Legislative Analysis

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COMMERCIAL PREMISES LIABILITY ACT

House Bill 4582 as introduced
Sponsor: Rep. Jerry Neyer
Committee: Judiciary
Complete to 8-20-25

SUMMARY:

House Bill 4582 would create the Commercial Premises Liability Act, which would provide for the liability of ***possessors*** of real property for injuries to ***invitees***. Under the bill, a possessor would have a duty to use *ordinary care*[1] to protect an invitee from risks of harm from a *condition* (i.e., a dangerous or hazardous state on a property that could cause injury) on the possessor's ***premises*** if both of the following apply:

- The risk of harm is unreasonable.
- The possessor knows or should know of the condition and should realize that the condition involves an unreasonable risk of harm to an invitee.[2]

Possessor would mean any of the following:

- A ***person*** that is in occupation of the premises with intent to control it.
- A person that has been in occupation of the premises with intent to control it, if no other person has subsequently occupied the premises with intent to control it.
- A person that is entitled to immediate occupation of the premises, if no other person is a possessor as described above.

Invitee would mean an individual who is invited, expressly or impliedly, to enter or remain on the premises for a commercial benefit to the possessor of the premises or for a purpose directly or indirectly connected with business dealings with the possessor.

Person would mean an individual or a partnership, corporation, limited liability company, association, or other legal entity.

Premises would mean real property.

Conversely, a possessor would owe no duty to protect an invitee from, or warn an invitee of, risks of harm from an ***open and obvious*** condition on the possessor's premises (see "Background" below). In other words, under the bill, a possessor would not be liable for any injuries to an invitee that occur as the result of a condition that is known to the invitee **or** that would have been discovered by a reasonably careful person on casual inspection under the

[1] *Ordinary care* (also referred to as "due care" or "reasonable care") is the level of attentiveness, prudence, and diligence that may be expected from a reasonable person in the same situation or under similar circumstances. It is the standard of care typically used in tort actions to determine whether a person was negligent.

[2] For the purposes of the bill, a possessor should be aware of a condition if, in the exercise of ordinary care considering the character of the condition and whether it has existed for a sufficient length of time, the possessor would discover the condition.

circumstances. However, the bill would require a possessor to take reasonable precautions to avoid any risk presented by any special features of a condition that *is* open and obvious but that make the condition effectively unavoidable or create an unreasonably high risk of severe harm (e.g., an unguarded 30-foot-deep hole in a parking lot).

The bill would not do any of the following:

- Affect or impair any defense that may be available to the *owner* (a person that holds legal or equitable title to premises) or possessor of premises under any other law.
- Create a duty of care of an owner that is not also a possessor of the premises.
- Impair comparative fault under section 2955a or 2959 of the Revised Judicature Act[3] or under any other law.

Finally, the bill would not apply to a condition that is inside a building or other structure on the premises.

BACKGROUND:

The tort of negligence consists of four elements: duty, breach, causation, and damages. In general, the possessor of real property owes a *duty* of care to anyone invited to enter or remain on their property—that is, protecting invitees from an unreasonable risk of harm from a condition on the premises. If a *breach* of that duty of care by a possessor is the proximate *cause* of an injury to an invitee, the injured party may seek *damages* from the possessor in court. As a subset of negligence cases, these same elements apply in premises liability cases.

