property owners & insurers newsline
SECREST SW WARDLE
A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

"Put Up or Shut Up"

By Aaron D. Swayne **August 6, 2024**

In *Estate of Peabody v Positive Family Dental, PLLC*, the decedent and her husband drove themselves to Positive Family Dental's office for a dental appointment on September 14, 2021. The decedent's husband was walking in front of the decedent. As he made his way up the handicap ramp using his walker, he heard a "holler or scream" from his wife, the decedent. He looked back and saw that she was falling. The decedent wife landed face down on the ramp with her feet extending off the bottom of the ramp. Dental office personnel heard the decedent's screams and came out to render aid and call 911. The decedent was taken to the hospital and died four days later. Her medical records indicated that she had fractured her arm and her neck as a result of the fall. Her estate ultimately sued Positive Family Dental for wrongful death, alleging one combined count of premises liability and general negligence. Plaintiff asserted that the Defendant's handicap ramp was dangerous and defective because there was a height difference at the bottom of the ramp, there was not a handrail on both sides of the ramp, and the existing handrail was inadequate.

After discovery, Defendant Positive Family Dental moved to dismiss because (1) there was no evidence of how the fall occurred so Plaintiff could not prove causation; (2) the condition of the ramp and the handrail was open and obvious; (3) there is no evidence of the breach because the conditions were not unreasonably dangerous; and (4) Defendant lacked notice. Defendant also asserted that Plaintiff's negligence claim should be dismissed because the Complaint only sounded in premises liability. In response, Plaintiff argued the claim sounded in general negligence because Defendant created the dangerous condition, i.e., the handicap ramp, or allowed it to exist. Plaintiff asserted that Defendant's property was in violation of building codes, yet it failed to identify any specific building codes. Plaintiff also referenced the alleged

Secrest Wardle Notes

"[O]nce discovery is closed the summary disposition hearing becomes the 'put up or shut up' stage of the proceeding, and if there is no factual support for a claim, it will not continue." In other words, if there are no facts to support the required elements of a plaintiff's claim (i.e., a defective/dangerous condition, causation and notice), then the conversation does not even get to a *Kandil-Elsayed* open and obvious analysis of whether there was a breach of duty by the premises possessor.

In a premises liability case, the plaintiff must prove their injury arose from an allegedly dangerous condition on the land, even if the premises possessor allegedly created the condition giving rise to the plaintiff's injury.

Plaintiff must also prove that the condition caused plaintiff's injury, and that defendant had sufficient notice of the condition before the injury.

Speculation and conjecture will not survive summary disposition. Rather, a litigant must be able to provide evidence sufficient to show that a genuine issue of material fact exists. In other words, a party must "put up or shut up."

While *Kandil-Elsayed v F & E Oil, Inc.*, 512 Mich 95 (2023) may have shifted the "open and obvious" doctrine from a duty analysis to a breach analysis, litigants must still show that a genuine issue of material fact exists. Litigants must also be able to distinguish between a premises liability action and a general negligence action. *Estate of Peabody v Positive Family Dental, PLLC*, No. 366895, 2024 WL 3079495 (Mich App June 20, 2024) is an unpublished Court of Appeals opinion highlighting these concepts

opinion of a safety expert, yet never provided any documentary evidence detailing the opinion. Plaintiff also asserted that the open and obvious doctrine did not apply because the hazard posed by the ramp and handrail was effectively unavoidable and that the danger posed was unreasonable. However, Plaintiff did not support these allegations with any evidence. Plaintiff merely reiterated that Defendant was in violation of building codes without reference to any specific codes and claimed a safety expert would provide testimony but never provided any supporting documentation such as an affidavit. On the causation issue, Plaintiff suggested that the allegedly defective handrails played a part in the decedent's fall; however, this was based purely on speculation. In reality, no one, including the decedent's husband, actually witnessed what caused the decedent's fall. The trial court granted Defendant's Motion for Summary Disposition and Plaintiff appealed.

The Court of Appeals held that the trial court correctly granted Defendant's Motion for Summary Disposition for two reasons. First, the underlying action sounded solely in premises liability, not general negligence. Relying on *Buhalis v Trinity Continuing Care Serv*, 296 Mich App 685, 691 (2012), the Court of Appeals held that because the ramp and the handrail were both conditions on the land, Plaintiff's theory of liability stemmed solely from Defendant's duty as an "owner, possessor, or occupier of land." The fact that Plaintiff alleged Defendant either created or allowed a dangerous condition to exist on the land is immaterial since neither Defendant's action nor conduct caused the decedent to fall.

The Court further held Plaintiff could not prove causation. No one witnessed the fall and Plaintiff could only speculate as to how and why the decedent fell. Moreover, Plaintiff did not provide any affidavits or other evidence showing that there was a genuine issue of material fact for trial. Instead, Plaintiff claimed Defendant violated building codes but did not submit as evidence the codes that were allegedly violated. Additionally, Plaintiff asserted it had an expert witness who would opine that the handicap ramp's handrail was unsafe and in violation of building codes. No affidavit was provided, however. Moreover, at no point did Plaintiff direct the Court to any testimony supporting the inference that the decedent's fall was caused by a defect in the handicap ramp or its handrail.

Notably, the Court of Appeals included in its opinion that the new open and obvious analysis under *Kandil-Elsayed* was not dispositive in the case at hand because summary disposition was properly granted on the basis that Plaintiff failed to establish a genuine issue of material fact as to (1) what the alleged defect/dangerous condition was, and (2) that any such condition was the cause of decedent's fall.

As this case highlights, it is imperative that litigants truly understand the claims they are alleging. Further, a litigant must still present enough sufficient evidence to show that a genuine issue of material fact exists, despite the new legal analysis for the open and obvious defense under *Kandil-Elsayed*.

We welcome your questions – please contact:

Premises Liability Practice Group Chair
Mark F. Masters
mmasters@secrestwardle.com or 248-539-2844

For questions pertaining to this article
Aaron D. Swayne
aswayne@secrestwardle.com or 616-272-7972

Website LinkedIn Twitter YouTube Email

SECREST WARDLE

Troy | 248-851-9500
Grand Rapids | 616-285-0143

www.secrestwardle.com

Contributors

Premises Liability Practice Group

Chair
Mark F. Masters

Editors
Sandie Vertel
Susan Willcock
Nicolas Previdi