STATE OF MICHIGAN

COURT OF APPEALS

CODY GOHR and NATHANIEL GOHR,

Plaintiffs-Appellants,

v

KELLY'S DRYGOODS AND GROCERY, INC.,

Defendant-Appellant.

UNPUBLISHED
April 25, 2024

No. 363479
Chippewa Circuit Court
LC No. 2021-016724-NO

Before: GADOLA, C.J., and BORRELLO and PATEL, JJ.

PER CURIAM.

In this slip-and-fall action, plaintiffs appeal by right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). Defendant argued that it did not owe plaintiff Cody Gohr[1] a duty to protect him from the snow-covered and icy parking lot that caused his fall because the condition was open and obvious and no special aspects were present. The trial court agreed and granted summary disposition in favor of defendant.

After the trial court granted defendant's motion, our Supreme Court issued *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023), which reversed two aspects of *Lugo v Ameritech Corp Inc*, 464 Mich 512; 629 NW2d 384 (2001), overruled in part by *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95:

> First, we overrule *Lugo*'s decision to make the open and obvious danger doctrine a part of a land possessor's duty. Rather, we hold that the open and obvious nature of a condition is relevant to breach and the parties' comparative fault. Second, we overrule the special-aspects doctrine and hold that when a land possessor should anticipate the harm that results from an open and obvious condition, despite its

[1] Because plaintiff Nathaniel Gohr's loss of consortium claim is derivative of plaintiff Cody Gohr's negligence claim, our use of "plaintiff" refers to Cody.

> obviousness, the possessor is not relieved of the duty of reasonable care. [*Kandil-Elsayed*, 512 Mich at 104.]

Because the legal framework has been significantly altered, we vacate the trial court's order and remand for reconsideration in light of our Supreme Court's decision in *Kandil-Elsayed*.

I. BACKGROUND

Plaintiff alleges that he slipped and fell on snow and/or ice that had collected in front of the only exit from defendant's store in November 2021. Plaintiff testified that he has lived on Drummond Island for over eight years. Defendant's grocery store is the only one on the island. Plaintiff shopped at the store "[p]retty much every day" and was familiar with the parking lot and the store's entryway. On the day of the incident, plaintiff's husband drove them to defendant's store because they were out of groceries. They arrived between 12:00-12:30 p.m. It had been snowing for several hours. Snow was blowing and falling when they arrived at the store. The parking lot was covered in snow. Plaintiff estimated that there was two to three inches of snow on the ground. Plaintiff walked through the snow-covered parking lot to get to the store entrance while his husband waited in the parked car. He estimates that he was in the store for approximately 15 minutes. As plaintiff was checking out, the cashier informed him that the store did not permit the shopping carts to be taken outside when there was snow on the ground.[2] Plaintiff walked out of the store carrying a case of water and a bag of groceries. When he exited the store, the parking lot was still covered in snow, but the walkway in front of the store was cleared.

Plaintiff took relatively the same path back to his vehicle through the snow-covered parking lot as he did on the way into the store. He described the incident as follows:

> I went outside, and I basically went back the way that I came in. I was coming around the vehicles that were parked up close to the store. And then I felt a twist in my ankle, and I could—I feel like I remember hearing like a crunching sort of noise. And my body shifted to the left, and I fell back on my left hip and I think I braced with my left elbow.

Plaintiff testified that he "could feel the smoothness of the ice" under the snow as his foot twisted. He stated that his left foot slipped like there was ice. And he could see that there was ice under the snow when he tried to stand up. Thus, plaintiff "surmised that it was likely the ice underneath the snow that caused" his fall. The ice was relatively thin—he could see the parking lot beneath it "like a window." But he maintained that the snow concealed the ice. Plaintiff testified that, if he had known that he was going to encounter snow-covered ice, he would have avoided it. But he claimed that he could not have avoided it because the entire lot was snow-covered.

Plaintiff has lived in northern Michigan for eight years. He acknowledged that ice commonly occurs in parking lots in the winter in Michigan, and it is something that he would expect to find and watch out for. But he claimed this was his first encounter with ice underneath snow. He maintained that he avoids ice if he is able to see it. Plaintiff testified that there was

[2] The store owner confirmed that this was defendant's policy.

nothing about the appearance of the parking lot that would have alerted him that there was black ice underneath the snow. And it did not appear that the area had been salted. He also acknowledged that snow-covered areas can be slippery.

Plaintiff testified that there was only one way to enter and exit the store. Because the entire parking lot was snow-covered, he could not discern which areas were safe to traverse. Plaintiff conceded that he could have made multiple trips to his vehicle, but stated he "didn't want to cross [the] snowy parking lot multiple times." He also admitted that he could have gone to the vehicle and asked his husband to pull the vehicle closer to the front of the store, but stated that he would have faced the same "environmental circumstances" walking back across the parking lot. Although plaintiff speculated that he could have avoided falling if he was permitted to use a grocery cart in the parking lot, he denied that the grocery items he was carrying had anything to do with his fall.

Defendant's owner and manager, Kelly Melvin, testified that she was working at the store on the date of the incident. It started snowing after she arrived at the store between 8:00 a.m. and 9:00 a.m. Kelly testified that defendant has the following policies and procedures for clearing snow from the store's porch and the walkways:

> Well, when we come in in the morning and if it snowed . . . whoever opens the store and usually it's me that shovels or one of my girls go out and shovel the porch and walkways. And then we put salt or sand down. That's every day that it snows or—they check the conditions of the walkways and everything every single day, every morning when we open the store.