In its decision in *Lugo v Ameritech Corp, Inc.*, 464 Mich. 512 (2001), the Michigan Supreme Court held that a possessor's duty of care to protect invitees does not extend to conditions on a property that are "open and obvious" unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous," in which case "the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk."[4] In *Lugo*, the plaintiff had fallen after stepping in a pothole in the parking lot adjacent to the defendant's building and sued for damages. The defendant moved for summary disposition on the grounds that the pothole "constituted an open and obvious danger from which it had no duty to protect plaintiff."[5] While the circuit court agreed and granted summary judgment, the Court of Appeals reversed, reasoning in relevant part that the case presented genuine issues of material fact regarding the duty of care owed by the defendant to the plaintiff and that the open and obvious doctrine did not apply.[6] Largely due to unclear Michigan case law on the issue, the circuit court and the Court of Appeals disagreed on which portions of the obviousness analysis fell under "duty" (questions of *law* to be decided by a judge) and which fell under "breach" and *comparative negligence* (questions of *fact* to be decided by a jury).[7]

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[3] MCL 600.2955a
MCL 600.2959

[4] *Lugo v. Ameritech Corp, Inc.*, 464 Mich. 512, 517. The syllabus and full text of all opinions are available here.

[5] *Id.*, at 515.

[6] Specifically, the Court of Appeals determined that "there was a genuine issue of material fact regarding whether the defendant should have expected that a pedestrian might be distracted by the need to avoid a moving vehicle, or might even reasonably step into the pothole to avoid such a vehicle." *Id.*

[7] *Comparative negligence* (or "comparative fault") was codified by the legislature in 1979 and allows for liability to be shared between parties. In tort litigation in which a plaintiff seeks damages for personal injury, property damage, or wrongful death, Michigan courts may assign a percentage of fault to each party involved in an accident, and

On appeal, the Michigan Supreme Court reversed the Court of Appeals, reinstating the circuit court's summary judgment and clarifying that the open and obvious doctrine is not an exception to the duty generally owed by a possessor to invitees, but rather "an integral part of the definition of duty."[8] *Lugo* was determinative in many subsequent premises liability cases. Because property owners owed no duty of care to protect invitees from many potentially hazardous property conditions, and because duty is a threshold question of law, many of these cases were dismissed and did not proceed to trial simply because no duty was owed to a plaintiff in the first place.

In 2023, the Michigan Supreme Court overruled *Lugo*, ruling in a pair of combined cases (*Kandil-Elsayed v F&E Oil, Inc.* and *Pinsky v Kroger Co.*)[9] that the question of whether a condition is open and obvious should be analyzed as part of the breach and comparative fault analyses, rather than as a component of the element of duty. The court reasoned that "by situating the open and obvious danger doctrine in duty [as in *Lugo*], the plaintiff's comparative fault […] works to cut off liability in full," a reality that is incompatible with Michigan's status as a comparative-fault jurisdiction. Further, the court held that *Lugo*'s "special aspects" inquiry "created confusion as to what the exceptions to the open and obvious danger doctrine would be" in a way that ultimately "defies practical workability."[10] Under the new *Kandil*/*Pinsky* framework, a possessor still has a duty to exercise reasonable care to protect invitees from unreasonable risks of harm from a condition on their property, but this duty of care now extends to conditions that are open and obvious as well.[11]

In effect, House Bill 4582 would codify the open and obvious doctrine in statute and reinstate the pre–*Kandil*/*Pinsky* status quo.

FISCAL IMPACT:

A fiscal analysis is in progress.

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plaintiffs can generally recover damages if they are 50% or less at fault. As with questions related to the element of breach, questions of comparative negligence are questions of fact that are decided by a jury. See MCL 600.2959.

[8] *Id.*, at 516.

[9] *Kandil-Elsayed v F&E Oil, Inc.*, Docket No. 162907 (2023) and *Pinsky v Kroger Co. of Michigan*, Docket No. 163430 (2023). The syllabus and full text of all opinions are available here.

[10] *Kandil-Elsayed*, slip op. at 36.

[11] A fundamental component of the court's holding in *Kandil*/*Pinsky* is that, while the open and obvious doctrine is still relevant as part of the breach and comparative fault analyses, these inquiries take place *after* the case proceeds to trial and are ultimately decided by a jury. Under the *Lugo* framework (and the provisions of House Bill 4582), the question of whether a condition is open and obvious is a threshold issue for determining whether or not a case proceeds to trial.