PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

Back to the Future

The End of the Road for Michigan's 'Open & Obvious' Defense

Presented by
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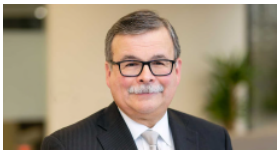
Today's Presenters



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"If you're gonna build a time machine into a car, why not do it with some style?"

– Dr. Emmet Brown

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Key Michigan Supreme Court Rulings

- *Kandil-Elsayed v F & E Oil, Inc* & *Pinsky v Kroger of Michigan*
- *Lugo v Ameritech Corp.*

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Back to the Future… Literally.

- The end of open and obvious as a defense is a drastic change.
- In reality, this Michigan Supreme Court decision is a step backwards to a legal landscape that existed before *Lugo.*
- This webinar is a focused examination before and after this dramatic decision.

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"All right. This is an oldie, but, uh... well, it's an oldie where I come from."

– Marty McFly

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Duty Question

- The old rule separated duty from comparative negligence.
- Previously, comparative negligence in Michigan did not avoid the need for an initial finding that premises owner owed a duty to invitees.
- Moreover, the duty and comparative negligence standards are fundamentally exclusive -- two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.
- *Riddle v. McLouth Steel Prod. Corp.* 440 Mich. 85, 95, 485 N.W.2d 676, 681 (1992)

Continued

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Open & Obvious – As It Used To Be

- Where dangers are known to invitees or are so obvious that invitees might reasonably be expected to discover them, an invitor owes no duty to protect or warn invitees unless he should anticipate the harm despite knowledge of it on behalf of the invitee.
- *Williams v. Cunningham Drug Stores, Inc.,* 429 Mich. 495, 500, 418 N.W.2d 381 (1988), cited in *Riddle*

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Lugo v Ameritech Corp.

- As a general rule, premises possessor is not required to protect invitees from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, premises possessor has duty to undertake reasonable precautions to protect invitees from that risk.
- *Lugo v. Ameritech Corp., 464 Mich. 512, 629 N.W.2d 384 (2001), overruled by Kandil-Elsayed v. F & E Oil, Inc., No. 162907, 2023 WL 4845611 (Mich. July 28, 2023)*
- The doctrine goes back not just 20 years but 30 years and was clearly established.
- Objective standard—focus on defect not plaintiff's care.

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Open & Obvious

- In *Robinson v Estate of Tyler (*2003 WL 22114005), plaintiff , who was legally blind , broke his leg and dislocated his knee in a fall down a step at defendant's establishment.
- Michigan Court of Appeals applied the objective test to the case—focusing on the risk itself (i.e., the step and not on the subjective care exercised by plaintiff).
- Open and obvious danger was one where a person of ordinary intelligence would discover on casual inspection, not considering plaintiff's visual impairment.
- Dismissal of the claim was upheld on appeal.
- This case was often cited as example of an overextending defense.

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"I'm your density. I mean your destiny."

– George McFly

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Kandil-Elsayed v F&E Oil Inc. & Pinsky v Kroger of Michigan

- As was long predicted, the Michigan Supreme Court was going to address open and obvious, so no surprise there. What was shocking was breadth of the decision.
- In a 5-2 decision on July 28, 2023, the court swept away decades of precedent in *Kandil-Elsayed v F & E Oil Inc. and Pinsky v Kroger Co. of Michigan*. The Supreme Court ruling reached back into the past to abolish open and obvious in favor of comparative fault.

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Kandil-Elsayed v F&E Oil Inc. & Pinsky v Kroger of Michigan

The Supreme Court ruled:

- *"Lugo* was wrongly decided and must be overruled in two respects. First, we overrule *Lugo*'s decision to make the open and obvious danger doctrine a part of a land possessor's duty. Rather, we hold that the open and obvious nature of a condition is relevant to breach and the parties' comparative fault. Second, we overrule the special-aspects doctrine and hold that when a land possessor should anticipate the harm that results from an open and obvious condition, despite its obviousness, the possessor is not relieved of the duty of reasonable care."

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"Hey, McFly! I thought I told you never to come in here. Since you're new here, I-I'm gonna cut you a break, today. So, why don't you make like a tree and get outta here?"

– Biff Tannen

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Sudden Impact

- The *Kandil-Elsayed* decision upends defense strategy for premises liability cases.
  - The decision eliminates a complete defense–most often decided by the judge—in favor of a jury determination of comparative fault
- Applies to all new cases
  - Applies to all cases in the midst of discovery/with dispositive motions pending

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Sudden Impact

- Retroactive application
  - Will apply to all pending cases, including those on appeal, **unless** the Supreme Court indicates otherwise
  - At this point, we believe it is very unlikely the Supreme Court will address retroactivity.

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Sudden Impact

- The decision applies to all pending cases, including:
  - Cases pending on appeal
  - Cases pending in the circuit court
  - Pending claims in which litigation has not yet been initiated
  - It is expected that the appellate courts will remand most, if not all, cases to the trial courts for trial.
  - Even where the appellate court affirmed summary disposition and case remains pending before the Michigan Supreme Court on an application for leave, the high court will likely remand to the appellate court for reconsideration in light of this decision.

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"Roads? Where we're going, we don't need roads."

– Dr. Emmet Brown

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Back to the Future…

- Potential for more claims and cases
- Circumstances such as curbs, stairs, fixtures, displays will produce more suits
- Different proofs in addition to the elements required for open and obvious will now be required to mount a defense
- Focus on notice defense when the alleged cause is temporary spills, leaks, snow and ice
- Aggressive investigation to support a more defensible case
- Need store video, photos and contemporary witness statements to support defenses

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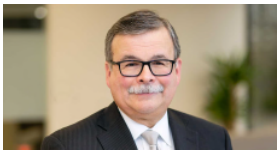
Questions?



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Today's Presentation

BACK TO THE FUTURE
The End of the Road for Michigan's 'Open & Obvious' Defense

Date: Wednesday, Sept. 20
Time: 11 a.m. to 11:30 a.m.
Cost: Complimentary

Program Description:

Like a scene from the blockbuster 80s movie "Back to the Future," a recent ruling by the Michigan Supreme Court has sent the state back in time more than 20 years by overturning *Lugo v Ameritech Corp* and restoring the comparative negligence standard for premises liability cases.

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Thank You for Attending!

Have a
Great Day!

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