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General Municipal Liability Defense and Governmental Immunity Update

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Open and Obvious Danger Doctrine–Now What?

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At common law – duty of an owner of premises depends on status of visitor to the property: invitee, licensee, trespasser

In addition to using care to keep premises reasonably safe, a premises owner has the duty to warn invitees and licensees of latent defects that the person would not likely discover themselves.

Riddle v McLouth Steel, 440 Mich 85 (1992)

The Court reiterated that the duty to warn does not include warning of dangers that are open and obvious, that would be apparent to a person of ordinary intelligence upon casual inspection

The Court stated explicitly that this was not a change in the law. The duty to warn extends only to latent defects that a person would not be expected to discover themselves.

Lugo v Ameritech, 464 Mich 512 (2001)

The open and obvious rule is not an “exception” but is an integral part of the duty of a premises owner. *Lugo* first recognized the "special aspects" component of the O&O doctrine:

- 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

How did this apply to municipal liability for sidewalks?

Governmental Tort Liability Act (GTLA)

MCL 691.1402 – highway exception to governmental immunity

MCL 691.1401(c) – definition of highway includes sidewalks

MCL 691.1402a – municipalities have duty of maintenance and repair of public sidewalks (on a highway) and liability for failure to do so that results in injury

- Generally, the open and obvious danger doctrine = common law duty to warn of defects otherwise undetected or that pose unreasonable risk of harm.

- **The highway and sidewalk exceptions do not include a duty to warn.**

- Open and obvious danger doctrine did not squarely apply to the statutory duty "to keep" a sidewalk in reasonable repair.

- Municipal defendants could not use the open and obvious doctrine as an absolute defense to a lawsuit under § 1402a, but only as a component of comparative negligence on part of the plaintiff for purpose of determining damages.

• Because of proliferation of sidewalk injury claims, Legislature adopted 2016 amendment to sidewalk statute, adding MCL 691.1402a(5):

(5) In a civil action, a municipal corporation that has a duty to maintain a sidewalk may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious.

Buhl v. Oak Park, 507 Mich 236 (2021).

The 2016 amendment MCL 691.1402a(5) could not be applied retroactively under the general rule that "statutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary."

The Court ruled that the amendment could only be applied to causes of action that arose after the effective date of the amendment, January 4, 2016.

- Post-2016 amendment good for municipalities – much greater frequency of summary dispositions where a sidewalk defect was open and obvious.

And then …

Kandil-El Sayed v F&E Oil Inc and *Pinsky v Kroger Co.*, 512 Mich 95 (2023)

- The Michigan Supreme Court issued a consolidated opinion, effectively abolishing the open and obvious danger doctrine as an element of the existence of a duty to a plaintiff in a premises liability claim.

- Under the current framework introduced by the Supreme Court, achieving dismissal of these claims will be significantly more difficult, as the nature of the hazard in question will most likely be a question of fact for the jury.

- Whether the condition was open and obvious will be considered in deciding the amount of a plaintiff's comparative fault for purposes of determining damages but will no longer be grounds for dismissal at the outset of a case.

- Steps under *Kandil*:

- Plaintiff must establish that the land possessor owed plaintiff a duty

- Was there a breach of that duty?

Reasonable care owed to an invitee under the circumstances remains the standard. As part of the breach inquiry, the fact-finder may consider, among other things, whether the condition was open and obvious and whether, despite its open and obvious nature, the land possessor should have anticipated harm to the invitee.

- Steps (cont’d)

- If breach is shown, as well as causation and harm, then the jury should consider the plaintiff's comparative fault and reduce the plaintiff's damages accordingly. A determination of the plaintiff's comparative fault may also require consideration of the open and obvious nature of the hazard and the plaintiff's choice to confront it.

- Under MCL 691.1402a(5), what happens now? “Any defense available under the common law in a premises liability claim.”

- The open and obvious nature of the condition is no longer a consideration in determining a municipality’s duty of reasonable repair.

- It is an element of whether the duty has been breached and whether plaintiff was comparatively negligent.

- Municipal application of *Kandil-El-Sayed*:

Gabrielson v Woods Condo Ass'n, ___ Mich App ___ (Jan 4, 2024)

- Judicial decisions are given complete retroactive effect. *Kandil-El-Sayed* applies to all cases currently pending.

- *Logan v City of Southgate* (*COA* unpublished) June 27, 2024 (on remand)

- Injury occurred March 3, 2018, City raised O&O defense under § 1402a(5). Trial court granted summary disposition April 5, 2019. Plaintiff appealed. COA affirmed.

