Premises Liability vs. General Negligence in Michigan

Was Injury Caused by Condition of the Premises or Defendant's Conduct?

By Ronald C. Wernette Jr. and Eric A. Rogers

In Michigan, "the assertion of a premises liability claim does not preclude a plaintiff from also asserting another theory of liability based on a defendant's conduct."[1]

When drafting a complaint for damages arising out of alleged negligent conduct occurring on a defendant's property, an important consideration is whether to plead premises liability, general negligence, or both. This distinction often is claim-dispositive because of the "open and obvious" doctrine that applies to bar many premises liability claims but has no application to general negligence claims.[2]

In Michigan, premises liability arises from *conditions* of the premises under the defendant's control, while general negligence stems from *conduct* of the defendant.[3] Sounds simple, but in practice, the distinction is not always obvious. Good lawyers attempt to describe, and then artfully plead, the same injury-producing event in terms more favorable to their legal position.

For example, think of the garden-variety grocery shopper slip-and-fall in a puddle of clear fruit juice spilled in a grocery aisle. Was the injury caused by the unsafe *condition* of the premises? Or was the injury caused by the *conduct* of the grocery store employees in failing to clean up the spill despite having noticed it? Does it make a difference if the spill was caused by a store employee or another shopper? What if it is shown that a store employee had done an incomplete job of cleaning up the spill before the fall occurred? What sounds like a bright-line legal rule in theory is less clear in application.

This article identifies and briefly discusses the published Michigan caselaw in this area over the past few years to help practitioners better plead or defend these types of personal injury cases.

The gravamen of plaintiff's claim

A review of the cases reveals two general approaches used by plaintiffs in an effort to avoid the defense-friendly open and obvious doctrine of premises liability law. One approach has been for plaintiffs to plead multiple counts—a premises liability claim focusing on the allegedly dangerous condition on the land and a general negligence claim focusing on allegedly wrongful conduct—with an effort to distinguish between the two theories of liability. The other approach is to avoid any premises liability

claim at all and allege only general negligence, emphasizing the alleged wrongful conduct of defendants rather than focusing on the premises per se.

Regardless of the pleading made by a plaintiff, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim."[4] For example, in a related context, the Michigan Supreme Court held that "[a] complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence."[5] An example of this principle applied in the context of the premises liability/general negligence distinction is provided by *Anbari v Union Square Development, Incorporated*,[6] where the court stated:

> Plaintiff's injury resulted from a condition of the land and plaintiff is suing the landowner. That this condition arose out of Woudenberg's actions is not dispositive; indeed, many conditions of land arise out of a person's actions. The plaintiff may not avoid the law of premises liability by characterizing this case as one involving ordinary negligence, when he was injured by a condition of the land and is alleging a breach of reasonable care on the part of the landowner.[7]

The discussion that follows looks at how the Michigan Court of Appeals has applied these legal rules in practice under a variety of case-specific circumstances.

Published cases

There is little published caselaw, but an important starting point is the 2005 Michigan Court of Appeals case *Laier v Kitchen*,[8] in which the plaintiff's decedent was helping the defendant repair a farm tractor on the defendant's property. During the repair, the bucket on the tractor moved as a result of the repair work, pinning the plaintiff's decedent between the bucket and the tractor body. The plaintiff's wrongful death complaint alleged a single, generalized count of negligence without specifying the underlying theory of liability.[9] The trial court granted summary judgment in favor of the defendant under the open and obvious doctrine, holding that the claim sounded in premises liability and the defendant had no duty to warn the decedent of the obvious danger.[10] The Court of Appeals reversed the dismissal, but with separate opinions written by each of the three panel judges. *Laier* is an important case for the proposition that a claim for premises liability "does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct…."[11]

Another point of agreement by at least two *Laier* judges was that, to the extent there was a viable claim of general negligence, dismissal on the basis of the open and obvious danger was improper.[12] But only one judge opined that there was a factual record sufficient to assess whether a general negligence claim might actually be viable in the case,[13] making it harder to discern *Laier*'s precedential effect on the premises liability/general negligence question itself. *Laier* does not provide any controlling guidance for application of that legal rule. Post-*Laier*, there is little published caselaw applying the rule.

