Negligence Law Section

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Membership Tips

"Is Open and Obvious on its Last (Broken) Leg?"

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How many roads must a man walk down
Before he knows there is snow covered ice?

And how many times must a man look down, before
He can see clear water on the floor?

Yes, and how many deaths will it take 'til he knows
That too many people have died?

The answer, my friends, is now with the Supreme Court,
The answer is with the Supreme Court.

Blowin' In the Wind by Bob Dylan as modified by Todd Stearn

According to the Centers for Disease Control and Prevention, over one million Americans are injured, and over 17,000 people die, from a slip, trip and fall incident in the United States each year. Despite those staggering numbers, Michigan courts have spent many years limiting the rights of those victimized by the carelessness of others. For example, since 1992, the Michigan Supreme Court effectively eliminated any duty to warn of open and obvious dangers even where a property owner failed to keep their property in a reasonably safe condition. *Riddle v. McLouth Steel Products Corporation*, 440 Mich 85,100, 485 NW2d 676 (1992). *See*

also Lugo v Ameritech Corporation, Inc., 464 Mich 512, 629 NW2d 384 (2001) and *Joyce v Rubin,* 249 Mich App 231, 642 NW2d (2002).

In a sign that the "The Times They Are A-Changing," the Chief Justice of the Michigan Supreme Court, Bridget McCormack, has authored two (2) concurring opinions in the last several years that express the Justice's "reservations" about the judicially created doctrines that we currently have in place in premises liability law.

One of those cases is *Blackwell v Franchi*, [1] where the Plaintiff attended a dinner party at the defendant's home. The defendant's home included a hallway that led from the front door to the living room and dining room area. On one side of the hallway there was a mudroom with an eight inch drop off. When the Plaintiff went to put her purse in the mud room, she fell upon entering the room. There was a light switch located at the entry of the mudroom.

The defendant filed a motion for summary disposition in the trial court, arguing that the drop-off was open and obvious and that they therefore had no duty to warn of its existence. The defendant additionally argued that the Plaintiff could have turned on the light with the light switch located at the entry to the mud room. The Trial Court granted that motion. The Court of Appeals reversed finding that whether the room was open and obvious was a question of fact and that Plaintiff's failure to turn on the light was an issue of comparative negligence.

The Defendant appealed. The Supreme Court heard arguments and remanded the case to the Court of Appeals for consideration of (1) "whether the defendants owed plaintiff a duty to warn about the step because the plaintiff did not 'know or have reason to know of the condition and the risk involved," and (2) whether the step "involved an unreasonable risk of harm" and whether the "defendants should not have expected that a licensee like the plaintiff would 'discover or realize the danger.'" *Blackwell v Franchi*. [2]

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[1] 318 Mich App 573 (2017)
[2] 502 Mich 918 (2018).

However, even more interesting was Justice McCormack's concurring opinion in *Blackwell* which responded to many of the dissent's arguments. Judge McCormack spent considerable time quoting from the Restatement (Second) of Torts plainly pointing out that the Supreme Court had adopted the Restatement (Second) of Torts in *Preston v Sleziak,* 383 Mich 442 (1970) and seemingly arguing that the Restatement (Second) of Torts should be considered even more seriously in cases going forward in the future.

The applicable sections of the Restatement read as follows:

> § 343. Dangerous Conditions Known to or Discoverable by Possessor.
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.
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> * * *
>
> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated. [2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-216, 218.]

Justice McCormack rejected any rule that would "resurrect a judicial version of our long-dead contributory negligence regime under the camouflage of a duty analysis."

Several years after *Blackwell,* Justice McCormack revisited the Restatement (Second) of Torts in her concurring opinion in *Estate of Donna Livings v Sage's Inv. Grp., LLC*.[3] The *Livings* case involved a woman who slipped on ice in her employer's parking lot as she was headed in to begin her shift. It was uncontested that snow and ice covered the entire parking lot and was therefore open and obvious. The question in the case involved whether the hazard was effectively unavoidable due to the fact that the Plaintiff was headed into work.

