

THE RISK JOURNAL

A PUBLICATION FOR MMRMA MEMBERS

OCTOBER 2024

Risks Posed by Changes to "Open and Obvious" Doctrine

by Cindy C. King, Director
of Membership Services
and Human Resources

IN 2023, THE MICHIGAN Supreme Court issued a ruling that presents a significant shift in premises liability law, often referred to as the "open and obvious" doctrine. It largely precluded people from making claims based on sidewalk or stair step defects and other types of slip and fall incidents on public and private property.

With the 2023 ruling, individuals are now able to file—and potentially prevail in—premises liability or slip and fall claims against property owners in Michigan, including property owned by public entities.

A historical view

The open and obvious doctrine was established in 2001 based on the case of *Lugo v. Ameritech Corp*, in which the Michigan Supreme Court ruled that if someone visits a property and is not trespassing, and they face a condition that is open and obvious, the property owner does not owe that person a duty of care.



In the past, the "open and obvious" doctrine severely limited an injured person from holding property owners or occupants responsible.

Essentially, this meant that an individual could not recover compensation or damages for injuries sustained from an accident. While the court did allow special aspects or exceptions, the basic reasoning behind the 2001 decision was that the dangerous or harmful condition was known, and that the individual should have seen and avoided it.

However, over the subsequent 20 years or so, Michigan courts did not consistently

apply the law. The *Lugo* ruling did not fully resolve the key question of whether the property owner satisfied their duty of care not to harm individuals—or if they had breached that duty of care. As a result, many people were injured and had no ability to collect damages.

A new look at the doctrine

The Supreme Court selected two separate cases to settle this liability issue:

In *Kandil-Elsayed v. F & E Oil, Inc.*, Ahlam Kandil-Elsayed filed a negligence action based on premises liability in Wayne Circuit Court against F & E Oil, Inc., after she slipped and fell at a gas station it operated. Plaintiff argued that the snow and ice on the premises constituted

Individuals can now file—and potentially prevail in—slip and fall and other premises liability claims against property owners in Michigan.

a dangerous condition. After the lower courts ruled against her, she took her case to the Michigan Supreme Court.

In *Pinsky v. Kroger Co. of Mich*, Renee Pinsky and her husband, David, brought a negligence action in Washtenaw Circuit Court against Kroger Company of Michigan after Renee tripped over a cable that had been strung from a checkout counter to a display basket.

Defendant Kroger moved for summary disposition, arguing that because the hazard was open and obvious and no special aspects were present, it owed no duty to the plaintiffs.

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MMRMA Annual Meeting Guests Gained Powerful Insights

by Tamara Christie,
Communications Manager

Herman Moore on Success

MMRMA's 2024 Annual Meeting kicked off with a memorable and thought-provoking opening session by Herman Moore, legendary former Detroit Lions wide receiver.



After earning numerous accolades during his 11 seasons with the Lions, today Herman is an entrepreneur and philanthropist whose Tackle Life Foundation offers services for adolescent mental health counseling and mental health and physical health educational opportunities for parents, teachers, administrators, and coaches.

Herman shared four key lessons from his *Playbook for Success*:

1. Embrace change. It is a constant fact of life. If we can use it to help us innovate, we can turn change into a positive force to help us move forward.

2. Value your people. Each of us has something of value to offer that is critical to the success of the entire team. In football, kickers may not be on the field for long stretches of playtime, but they always



Having a strong character means doing the right thing for its own sake and recognizing that everyone is dealing with life's challenges.

need to be ready because their role can cost—or save—the game.

3. Leadership. Practically anyone can become a leader through discipline, preparedness, and commitment. When teams see someone who respects and supports them, they will reciprocate.

4. Character. Herman asked his audience, "What do you do when no one is looking?" Having a strong character means taking responsibility, doing the right thing for its own sake, and recognizing that everyone is dealing with life and challenges. He recounted times when he had to own up to his own mistakes. Being able to say "I dropped the ball," without excuses, and with a renewed intention to do better in future, exemplifies a strong, effective character.

After speaking, Herman attended that evening's festivities, spending hours posing for pictures with attendees, signing photos, and promoting his foundation. His character shone through every interaction.

The 24/7 information stream has made people more skeptical and earning their trust is more difficult.