In *Wheeler v Central Michigan Inns, Incorporated*,[14] the plaintiff's decedent child drowned in a pool owned by the defendant. The plaintiff's complaint was unclear about its wrongful death theory of liability. The trial court dismissed plaintiff's claims, whether characterized as premises liability (open and obvious danger) or general negligence (no duty). The Court of Appeals suggested that a premises liability cause of action likely would fail on several grounds, but noted that the "plaintiff herself stated that her cause of action sounded in ordinary negligence, rather than premises liability…."[15] As a result, *Wheeler* analyzed the general negligence claim in a substantive way and affirmed the dismissal after finding the defendant owed no legal duty on which to base a general negligence claim.[16]

In *Buhalis v Trinity Continuing Care Services*,[17] the plaintiff slipped and fell on ice on a patio near the entrance of a building owned by the defendant. The plaintiff asserted both premises liability and ordinary negligence claims. The trial court dismissed the premises liability claim on the basis of the open and obvious doctrine but refused to dismiss the ordinary negligence claim. The Court of Appeals reversed, finding that the trial court erred in finding a viable ordinary negligence claim was asserted. The Court first stated the rule of decision: "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury."[18] Applying the rule to the facts of this case, the Court held, "Though she asserted that Trinity's employees caused the dangerous condition at issue, this allegation does not transform the claim into one for ordinary negligence….Therefore, Ms. Buhalis's negligence claim is a common-law premises liability claim and, to the extent she

FAST FACTS

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purported to allege an ordinary negligence claim in addition to her premises liability claim, the trial court should have dismissed that claim."[19]

The Michigan Supreme Court's only recent guidance was provided in 2008 in *Kwiatowski v Coachlight Estates of Blissfield, Incorporated*.[20] Unfortunately, the guidance is less than clear and does not offer much help to practitioners or the bench. The Supreme Court, in lieu of granting leave to appeal, issued a one-paragraph split decision order reversing the 2–1 Court of Appeals unpublished majority opinion and adopted the dissenting opinion below.[21] The facts of the case are straightforward. The plaintiff lived at a mobile home park owned and managed by the defendants. The individual defendant opened a door at the management office, which hit the plaintiff, causing the plaintiff to fall from a porch and sustain injury. The plaintiff initially filed suit against the defendants on a premises liability theory. The trial court granted the defendants' motion for summary disposition, but allowed the plaintiff to file an amended complaint to allege general negligence against both defendants. The defendants again sought summary disposition, but the trial court denied the defendants' motion. The Court of Appeals majority reversed, finding that:

> [P]laintiff's classification of his claim as negligence rather than premises liability, is questionable. Where an injury arises out of a condition on the land, rather than out of the activity or conduct that created that condition, the action lies in premises liability. See *James v Alberts*, 464 Mich 12, 18–19; 626 NW2d 158 (2001). In this matter, plaintiff was not injured by the door hitting his face and chest. Rather, plaintiff was injured by his fall once he lost his balance on the small porch and when his foot caught under the door. The small porch and the slight gap between the porch and the door are conditions of the land. Thus, plaintiff's claim arguably sounds in premises liability, not general negligence.[22]

The dissenting judge disagreed with this conclusion, stating:

> Finally, despite the majority's suggestion to the contrary, I conclude that plaintiff's claim sounded in ordinary negligence rather than premises liability.... Plaintiff's claim is based on defendant's alleged negligence in opening the door—not defendant's failure to protect him from dangerous conditions on the land. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006).... Plaintiff's claim sounded in ordinary negligence only. *Hiner, supra* at 615–616.[23]

Kwiatowski stemmed from a simple set of undisputed facts. Yet the judges of the split Court of Appeals panel and the justices of the split Supreme Court reached different conclusions about whether the gravamen of the plaintiff's claim involved a condition of the land or the conduct of the defendants. The lesson from the split decisions in *Kwiatowski* and *Laier* is that the gravamen of the plaintiff's complaint lies in the eye of the beholder. This means, in practice, that persuasive lawyering, as well as which member of the bench is making the decision, could make all the difference in a particular case.

Unpublished cases

Since *Laier*, the Michigan Court of Appeals has issued more than a dozen unpublished opinions dealing with the matter, and some helpful guidance can be found in those cases.[24] Space limitations do not allow for discussion of the body of unpublished caselaw, but the chart on the following page identifies the pertinent cases.

