed, plaintiff's status on the land must be evaluated. The duty of care owed by a premises possessor depends on whether the plaintiff was a "trespasser," "licensee," or "invitee." Each of these categories corresponds to a different standard of care that is owed to those injured on the premises.

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A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him/her by "willful and wanton" misconduct. This general rule has long been subject to the interpretation that, "after the owner of premises is aware of the presence of a trespasser, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from ***active*** negligence." "Active negligence," in this context, involves action or conduct. *See Preston v. Austin.****[ii]*** "Before the principle of active negligence can apply, some duty must rest upon the defendant which is violated by his conduct or act." *Schmidt v. Michigan Coal & Mining Co*.[iii] Because the duty to refrain from active negligence only arises after the premises owner becomes aware, or should be aware, of the trespasser's presence, it follows that it does not encompass conduct that occurred before the trespasser arrived. *Pippin v Atallah.****[iv]***

A "licensee" is owed a slightly higher duty of care. A licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent. Such consent may be express or implied. Permission may be implied where the owner, or person in control of the property, "acquiesces in the known, customary use of property by the public." *Stitt v Holland Abundant Life Fellowship.****[v]*** A possessor of land owes a licensee a duty only to warn the licensee of any hidden dangers the land possessor knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The land possessor owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit.[vi] Typically, social guests are licensees who assume the ordinary risks associated with their visit. *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*. [vii]

The final category is "invitee." An invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v Great Atlantic & Pacific Tea Co., Inc.****[viii]*** *An* "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Wymer v Holmes.****[ix]*** **Importantly,** invitee status requires a commercial purpose.[x] The land possessor has a duty of care not only to warn the invitee of any known dangers, but the additional obligation to make the premises safe, which requires the land possessor to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Wymer.****[xi]***

Once you know the landscape with which you are dealing (what duty defendant owed), the road to Oz becomes much brighter.

II. NOTICE AS A DEFENSE

Like the Tin Man who searched for a heart to complete him, let's review "the heart" of a land possessor's defenses to the dreaded premises liability claim: notice.

While an invitor's legal duty is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land," this duty arises only when the danger is attributable to the invitor's negligence, or if the invitor had actual or constructive knowledge of its existence. *Clark v Kmart Corp.****[xii]*** In other words, "the mere existence of a defective condition in a [] public place of business does

not, as a matter of law, render the proprietor liable to an invitee for an injury caused by the condition, unless the proprietor knew, or in the exercise of reasonable care ought to have known, of the defect." *Berryman v K-Mart.**[xiii]** See* also *Derbabian v S & C Snowplowing, Inc*.[xiv] ("assuming defendant was in possession and control of the parking lot at the time of plaintiff's injury, defendant would be liable for plaintiff's injuries only if the condition of the parking lot was caused by defendant's active negligence or the condition 'ha[d] existed a sufficient length of time that [defendant] should have had knowledge of it.'"); and, *Hampton v Waste Management of Michigan, Inc*.[xv] (to charge the invitor with knowledge of the dangerous condition, it must have "existed a sufficient length of time that [defendant] should have had knowledge of it.")

Importantly, to be entitled to summary disposition on a Notice defense, the premises possessor does **not** have to present evidence that it lacked notice of the hazardous condition that allegedly caused the incident to occur, but needs to show only that the invitee has presented insufficient proof to establish the notice element of his/her claim. *Lowrey v LMPS & LMPJ, Inc*.[xvi]

*Daher v Abdo**[xvii],* is illustrative. There, the plaintiff was injured when, while attempting to visit the defendant homeowner's wife at their residence, one of the wooden steps leading to the back door of the house broke, causing the plaintiff to fall and sustain injury. The defendant homeowner brought a motion for summary disposition, arguing that he did not have actual or constructive notice of the defective step. The plaintiff responded by arguing that the defendant should have known about the step because he admitted that he regularly inspected and maintained the stairway and had previously replaced deteriorated steps. The trial court denied defendant's motion; however, the Court of Appeals reversed, finding that plaintiff did not establish a claim against defendant homeowner because plaintiff failed to present evidence of the character, nature, or duration of the condition that would permit the inference what there was something wrong with the step that defendant should have seen, and dismissed plaintiff's claim. In its analysis, the Court of Appeals stated:

> "Plaintiff argues that because defendant testified that he regularly inspected the stairway and had previously replaced deteriorated steps, he should have known about the defective condition of the step involved in plaintiff's fall. But plaintiff's argument rests on speculation only. Plaintiff has proffered no evidence in support of a conclusion that defendant should have known about the deteriorated steps. For example, she has presented no evidence of the character, nature, or duration of the condition that would permit the inference that there was something wrong with the step that defendant should have seen. *See*, i.e., *Clark v Kmart Corp*.[xviii] In opposing the motion for summary dismissal, plaintiff was required to present admissible evidence to show the existence of a disputed fact as to the issue of notice that does not depend on speculation or conjecture. *See, Veenstra v Washtenaw Country Club**[xix]*; *Libralter Plastics, Inc v Chubb Group of Ins Cos.**[xx]* Plaintiff has failed to carry her burden and summary disposition should have been granted in defendant's favor."

In summary, if the defendant possessor of the premises does not know, or have reason to know of the alleged hazardous condition, summary disposition in favor of defendant is appropriate, **as a matter of law.**

III. CONTRARY TO POPULAR BELIEF, THE OPEN AND OBVIOUS DEFENSE IS NOT DEAD

As hinted above, in July 2023, the Michigan Supreme Court issued *Kandil-Elsayed,**[xxi]* which significantly changed the legal landscape in defending premises liability cases. According to *Kandil-Elsayed,* whether a condition is open and obvious no longer relates to a landowner's duty of care, but rather is only relevant when determining comparative fault. Thus, whether a condition is open and obvious is now a fact question for the jury to decide, rather than a legal issue that can be resolved at the summary disposition phase.

Nonetheless, because open and obvious impacts the question of comparative fault, it should still be plead as an Affirmative Defense. MCL 600.2959 is relevant here:

> **600.2959. Tort actions; comparative fault of injured or dead person; reduction of economic damages, disallowance of non-economic damages**
>
> Sec. 2959. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce **economic** damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and **noneconomic** damages shall not be awarded.

(Emphasis added.)

In other words, the plaintiff's damages shall be reduced in accordance with his/her degree of comparative fault. And if it is determined that plaintiff's degree of comparative fault exceeds 50%, regardless of whether the other at fault persons are a party to the lawsuit, plaintiff's economic damages shall be reduced by the degree of the plaintiff's comparative fault, and the plaintiff's non-economic damages are barred.

Thus, when a cowardly Plaintiff's attorney proudly tells you that Open and Obvious is dead, have the courage of the renewed Lion, and educate him/her on why that is not true.

CONCLUSION

Although we are not in Kansas anymore, defendants in Premises Liability cases are not doomed to die in the wicked castle.

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[i] *Kandil-Elsayed v F & E Oil, Inc* and *Pinsky v Kroger Co of Mich., 512 Mich. 95 (2023)*
[ii] *Preston v Austin*, 206 Mich. 194, 201 (1919)
[iii] *Schmidt v Michigan Coal & Mining Co*., 159 Mich. 308, 311–312 (1909)
[iv] *Pippin v Atallah*, 245 Mich.App. 136 (2001)
[v] *Stitt v Holland Abundant Life Fellowship*, 462 Mich. 591 (2000)
[vi] *Id.*

[vii] *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*. 336 Mich App. 616, 627; 971 NW2d 716 (2021)
[viii] *Quinlivan v Great Atlantic & Pacific Tea Co., Inc.*, 395 Mich. 244, 256 (1975)
[ix] *Wymer v Holmes*, 429 Mich. 66, 71, n. 1 (1987) (overruled, in part on other grounds, *Neal v Wilkes,* 470 Mich. 661 (2004))
[x] See, *Stitt, supra* at 607.
[xi] *Wymer, supra* at 71, n. 1
[xii] *Clark v Kmart Corp*, 465 Mich. 416, 419 (2001)
[xiii] *Berryman v K-Mart*, 193 Mich.App. 88 (1992)
[xiv] *Derbabian v S & C Snowplowing, Inc*, 249 Mich.App. 695, 706 (2002)
[xv] *Hampton v Waste Management of Michigan, Inc*, 236 Mich.App. 598, 604 (1999)
[xvi] *Lowrey v LMPS & LMPJ, Inc*, 500 Mich. 1, 8-9 (2016)
[xvii] *Daher v Abdo*, 2006 WL 1042013 (Mich Ct App, April 20, 2006)
[xviii] *Clark, supra* at 419
[xix] *Veenstra v Washtenaw Country Club*, 466 Mich. 155, 163 (2002)
[xx] *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich.App. 482, 486 (1993)
[xxi] *Kandil, supra*