Kurt Mortensen on Influence



To make a difference, whether at work or in our personal lives, we can all benefit

by learning the importance of influence and how to have an impact on others.

Kurt Mortensen, author of the best-selling book *Maximum Influence*, explained that social media and today's 24/7 information stream have changed the game when it comes to earning trust. People are more skeptical than ever, so it is important to have mastery over our message, delivery, and intentions.

Kurt shared the key components of trust: character, competence, confidence, and credibility. When people around us can see that we are sincere, informed, and credible, they are much more

likely to accept our influence and guidance.

He also stressed the importance of storytelling to convey ideas and the value of imaging and visualizing the outcomes we want. This can help us combat worry, which Kurt called "negative goal setting." Ultimately, we can learn from those we find persuasive to become more effective in our own lives.

Dale Smith Thomas on Perspective



Speaker and life coach Dale Smith Thomas bills herself as "the hope doctor." She

says "hope" is more than just a wish and coined this acronym for HOPE—Help Other People Excel. She has made it her mission to share insights on how to use the power of our heads and hearts to find our own path to success.

Our perspective is the things we focus on, the way we

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Changes in Michigan Premises Liability Law, continued from page 1

The Washtenaw court denied the motion for summary disposition, and Kroger appealed.

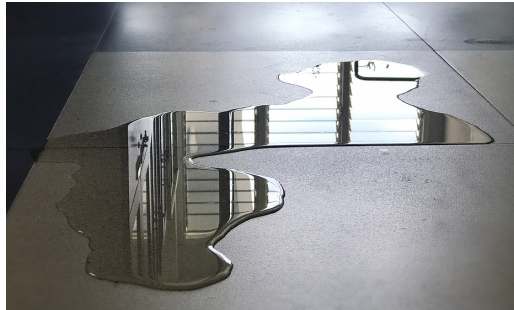
The Court of Appeals reversed the lower court's decision, holding that the cable was open and obvious and not unreasonably dangerous as a matter of law. Plaintiffs then successfully appealed to the Michigan Supreme Court.

Using these two cases to resolve the confusion posed in the *Lugo* decision, the Court ultimately decided to do away with the open and obvious doctrine. Today, all premises liability claims will be evaluated based on fault and whether the owner of the property failed to protect visitors from unreasonable harm.

New parameters

Going forward, property owners, including MMRMA members, must be mindful of the following questions, which judges and juries will surely consider when deciding if the property owner is at fault:

- > Did the property owner owe a duty to this person? What was their status: licensee, invitee, or trespasser?
- > Did the property owner breach their duty?



MMRMA members must be proactive in addressing common and frequent hazardous conditions before an accident occurs.

- > What was the condition that caused harm? Was it open and obvious? Could the claimant have avoided it?
- > Did the owner take the necessary or reasonable steps to address the condition?
- > How much is each party at fault?

Going forward, it is likely that Michigan courts will analyze these types of claims in much more detail to evaluate who is at fault and to what extent.

MMRMA resources

MMRMA developed a Risk Control Bulletin, *Changes to Premises Liability in Michigan*, that explains the 2023 ruling in more detail. The bulletin includes examples of the types of hazards that frequently result in falls and potentially serious injury (see sidebar).

The bulletin also contains examples of the basics of

Assigning fault will be much more nuanced and no longer a simple yes-or-no decision.

slip and fall claims, and guidance on the importance of maintaining property to avoid exposure.

Registered users of mrrma.org can log in and download the Risk Control Bulletin in My Documents in the Policy/Procedure Documents and Bulletins > Public Services folder.

The MMRMA team is also working on an update of our brochure, *Sidewalk Liability Risk Avoidance Inspection Program and Safety Guidelines*.

Call Membership Services at 734-513-0300 to speak with a Risk Control Consultant for further guidance and specific recommendations on action to minimize premises liability risks.