Previously, the Michigan Supreme Court had held that special aspects can defeat the open and obvious defense. For example, in *Lugo v Ameritech*,[4] the Court stated that "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk."[5] One example of a special aspect was "a commercial building with only one exit for the general public where the floor is covered with standing water," thus making the hazardous condition "effectively unavoidable." [6] In *Livings*, the Supreme Court held that "a hazard can be deemed effectively unavoidable if the person confronted it to enter his or her place of employment for purposes of work." [7]

Justice McCormack's concurring opinion in *Livings* once again relied heavily on The Restatement (Second) of Torts and "express(ed) (her) reservations about the continued reliance on the judicially created special aspects doctrine." Justice McCormack pointed out why the Restatement approach made sense and openly wondered "why Michigan needs a special rule," apart from virtually every other jurisdiction:[8]

"Rather than continually finessing and refining this outlier doctrine, we should

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[3] 507 Mich 328, 349 (2021)
[4] 464 Mich 512 (2001)
[5] *Id.* at 517
[6] *Supra.* at 518
[7] 507 Mich at 345
[8] *Id.* at 359-360

> ask whether the Second Restatement's approach (as adopted by many of our sister jurisdictions) would provide more stability and predictability for Michigan. Or perhaps it is time for this Court to consider the Third Restatement's approach, which aligns more neatly with comparative negligence principles by imposing a blanket reasonable duty of care standard."[9]

The Supreme Court is now considering appeals in three (3) separate cases; *Becker v Enterprise Leasing Co. of Detroit, LLC*, 972 NW2d 262 (April 22, 2022), *Pinsky v Kroger Co. of Michigan*, 972 NW2d 256 (April 22, 2022), and *Kandil-Elsayed v F & E Oil, Inc.*, 969 NW2d 69 (February 4, 2022).

In *Becker,* the Plaintiff tripped and fell on a raised portion of sidewalk at night. The Court of Appeals affirmed the trial court's grant of summary disposition, holding that " a minor height discrepancy is not considered, under our caselaw, to be an unexpected condition on a sidewalk. Even with the relative darkness confronted by plaintiff that night, there was no genuine issue of material fact that, objectively speaking, an average person with ordinary intelligence would have discovered it upon casual observation."[10]

In *Pinsky*, an employee of a Kroger store strung a cable at ankle height from one side of a closed checkout lane to the other side. As the plaintiff walked through the lane, she tripped on the cable and fell to the floor. Despite the fact that the cable was at ankle level, the Court of Appeals determined that the height of the wire was not dispositive of whether the hazard was open and obvious "because even floor-level hazards can be open and obvious, and therefore, a cable at knee level is not too low to be open and obvious."

In those cases, the Supreme Court directed the parties to brief several issues including in *Pinsky* specifically whether the open and obvious nature of the condition should be a complete bar to the claim or whether it should be a consideration for the jury in assessing the comparative fault of the parties as set forth in the Restatement Torts, 3d.

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[9] *Supra*. at 360

[10] 2021 WL 4238280 at *4.

Finally, in *Kandil-Elsayed*, the plaintiff slipped on snow at a gas station as she was walking toward the building to pay for her gas. The Plaintiff testified that the snow was visible, but believed that ice hidden under the snow caused her to fall. The Supreme Court specifically asked the parties to file supplemental briefs addressing several issues including "whether *Lugo v Ameritech*, (citation omitted) is consistent with Michigan's comparative negligence framework; and if not,… which approach this Court should adopt for analyzing premises liability cases under a comparative negligence framework."[11]

It looks like the Supreme Court may be taking notice of another Bob Dylan song:

> Gonna change my way of thinking
> Make myself a different set of rules
> Gonna change my way of thinking
> Make myself a different set of rules
> Gonna put my good foot forward
> And stop being influenced by fools.
>
> Gonna Change My Way of Thinking by Bob Dylan

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[11] 969 NW2d at 70