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Open and Obvious Lives? Dismissal of Premises Liability Suit Affirmed Post-*Kandil-Elsayed*

By Drew W. Broaddus **November 8, 2023**

On July 28, 2023, the Michigan Supreme Court released its 5-2 decision in the consolidated cases of *Kandil-Elsayed v F & E Oil, Inc,* ___ Mich ___ (2023) (Docket No. 162907) and *Pinsky v Kroger Co of Michigan,* ___ Mich ___ (2023) (Docket No. 163430). As noted in the sidebar, this decision overruled *Lugo*, making the open and obviousness of a condition a question for the jury to consider as part of its breach and (if breach is found) comparative fault inquiries – rather than a question of the property owner's duty, which is decided by the court.

The *Kandil-Elsayed* majority found that a landowner/possessor owes a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land. *Lugo's* holding, that the open and obvious nature of a condition meant an owner/possessor owed no duty, was overruled. While the open and obvious nature of a condition remains relevant in premises liability cases, it is analyzed as part of breach and comparative fault, not duty. The special-aspects doctrine in *Lugo* – which held that land possessors could be held liable for an open and obvious condition only when an invitee provided evidence of special aspects of the condition, such as when the condition was effectively unavoidable or presented a substantial risk of death or severe injury – was rejected as inconsistent with § 343A of the Second Restatement of Torts, which asks whether the land possessor should have anticipated the harm. Although the property owners in both *Kandil-Elsayed* and *Pinsky* owed a duty to the respective injured plaintiffs, the Court found genuine issues of fact as to whether the defendants breached that duty and if so, whether plaintiffs were comparatively at fault and should have their damages reduced. Both cases were therefore sent back to their respective trial courts. *Kandil-Elsayed,* ___ Mich at ___; slip op at 46-48.

The Court of Appeals applied the new *Kandil-Elsayed* precedent in *Cunningham v Inland Pipe Rehab Holding Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2023 (Docket No. 363159). *Cunningham* involved an electric bicycle rider who lost control when she ran over a hose in the City of Detroit. Inland Pipe was under

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Earlier this year, in *Kandil-Elsayed v F & E Oil, Inc,* ___ Mich ___ (2023) (Docket No. 162907), the Michigan Supreme Court overruled *Lugo v Ameritech Corp, Inc,* 464 Mich 512 (2001).

In doing so, the Court held that "the open and obvious danger doctrine" is no longer "part of a land possessor's duty." *Kandil-Elsayed,*___ Mich at ___; slip op at 2. "Rather, … [t]he open and obvious nature of a condition is relevant to breach and the parties' comparative fault." *Id.*

The practical effect of this is that "the open and obvious nature of a condition" will be a motion defense much less frequently; rather, it now generally must be considered by a jury. *Id.* at ___; slip op at 10. But, the Court left open the possibility that the issue *could* still give rise to dispositive motions in certain cases. *Id.* at ___; slip op at 10 n 2.

In *Cunningham v Inland Pipe Rehab Holding Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2023 (Docket No. 363159), the panel applied *Kandil-Elsayed* and still affirmed the dismissal of a premises liability suit based on the open and obvious defense.

contract with the City to clean out the sewers. To do this, Inland Pipe connected a hire-pressure hose from a fire hydrant to a vacuum truck. *Id.,* unpub op at 1. On the day of Cunningham's accident, Inland Pipe "created a work zone on eastbound Larned Street, running the hose across the eastbound lanes only." *Id.* "Two of the three eastbound lanes were closed, orange warning signs and traffic cones were displayed, and an orange ramp covered the hose on the one lane open for traffic to cross over it." *Id.* Inland Pipe's employees set up and took down the construction site each day, with a worker holding a sign during work hours that said "slow" on one side and "stop" on the other. *Id.*

Shortly before her fall, Cunningham was riding on westbound Larned and admittedly saw a construction hose across the eastbound lanes. *Cunningham,* unpub op at 2. "When she started traveling on the eastbound side of Larned to return home, she again saw the hose." *Id.* "She pulled over, parked her bike on the grassy median between the east and westbound lanes of Larned, and watched cars go over the hose for 15 to 20 minutes to determine whether she could ride her bike over it." *Id.* After she saw cars driving over the hose, "she presumed it was not pressurized, and decided to ride her bike over it." *Id*. An employee of Inland Pipe, standing with a traffic control sign, yelled at Cunningham to slow down. *Id.* But Cunningham still rode over the hose and fell. *Id.*

Cunningham sued Inland Pipe, trying to frame her claims in terms of ordinary negligence and nuisance. Inland Pipe "moved for summary disposition, asserting that plaintiffs' negligence claim was actually a premises-liability claim" because Inland Pipe "was in possession and control of the street under its contract with the city…." *Id.* Inland Pipe argued that "Cunningham was a licensee," Inland Pipe "had no duty to protect against open and obvious dangers," and the hose did not present any special aspects. *Id.* Inland Pipe also argued that there was no evidence that it interfered "with a common right enjoyed by the general public," as would be necessary to advance a public nuisance claim. *Id*.

The trial court granted Inland Pipe's motion based on the open and obvious nature of the hose, and the absence of any special aspects. *Cunningham,* unpub op at 2. Plaintiff appealed. After the trial court's ruling, but before the Court of Appeals considered the case, the Supreme Court issued *Kandil-Elsayed.* Although the basis of the trial court's ruling (*Lugo*) was no longer good law, the Court of Appeals affirmed on other grounds: "In applying the new framework, we believe that the evidence was sufficient to establish that defendant did not breach its duty to Cunningham." *Cunningham,* unpub op at 6. "There is no question of fact whether it was reasonable to expect that an average person with ordinary intelligence would have discovered the hose across Larned upon casual inspection, as Cunningham testified that she first saw the hose traveling westbound on Larned, and again directly encountered it on her way home traveling eastbound." *Id.* (cleaned up). Also, she "specifically pulled her bike over and stopped in the grassy median for 15 to 20 minutes for the sole purpose of observing cars traverse the hose and deciding to cross it with her electric bike." *Id*. So, there was no question that "she did discover the hazard upon casual inspection." *Id.* "Thus, even though the trial court erred in its analysis, concluding that defendant had no duty to protect Cunningham from an open and obvious danger by analyzing the open and obvious doctrine under the duty element of premises liability, which the trial court did before *Kandil-Elsayed* was decided, nonetheless, summary disposition was appropriate because there is no genuine issue of material fact under the new framework that defendant did not breach the duty owed to Cunningham to protect her from unreasonable harm where the hose was open and obvious." *Id.*

Two things make this case atypical. First, the Plaintiff was apparently a licensee, *Cunningham,* unpub op at 2. Although the panel did not address it, this means she was entitled to a lesser duty than the invitees at issue in *Kandil-Elsayed.* See *Kandil-Elsayed,* ___ Mich at ___; slip op at 9, 39. Second, because of the Defendant's argument regarding nuisance, the record allowed for the Court of Appeals to consider a "no breach" argument on appeal. In many cases of this type, the "no breach" argument was not made in the trial court (since under the pre-*Kandil-Elsayed* law, the lack of duty was so often dispositive); in those cases, the law change requires a remand (since the Court of Appeals cannot affirm on alternative grounds not raised below).

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