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On the Retroactivity of *Kandil-Elsayed* and Other Issues in Premises Liability Law

By Drew W. Broaddus **January 11, 2024**

Gabrielson involved a relatively simple trip and fall in a condominium complex. The Plaintiff was walking into a unit that she was renting, when her foot got caught on a defective rubber strip that was supposed to be holding down a carpet. Plaintiff sued the unit owner she was renting from, the condominium association, and the association's management company, under theories of "general and active negligence, premises liability, negligence per se, and statutory violations [in particular, MCL 554.139]." *Gabrielson*, ___ Mich App at ___; slip op at 3. The trial court found that Plaintiff's claim sounded exclusively in premises liability and as a premises liability claim, it failed because the defect "was open and obvious because plaintiff knew it was there." *Id.* at ___; slip op at 4. Plaintiff appealed by right.

After the Plaintiff filed her appeal, but before it was decided, the Michigan Supreme Court released *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95 (2023). The *Gabrielson* panel summed up that holding as follows: "The open and obvious nature of a condition remains a relevant inquiry in a premises-liability case. However, to the extent prior cases have held that it should be analyzed as a part of a land possessor's duty, those cases are overruled. Rather, the open and obvious nature of a danger – i.e., whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection … is relevant to the defendant's breach and the plaintiff's comparative fault." *Gabrielson*, ___ Mich App at ___; slip op at 5.

Under this rule, the trial court's ruling clearly could not be affirmed. However, the Defendants "argued that the holding in *Kandil-Elsayed* should not have retroactive application" because "the decision established a new principle of law…." *Gabrielson*, ___ Mich App at ___; slip op at 5. "Defendants argued that our Supreme Court could not have intended a punitive purpose of punishing premises-liability defendants who, for 30 years, understood that they had no duty to protect invitees against avoidable open and obvious dangerous conditions." *Id.* "Further,

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In *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95 (2023), 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*, 512 Mich at 104. "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. *Kandil-Elsayed*, 512 Mich at 112.

Gabrielson v The Woods Condo Assoc, ___ Mich App ___; ___ NW2d ___ (2024) (Docket No. 364809) confirmed that *Kandil-Elsayed* applies retroactively to all pending cases.

defendants argued, such landowners have a right to rely on the existing state of the law to determine the scope of their legal duties." *Id.*

The Court of Appeals rejected this position. *Gabrielson*, ___ Mich App at ___; slip op at 7. Taking note of "the general rule is that judicial decisions are to be given complete retroactive effect," the panel then addressed the three well-established criteria for retroactivity in this context: "(1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.* As to (1), the Supreme Court's stated purpose in *Kandil-Elsayed* was to "eliminate the vestiges of the contributory-fault doctrine that remained in our premises-liability law despite Michigan's clear policy of comparative fault." *Gabrielson*, ___ Mich App at ___; slip op at 7. "[M]oving the consideration of the plaintiff's fault with respect to an allegedly open and obvious danger from the duty analysis to the breach analysis" was intended to restore "consistency to Michigan's negligence jurisprudence." *Id.* The new rule was also meant to eliminate "the potential for unfairness engendered by incongruent interpretations of how that standard is to be applied to real-world scenarios." *Id.*

As to (2) – the extent of reliance on *Lugo* – the *Kandil-Elsayed* majority found that "the law as stated in *Lugo* could not be predictably relied upon; parties and the courts ha[d] grappled with its standard and its application in premises-liability litigation for years." *Gabrielson*, ___ Mich App at ___; slip op at 7. The new rule "end[ed] two decades of uncertainty and arguments, where parties and lower court have had to navigate an unclear standard and varying applications." *Id.* And as to (3), the panel found that "the administration of justice will not be adversely effected by the retroactive application of the *Kandil-Elsayed* decision" because property owners were always required to exercise "reasonable care under the circumstances…." *Gabrielson*, ___ Mich App at ___; slip op at 8. The new rule advances the interests of justice (at least theoretically) by ensuring that "premises-liability claims are adjudicated by the same standard applicable to other negligence claims, affording claimants the same right to have their claims considered under a comparative-fault regime rather than a contributory-negligence scheme." *Id.*

The panel then applied *Kandil-Elsayed* to each of the three Defendants. The panel found that the unit owner, the association, and the management company all owed duties to the Plaintiff. This involved a fact-specific analysis of possession and control. *Gabrielson*, ___ Mich App at ___; slip op at 10-12. As to the unit owner, the duty owed was that of an invitee. *Id.* at ___; slip op at 12. But as to the association and the management company, Plaintiff was a mere licensee. *Id.* This distinction mattered when the panel went on to address breach. *Id.* at ___; slip op at 12. Under the higher duty owed to an invitee ("to also make the premises safe" and "to inspect the premises and … make any necessary repairs or warn of any discovered hazards"), the panel found a question of fact as to whether the unit owner breached a duty. *Id.* at ___; slip op at 9, 13. But under the lesser duty owed to licensees ("to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved"), the panel found no question of fact as to breach, so the association and the management company were entitled to summary disposition. *Id.* "As licensors, neither of them had a duty to act regarding a danger that was known to plaintiff." *Id.* at ___; slip op at 13. "Plaintiff testified that she knew the rubber strip was in poor condition, the carpet was frayed underneath it, and the rubber strip would curl upwards on hot days." *Id.* "On the basis of plaintiff's testimony, plaintiff knew that the rubber strip on the step posed a tripping hazard before her fall." *Id.*

Finally, the panel addressed Plaintiff's claim under the Landlord-Tenant Act. The trial court dismissed the suit without mentioning this claim. *Gabrielson*, ___ Mich App at ___; slip op at 15. This was erroneous because even before *Kandil-Elsayed*, "the open and obvious danger doctrine [was] not available to deny liability for a statutory violation under MCL 554.139(1)." *Gabrielson*, ___ Mich App at ___; slip op at 15. The panel declined to say whether the unit owner could owe duties under the statute, and directed the trial court to consider this on remand. *Id*. But, as to the association and management company, the panel found that this claim was properly dismissed because the Plaintiff had no lease with those entities. *Id*. at ___; slip op at 16. So, "the trial court reached the correct outcome for the wrong reason." *Id.*

Judges Mark Cavanagh and Kathleen Jansen comprised the majority. Chief Judge Michael Gadola wrote separately to express his disagreement with the *Kandil-Elsayed* holding (although he concurred in the majority's retroactivity analysis).

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