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Court of Appeals Majority Declines Opportunity to Expand *Kandil-Elsayed* Beyond its Scope

By L. Charlynn Turner **September 17, 2024**

After the July 2023 release of the Michigan Supreme Court's decision in *Kandil-Elsayed v F&E Oil, Inc*, 512 Mich 95 (2023), many tort practitioners and others were quick to tout that the effect of the decision would inevitably lead to the proverbial "death" of defendants obtaining successful pre-trial dispositive relief in claims brought against them under a theory of premises liability. That is because *Kandil-Elsayed* departed from decades-old law in overruling *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001) and its progeny to the extent that it held that the open and obvious nature of a condition should be analyzed as part of a land possessor's duty and to the extent that it held that the special aspects doctrine be considered rather than the anticipation-of-harm standard.

This pessimistic view of *Kandil-Elsayed* seemed to gain short-lived traction when, in some instances, Michigan's appellate courts began routinely remanding pending matters that were previously disposed of in the trial court on the basis of the open and obvious doctrine for reconsideration of the matter in light of *Kandil-Elsayed*. However, since then, some members of the judiciary (both trial courts and appellate courts) have not been persuaded by the purported one-size-fits-all approach in applying *Kandil-Elsayed* and instead approached each matter as it is case-specific, applying settled law in light of *Kandil-Elsayed* to the settled factual record in front of it and the court rules. Indeed, this latter case-specific approach is consistent with the Michigan Supreme Court's intent. This is evident because the *Kandil-Elsayed* Court, itself, clarified several times within its 49-page majority opinion, that dispositive motion relief is still possible despite its overruling of *Lugo*, particularly where no questions of material fact remains if dispositive relief was obtained under MCR 2.116(C)(10).

A recent Secrest Wardle appellate victory, *Bowerman v Westveld Serv, LLC et al.*, unpublished opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 366338), provides a good example of when these judicial approaches to *Kandil-Elsayed* are at odds with one another. In *Bowerman*, Plaintiff, a 75-year-old woman, had lived at Stanton Park Apartments. This is the same place that Plaintiff actually spent approximately 10 years

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When the Michigan Supreme Court's decision in *Kandil-Elsayed v F&E Oil, Inc*, 512 Mich 95 (2023) was announced, many practitioners and others assumed that dispositive relief was a thing of the past. In fact, even some appellate practitioners were skeptical as to a defendant's ability to overcome an appellate remand to the trial court if a pending matter was previously disposed of under the open and obvious doctrine. That is because *Kandil-Elsayed* has been found to operate retroactively. See *Gabrielson v Woods Condo Assoc, Inc*, ___ Mich App ___ (2024) (Docket Nos. 364809 and 364813).

However, as illustrated recently in a 2-1 split decision in *Bowerman v Westveld Serv, LLC et al.*, unpublished opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 366338), the prevailing trend is leaning toward the rightful case-specific judicial approach, applying binding legal precedent to an already settled factual record and court rules despite the lower court having previously disposed of the case under the open and obvious doctrine. Further, the *Bowerman* majority foreclosed an invitation to expand *Kandil-Elsayed*, which would have applied *Kandil-Elsayed*'s reasoning equally to "ordinary negligence" claims.

as its property site manager before her retirement. On October 30, 2021, Plaintiff fell into a cutout of concrete or "trench" while taking her trash out early that morning. The trench was approximately ten feet long and four inches deep.

For at least two weeks prior to her fall, Plaintiff kept detailed personal notes regarding the condition of Stanton Park Apartments. Despite noting the existence of the "trench" and acknowledging that it was still dark outside, Plaintiff testified that she went out anyway to dump her trash. In fact, Plaintiff took her trash out every day passing by the "trench."

Plaintiff filed a complaint alleging, in relevant part, a "negligence" claim against Westveld Services, LLC ("Westveld"), who was a company hired by the property management company to replace concrete in various areas around the apartment complex. The trial court ultimately granted summary disposition in favor of Westveld because the "trench" was an open and obvious condition without special aspects such that Plaintiff's claim was precluded.

On September 12, 2024, the Court of Appeals affirmed the trial court in a 2-1 split unpublished decision. The majority acknowledged that Plaintiff labeled her action as one of "negligence," but cited *Finazzo v Fire Equipment Co*, 323 Mich App 620 (2018) for the proposition that, when a plaintiff's claim is based on the condition of the premises, it is a premises liability claim. And as a premises liability claim, the majority then cited *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653 (1998) for the proposition that a premises liability claim is conditioned upon the presence of *both* possession and control over the premises. The majority explained that Westveld lacked possession or control over the premises when it vacated the premises following its work nine days prior to Plaintiff's fall. And so, even in light of *Kandil-Elsayed*, the majority concluded affirmance of the trial court's ruling was appropriate, even if for a different reason than that identified previously by the trial court. In other words, the majority relied upon well-known settled appellate law, which states that an appellate court may affirm a trial court's decision on a motion for summary disposition if it reached the correct result, but for a different reason.

In dissent, Judge Philip Mariani agreed with the majority that there was no evidence Westveld possessed and controlled the area in question at the time of Plaintiff's fall. However, in his view, Plaintiff's claim may still be examined under an "ordinary negligence" theory despite Plaintiff's alleged injury being premised upon a condition of the land, and therefore, rooted in premises liability. The majority seemingly went on to examine the matter under an "ordinary negligence" theory to heed off Mariani's dissent. The majority concluded that although a contractor has a duty to perform its work with ordinary care so as to not create an *unreasonable* risk of harm, there was no genuine issue of material fact that Westveld breached a duty owed to Plaintiff. Mariani disagreed, believing that a plaintiff's knowledge of a hazardous condition is no longer dispositive on the question of whether a breach occurred. Although *Kandil-Elsayed* was examined under the lens of a premises liability theory, in Mariani's view, its discussion regarding comparative fault should be expanded to "ordinary negligence" claims as well.

In short, *Bowerman*'s outcome turned on which judicial approach is employed – a case-specific approach applying settled law versus a one-size-fits all approach, which may even go as far to expand the scope of *Kandil-Elsayed*. The prevailing trend is leaning toward the rightful case-specific judicial approach.

We welcome your questions – please contact:

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