The Michigan Court of Appeals in most cases presented has rejected an attempt to assert a general negligence claim except when a defendant's actions are clearly the focus of the claim and the defendant's status as a premises owner/possessor is coincidental. *Kwiatowski* is an example of this; the plaintiff's injury was characterized by 6 of the 10 jurists reviewing the case as having been caused by the defendant's conduct in opening a door—and thus a general negligence claim was allowed.[25]

The Court of Appeals has also accepted the assertion of general negligence when a premises liability claim would be invalid for other reasons. For example, in the *Wheeler* case discussed previously, the Court implied that a premises liability cause of action would fail because the defendant had complied with all applicable safety requirements.[26]

In summary, if there is a focus on a defendant's actions in the absence of a cognizable premises liability claim (e.g., the defendant is not the owner/possessor or the defendant's status as owner/possessor is unrelated to the liability asserted) or if a physical act by the defendant directly caused the plaintiff's injury, a viable claim of general negligence might be allowed. Again, the gravamen of the claim seems to be in the eye of the beholder; some see *condition* where others see *conduct*, making it difficult to predict how a particular set of facts will be viewed by a court. Thus, the opportunity for advocacy is always present.

Case Name	Case Citation	Year	Plf Pled		Court Applied		Facts
			PL	ON	PL	ON	
Laier v Kitchen	266 Mich App 482; 702 NW2d 199	2005	Unspecified Negligence		X	X	The plaintiff's decedent was repairing a hydraulic line on a front-end loader with the defendant.
Wheeler v Central Michigan Inns, Inc	292 Mich App 300; 807 NW2d 909	2011		X		X	The plaintiff's decedent (child) drowned in a hotel pool.
Kwiatowski v Coachlight Estates of Blissfield, Inc	480 Mich 1062; 743 NW2d 917	2008	X	X		X	The defendant slammed a door into the plaintiff.
Buhalis v Trinity Continuing Care Servs	296 Mich App 685; 822 NW2d 254 (2012)	2012	X	X	X		The plaintiff slipped and fell on ice near the entrance of a building owned by the defendant.
Anbari v Union Square Development, Inc	Unpublished opinion per curiam of the Court of Appeals, issued March 15, 2012 (Docket No. 302833)	2012	X	X	X		The plaintiff opened an unlocked, unmarked door in a condo and fell through it.
Berry v Dearborn Heights Montessori, Inc	Unpublished opinion per curiam of the Court of Appeals, issued January 1, 2012 (Docket No. 300737)	2012	X	X	X		The plaintiff fell off a stage.
Dupras v Lloyd-Lee	Unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295130)	2011	X	X	X		The plaintiff slipped on a wet roof after the defendant implied it was OK to go on the roof.
Weeks v Menard, Inc	Unpublished opinion per curiam of the Court of Appeals, issued January 6, 2011 (Docket No. 294208)	2011	X	X	X		While shopping at the defendant's store, the plaintiff was standing on a pallet to pick up fertilizer and the pallet broke, injuring him.
Demchik v Comaty	Unpublished opinion per curiam of the Court of Appeals, issued October 21, 2010 (Docket No. 292370)	2010		X	X		The plaintiff attempted to open a locked glass window and injured his arm when the window broke.
Thorne v Great Atlantic & Pacific Tea Co, Inc	Unpublished opinion per curiam of the Court of Appeals, issued March 4, 2010 (Docket No. 281906)	2010		X	X		The plaintiff slipped and fell on grapes in a grocery store.
Ahola v Genesee Christian School	Unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 283576)	2009	X	X	X		The plaintiff exited a building from a dark doorway and fell after missing two steps not visible in the darkness.
Koontz v Sybra, Inc	Unpublished opinion per curiam of the Court of Appeals, issued July 17, 2008 (Docket No. 278658)	2008		X	X		The plaintiff slipped and fell on debris outside one of the defendant's restaurants.
Perkins v Mid-Michigan Recycling, LLC	Unpublished opinion per curiam of the Court of Appeals, issued June 19, 2014 (Docket No. 312936)	2014	X	X		X	The plaintiff driver fell off steps of a large front-end loader on the defendant's property.
Schoch v Michigan Paving and Materials Co	Unpublished opinion per curiam of the Court of Appeals, issued September 30, 2010 (Docket No. 291435)	2010		X		X	The plaintiff fell and broke a bone while walking across a parking lot with uneven pavement grades.
Floyd v Insulspan, Inc	Unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 286442)	2009		X		X	The plaintiff truck driver was transporting snow-covered lumber, and slipped and fell when attempting to cover the lumber with tarps.
Fayad v Darwich	Unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 284181)	2009	Unspecified Negligence		X	X	A third party was cutting down a tree with a chainsaw as the plaintiff and the defendant held ropes to pull it down. The defendant ran away and the tree fell on the plaintiff.
Pernell v Suburban Motors Company, Inc	Unpublished opinion per curiam of the Court of Appeals, issued April 23, 2013 (Docket No. 308731)	2013	X	X	X	X	While being escorted by an employee at an auto dealership, the plaintiff slipped on water in a service bay and fell.
Cohen v Great Lakes Live Steamers, Inc	Unpublished opinion per curiam of the Court of Appeals, issued March 6, 2008 (Docket No. 275190)	2008		X	X	X	The plaintiff was riding a model train operated by the defendant and was injured when the train derailed.