- Plaintiff filed application for leave with Supreme Court, which remained pending until September 8, 2023, after *Kandil-Elsayed* decided. MSC vacated and remanded in light of *Kandil-Elsayed*. On remand, COA reversed the summary disposition in the city's favor.

Eggenberger v W. Bloomfield Twp, (COA unpublished) Sept 24, 2024 (Docket No. 368247)

- Injury of April 27, 2021, suit filed 2022. Trial court granted township's motion for summary disposition based on O&O danger doctrine with no special aspects. Plaintiff filed motion for reconsideration in July 2023, then *Kandil-El-Sayed* decided while motion pending.

- COA disagreed with township's argument that the O&O doctrine applied because it was in effect at the time of the plaintiff's injuries, citing *Gabrielson*. Court remanded for trial as question of fact existed re breach of statutory duty.

But municipalities still have other defenses:

- No liability for a sidewalk defect unless plaintiff proves that at least 30 days before the injury, the municipality knew or should have known of the sidewalk defect. MCL 691.1402a(2).

- There is a rebuttable presumption that a sidewalk is maintained in reasonable repair. MCL 691.1402a(3).

- Two-inch rule - Presumption may be rebutted by evidence of a vertical discontinuity of 2" or more, or a dangerous condition other than solely vertical discontinuity

RECREATIONAL LAND USE ACT, MCL 324.73301

Milne v Robinson, 513 Mich 16 (2024)

- Child killed riding an off-road vehicle on land owned by the defendant (her grandfather). Estate sued for negligence under Owner's Liability Act of the Michigan Vehicle Code, MCL 257.401.

- Supreme Court affirmed that the claim governed by RUA and not motor vehicle code. The landowner could be held liable only for gross negligence or willful and wanton misconduct. Affirmed summary disposition for defendant.

- Applies to recreational activities on municipal land.

PROPRIETARY FUNCTION EXCEPTION

MCL 691.1413:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section.
>
> Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

A governmental function can be a proprietary function, and vice versa.

- MCL 691.1401(b): "'Governmental function' means any activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."

- Whether an activity is a proprietary function depends on whether the primary purpose for the activity is to make a financial profit for the governmental entity.

Hyde v Univ of Mich Bd of Regents, 426 Mich 223 (1986).

- Whether the activity in fact produces a profit is not the test, but it is one factor to be considered.

- The exception does not penalize a governmental agency's legitimate desire to conduct an activity on a self-sustaining basis.

Hyde:

- How an activity is funded and how any profit is spent are also considerations.

- If the profit is deposited in the general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device.

- If the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit.

Harris v Univ of Mich Bd of Regents, 219 Mich App 679 (1996)

- University varsity gymnast injured on an out-of-state trip for intercollegiate competition sued under proprietary function exception. Court of Appeals upheld summary disposition holding that the operation of the Michigan Athletic Department is a governmental function and is not a proprietary function.

- Evidence that the department sponsors many nonrevenue sports over a long period of time and does not drop sports teams that consistently lose money "is strong evidence that the athletic program is not conducted primarily for profit."

Coleman v Kootsillas, 456 Mich 615 (1998)

- City's active landfill was partly converted into a for-profit ski hill.

- Profit generated by landfill was used to fund other city projects
- Millage rate was reduced by transferring profits to city's general fund
- Landfill was commercial operation that accepted garbage from other communities and Canada

- Court held that the operation of the landfill, although a governmental function (authorized by statute), was a proprietary function because the primary purpose was to produce a pecuniary profit.

- Sources of evidence:

- Meeting minutes showing that a council authorized an activity or service to meet a community need. Weighs against a finding that the primary purpose is to make a profit.

- Mission statement of a city department, rules or regulations, *e.g*, "to ensure that a wide array of outdoor recreation opportunities, both passive and active, are available to people of all age groups, interests, and abilities, while protecting and conserving the integrity of our natural and historical resources."

- Annual budget for the city or department – where does the money come from and where does it go? Does it actually generate a profit?

- Sources of evidence (cont'd)

- Does the municipality continue the activity despite losing money over a period of years?

- Are any user fees charged used to defray costs?

- Are profits reinvested in that activity or used to fund other unrelated projects or functions?

IMMUNITY OF OFFICIALS FOR ACTS OF THIRD PERSONS

Myre v Fine (COA unpublished) September 19, 2024.

- Parents of victim of Oxford school shooting sued school district and various officials, alleging that the school officials were grossly negligent and that their conduct was the proximate cause of the victim's death.

- COA upheld the constitutionality of the GTLA as applied to the plaintiffs and affirmed summary disposition for the individual officials. Court held that school officials were not "the" proximate cause of the victim's death. Clearly, the shooter was "the" proximate cause.

Questions? Comments?

THANK YOU

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