Frequent Causes of Slip and Fall Accidents

Hazards that frequently cause falls that might result in serious injuries include:

- Standing puddles of water
- Cracked or crumbling staircases
- Clear or black ice
- Uncleared snow
- Inadequate lighting
- Defective flooring
- Improperly secured mats
- Stairways and steps in violation of building safety codes
- Hidden drop-offs
- Concealed holes
- Poorly maintained escalators, elevators, or moving walkways

To minimize risk exposure, members should:

- Be proactive in identifying hazardous conditions and addressing them.
- Use surveillance cameras in high-risk areas and save the data feed if an incident occurs.
- Complete incident reports with photos of the area and a detailed description of the situation. All documentation is essential in defending a claim.

Sources:

<https://theclarklawoffice.com/michigan-supreme-court-eliminates-the-open-and-obvious-doctrine/>
<https://www.fosterswift.com/communications-COA-ruling-challenges-premises-liability-cases.html>

Evaluating AI for Use in the Public Sector



The Grand Hotel on Mackinac Island is one of Michigan's many historic lodging options. Marshall's National House Inn, the state's oldest, was built in 1835 and once served as a stop on the Underground Railroad. In Kalamazoo, the 11,000-square foot, 25-room Henderson Castle dates from 1895. This Queen Ann-style mansion was once part of Kalamazoo College and is now operated by a master French chef.

Michael Rhyner
Executive Director

Bryan J. Anderson, CPA
Managing Director

Cindy King
Director of Membership
Services and Human
Resources

Starr M. Kincaid, Esq.
Director of Claims

The *Risk Journal* is edited by Tamara Christie, Communications Manager, and published six times a year for members of Michigan Municipal Risk Management Authority. We welcome your feedback. To comment or suggest story ideas, please contact Tamara at 734 513-0300, 800 243-1324, or tchristie@mmrma.org.

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DAN BOURDEAU, MMRMA
Cybersecurity Practice Leader, presented at the Annual Meeting on the opportunities and challenges that Artificial Intelligence (AI) poses for public entities.

Dan shared examples of how Michigan local governments employ AI tools effectively. These uses also come with potential pitfalls, and Dan provided guidance on how members can approach their AI investments and initiatives with deliberation and success.

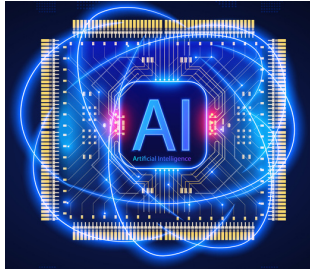
Wide array of applications

> **One MMRMA member** is successfully using an AI chatbot that provides 24/7 service, freeing up staff to work on more detailed functions. Developed with a local tech startup, the chatbot fields 60% of the entity's routine queries.

Annual Meeting Recap, *continued from page 2*

think about them, and what we do next. According to Dale, we can change our lives by changing our minds and how we employ them.

One example is to stop asking "Why?" things are happening and replace that with a different question: "What?" As Dale puts it, there are often no answers to "Why?" It keeps us in the past where we can't do or change anything. But when we ask "What?" we are going to do about our circumstances, we can start to visualize the present and future.



> **A large city in Michigan** deploys AI in its crime center, analyzing data from cameras, sensors, and social media. The initiative is credited with a 15% reduction in crime in key areas.

> **A state agency** uses predictive analytics of sensor data to predict maintenance failures, leading to a reported 20% extension of the life of critical infrastructure.

Challenges of AI

> **Data-related risks** include potential breaches, privacy concerns, and regulatory non-compliance. Anonymizing data and conducting legal

reviews can help. Ultimately, agencies must balance these issues with their duties to protect residents.

> **Workforce resistance** has been an oft-cited pitfall, but in many cases, jobs are not cut, but instead evolve to work alongside AI for more efficient service delivery.

> **Costs are a factor** because public sector budgets are stretched to meet core functions. Successful entities have collaborated with neighboring entities, secured grants, and found other creative approaches to deploy AI.

Dan concluded that ignoring AI comes with significant risks. By collaborating with other public entities, starting with small projects, and making decisions deliberately, MMRMA members can take the reins of AI instead of letting it lead the way.

To help achieve this, Dale shared her success formula: C+C=R. Circumstances plus choices equal our results. We can't always change our circumstances, but we are always making choices about what we read, what people we learn from, and what actions we take.

Sometimes changing our perspective means using different words in our internal monologues and out loud. For example, Dale suggested talking about the things on our calendar not as tasks we "have to" do but what we "choose to" do.