Published cases | Unpublished cases sounding in premises liability | Unpublished cases sounding in ordinary negligence | Upubliished cases sounding in premises liability and ordinary negligence

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Conclusion

Courts will look beyond the face of the complaint to determine a true cause of action, regardless of the labels chosen by a plaintiff. The legal line dividing premises liability and general negligence—which turns on the characterization of whether the gravamen of a claim is *condition* or *conduct*—is not always clear under Michigan common law. That leaves room for advocacy by counsel on both sides of the bar. If an injury occurred because of a plaintiff's likely clumsiness or a defendant's assurance of safety, and an aspect or condition of the premises is an operative issue, then a general negligence claim is unlikely to be recognized. But if a defendant was physically involved in the injury-producing event, the defendant's status as premises owner is coincidental to the operative events, or a premises liability claim would not lie against a particular defendant, a general negligence claim might be facially viable. ■

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ENDNOTES

1. *Pernell v Suburban Motors Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2013 (Docket No. 308731), p 4, citing *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005).
2. See, e.g., *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).
3. *James v Alberts*, 464 Mich 12, 18–19; 626 NW2d 158 (2001).
4. *Adams v Adams*, 276 Mich App 704, 710–711; 742 NW2d 399 (2007).
5. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich 1997).
6. *Anbari v Union Square Dev, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2012 (Docket No. 302833).
7. *Id.* at *3.
8. *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005).
9. *Id.* at 490.
10. *Id.* at 486.
11. *Id.* at 493. See also *id.* at 502 (Hoekstra, J.) ("the trial court and the parties failed to recognize ordinary negligence as a theory of recovery separate from premises liability and thus failed to develop a record sufficient to permit any meaningful review by this Court").
12. *Id.* at 490 (Neff, J.) and 502 (Hoekstra, J.); but see *id.* at 501 (Schuette, J.) (finding the record "about as factually underdeveloped as a fourth-world economy" and for that reason concurring in the result only and declining to join in the analysis of other panel members).
13. Although Judge Neff's opinion suggested there was sufficient evidence to support a viable claim for general negligence, the separate opinions of Judges Hoekstra and Schuette each expressly declined to opine on the viability of such a claim if made in this case.
14. *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300; 807 NW2d 909 (2011).
15. *Id.* at 304–305.
16. *Id.* at 307.
17. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012).
18. *Id.* at 258 (citations omitted).
19. *Id.*
20. *Kwiatowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008).
21. See *Kwiatowski v Coachlight Estates of Blissfield, Inc*, unpublished opinion of the Court of Appeals, issued July 3, 2007 (Docket No. 272106), rev'd 480 Mich 1062.
22. *Id.* at *3.
23. *Id.* at *4 (Jansen, J., dissenting).
24. Federal courts, particularly those in the Sixth Circuit, have become increasingly deferential to unpublished Michigan Court of Appeals decisions when there is no published controlling precedent. See Nelson & Jordan, *Unpublished but binding? Federal courts give near-binding effect to even unpublished Michigan Court of Appeals decisions*, 29 Mich Def Quarterly 16 (2013).
25. *Kwiatowski*, n 21 *supra*.
26. *Wheeler*, n 14 *supra* at 303.