If it snows, Melvin's son plows the parking lot early in the morning. Defendant keeps salt on hand for the employees to salt the parking lot with either a spreader or by hand. Generally, the lot is plowed first and then the salt is applied. But if the parking lot is icy, the salt is applied before the lot is plowed. Melvin acknowledged that snow and ice in the parking lot can be dangerous to customers. On the day of the incident, the walkway in front of the store was shoveled and salted to make it safe for customers. But Melvin conceded that the parking lot was not plowed or salted. Melvin contended that the parking lot could not be salted or plowed before the incident because there were parked vehicles in the way. She further testified that her son was working in the store and did not have time to apply salt in the parking lot before the incident. Defendant did not warn its customers that the parking lot had not been salted on the day of the incident.

Melvin testified that the cashier offered to carry plaintiff's grocery items to his vehicle, but plaintiff declined the assistance. Melvin conceded that the snow and ice in the parking lot caused plaintiff's fall, not the grocery items he was carrying. Melvin further admitted that, regardless of whomever carried the groceries, plaintiff would have had to walk through the parking to get to his vehicle.

Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it did not owe plaintiff a duty to protect him from the snow-covered and icy parking lot that caused his fall because the condition was open and obvious and no special aspects were present. In response, plaintiff denied that the snow-covered ice was open and obvious, and argued that it was effectively unavoidable. He requested that the trial court take the

matter under advisement or grant a stay of proceedings until the Supreme Court issued a decision in *Kandil-Elsayed*. The trial court granted defendant's motion. This appeal followed.

II. ANALYSIS

Plaintiff argues that the open and obvious doctrine does not obviate defendant's duty to exercise reasonable care to protect plaintiff from a known danger and thus there is a genuine issue of material fact whether defendant acted reasonably in failing to remove snow and ice or to salt the parking lot and whether the condition was effectively unavoidable.

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). When reviewing a motion for summary disposition under MCR 2.116(C)(10), a trial court must consider the evidence submitted by the parties in the light most favorable to the non-moving party and may only grant the motion if there is no genuine issue of material fact. *Id*. at 160. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (cleaned up). But we are "not permitted to assess credibility, or to determine facts" in analyzing whether a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id*.

In a premises liability case, "a plaintiff must prove the traditional elements of negligence: (1) that defendant owed the plaintiff a duty, (2) that defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). In this case, it is undisputed that plaintiff was an invitee and that defendant therefore owed plaintiff a duty "to exercise reasonable care to protect [her] from an unreasonable risk of harm caused by a dangerous condition of the land." *Kandil-Elsayed*, 512 Mich at 143, quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). "[A] land possessor owes a duty 'to use reasonable care to protect against hazards arising from natural accumulation of ice and snow.' " *Kandil-Elsayed*, 512 Mich at 149, quoting *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 248; 235 NW2d 732 (1975). This duty requires " 'that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of the injury to the invitee.' " *Kandil-Elsayed*, 512 Mich at 150, quoting *Quinlivan*, 395 Mich at 261. In this case, defendant argued, and the trial court agreed, that its duty does not extend to an open an obvious condition such as the snow-covered parking lot.

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). This test is an objective one that requires an inquiry of "the objective nature of the condition of the premises at issue." *Id.* Because Michigan has adopted a comparative fault regime for negligence claims, the *Kandil-Elsayed* Court held that the open and obvious nature of a condition is relevant to whether a defendant breached a duty and, if so, whether a plaintiff was comparatively at fault, not whether a defendant owed a duty. *Kandil-Elsayed*, 512 Mich at 144. " '[T]he fact that a dangerous condition is open and

obvious bears on the assessment of whether reasonable care was employed[.]' " *Id*. at 146, quoting 2 Restatement Torts, 3d, § 51, comment *k*, p. 251.

In this case, defendant also argued, and the trial court agreed, that the snow-covered parking lot was not effectively unavoidable. But the *Kandil-Elsayed* Court expressly overruled the special-aspects doctrine announced by *Lugo*,[3] explaining that "when a land possessor should anticipate the harm that results from an open and obvious condition, despite its obviousness, the possessor is not relieved of the duty of reasonable care." *Kandil-Elsayed*, 512 Mich at 104. The *Kandil-Elsayed* Court instructed that, "[r]ather than conduct a narrow analysis of whether an obvious danger is 'effectively unavoidable' or poses an 'unreasonable risk of severe harm,' the fact-finder should consider whether 'the possessor should anticipate the harm despite such . . . obviousness.' *Id*. at 147, quoting 2 Restatement Torts, 2d, § 343A, p 218. But "whether a land possessor should anticipate harm from an otherwise open and obvious danger is a relevant inquiry under *breach*, not duty." *Kandil-Elsayed*, 512 Mich at 147-148.

The Court summarized its holding as follows:

> [A] land possessor owes a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land. If the plaintiff establishes that the land possessor owed plaintiff a duty, the next step in the inquiry is whether there was a breach of that duty. . . . 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. 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. [*Id*. at 148-149 (cleaned up).]

In reaching its decision in this case, the trial court applied the now-overruled framework set forth by *Lugo* and its progeny. Whether the snow-covered, icy parking lot was open and obvious and whether defendant should have anticipated harm to plaintiff despite the obviousness are relevant inquiries to the issue of breach, not the determination of duty. See *Kandil-Elsayed*, 512 Mich at 147-148. Because the legal framework has been significantly altered, we vacate the trial court's order and remand for further proceedings to apply the principles announced in *Kandil-Elsayed* to the facts in this case. The parties should be afforded an opportunity to brief any issues resulting from the changes to the legal framework occasioned by *Kandil-Elsayed*.

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[3] The *Lugo* majority explained that while a land possessor generally "is not required to protect an invitee from open and obvious dangers," if there are "special aspects of a condition [that] make even an open and obvious risk unreasonably dangerous," then the possessor "has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. The *Lugo* Court provided "illustrations" of special aspects, which included an open and obvious condition that is effectively unavoidable. *Id*. at 518.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Sima G. Patel