



## Michigan Court of Appeals Ruling Adds Challenges for Premises Owners and Their Insurers as to Premises Liability Cases

Litigation Team

*Insurance Regulatory News E-blast*

January 22, 2024

A recent Michigan Court of Appeals decision in a premises liability case will have major implications for premises owners and possessors in Michigan as well as their liability insurers. In a recently issued published opinion, the Court confirmed that the earlier Michigan Supreme Court ruling in *Kandil-Elsayed v. F&E Oil* (rendered in 2023) is to be applied retroactively to all pending premises liability cases.

Previously, Foster Swift reported on the Michigan Supreme Court's rejection of the state's decades-old "open and obvious" doctrine and other implications of *Kandil-Elsayed* in our Summer 2023 update, "Michigan Supreme Court Announces Seismic Shift in Premises Liability Cases." The high court's landmark decision in *Kandil-Elsayed* invalidated the state's "open and obvious" doctrine as a complete defense to premises liability lawsuits, essentially holding that the "open and obvious" nature of an alleged hazardous condition of land is merely a factor to be considered as to issues of comparative negligence of the plaintiff and reasonableness of the defendant's conduct.

Questions arose after that case was issued as to whether it was to be applied retroactively to pending cases or prospectively.

### **What Retroactivity Means for Premises Owners, Possessors, and Their Insurers**

The recent Court of Appeals case of *Gabrielson v. The Woods Condominium Association, Inc.*, (Case No. 364809) clarified that *Kandil-Elsayed* is retroactive and applicable to pending cases. As the Court stated: [W]e conclude that the rule of law announced in *Kandil-Elsayed* should operate retroactively and applies to all cases currently pending on direct appeal, including this case."

---

#### **AUTHORS/ CONTRIBUTORS**

Dora A. Brantley

Julie I. Fershtman

Ray H. Littleton

Thomas R. TerMaat

---

#### **PRACTICE AREAS**

Business Law

General & Commercial Litigation

Insurance Coverage

Insurance Law

Small Business



This means that cases previously dismissed because trial courts found that the complained-of conditions were “open and obvious,” but are currently pending in the appellate courts, should be expected to return to the trial courts for further proceedings and trial.

### **Policy Adjustments and Underwriting Implications**

As we’ve previously noted, the Michigan Supreme Court’s ruling in the *Kandil-Elsayed v. F&E Oil* brought down the curtain on the state’s long-running “open and obvious” legal doctrine. As a result, premises owners and possessors as well as property insurers in Michigan potentially face a more precarious risk management landscape and greater expense.

Risk mitigation is more important than ever on part of property owners and managers to prevent conditions that could give rise to accidents and, later, lawsuits. Regular property inspections to check footing, lighting, handrails, and adequacy of snow and ice removal are a few examples.

Even though we can’t anticipate the full impact of the *Elsayed* decision on premises liability claims and outcomes, there’s little doubt that the legal and risk environment in this area has changed substantially for property owners and possessors, with a greater likelihood of more litigation and more trials. The attorneys at Foster Swift are available to advise the business and insurance community as to proactive measures to consider based on this change in the law. Our attorneys can help assess claims based on the new liability standards. Also, because many of our lawyers have experience in defending and trying premises liability cases, we welcome the opportunity to be of assistance.

*The attorneys of Foster Swift’s General and Commercial Litigation Practice Group have carefully reviewed the recent court decisions upending premises liability law in Michigan. They can answer questions and provide direction for updated risk management strategies, evaluations of claims, and litigation.*

*Please contact Julie Fershtman ([jfershtman@fosterswift.com](mailto:jfershtman@fosterswift.com)/248-785-4731), Ray Littleton ([rlittleton@fosterswift.com](mailto:rlittleton@fosterswift.com)/248-539-9903), Dora Brantley ([dbrantley@fosterswift.com](mailto:dbrantley@fosterswift.com)/248-785-4697), Tom TerMaat ([ttermaat@fosterswift.com](mailto:ttermaat@fosterswift.com)/616-726-2251) or another member of the Foster Swift litigation team.*