PLUNKETT COONEY

Michigan Supreme Court Eliminates'Open and Obvious' Defense in Premises Liability Cases

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On Friday, the Michigan Supreme Court issued an opinion that has effectively abolished the open and obvious danger doctrine in Michigan.

Prior to the Supreme Court's decision, the open and obvious danger doctrine provided that if an average person with ordinary intelligence would have been able to discover a potentially dangerous condition upon casual observation and avoid the same, the premises possessor had no duty to warn, nor a duty to maintain, absent a special aspect to the potential danger. A special aspect was defined as a condition that (1) remained unreasonably dangerous despite its open and obvious condition and presented a risk of severe harm or death; or (2) was effectively unavoidable. The doctrine was an absolute defense and formed the basis for a motion for summary disposition.

In issuing its ruling on Friday in the cases of *Kandil-Elsayed v F & E Oil, Inc* and *Pinsky v Kroger of Michigan*, the Supreme Court overruled decades of Michigan case law pertaining to the open and obvious danger defense. Before the decision, a premises possessor owed no duty to warn or protect against conditions that were open and obvious as a matter of law. Now, under the new law in Michigan, a premises possessor owes a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land even if it is open and obvious. The open and obvious nature of a condition can be considered by a jury as to whether that duty was breached and when deciding comparative negligence on the part of the plaintiff.

Unless the Supreme Court issues a subsequent statement making the change in the law anything other than retroactive, the decision will apply retroactively to all pending cases, whether at the circuit court or appellate levels. It is not anticipated that a subsequent statement will be released.

The effect of this change in the law will mean that far fewer motions for summary disposition will be warranted in premises liability cases in Michigan since this defense is no longer an absolute defense or a defense for the judge to decide. This means there should be more trials in such cases. In addition, it is anticipated that there will be more cases filed since this defense no longer bars a case from reaching a jury, especially in slip and fall cases involving snow and ice.

The members of Plunkett Cooney's Torts & Litigation Practice Group are in the process of preparing a more detailed analysis of the case, which will be distributed shortly. However, it was important to provide you with initial notice of this change as soon as possible.

In addition, please feel free to contact your Plunkett Cooney attorney to answer any questions that you or your team may have regarding this major change in Michigan law. As always, our attorneys are available to present a seminar or webinar to discuss the change in the law and answer any questions. Immediate inquiries may be directed to the Co-leader of the Torts & Litigation Practice Group, Robert A. Marzano at (248) 594-6357 or via email at rmarzano@plunkettcooney.com.