Support HB 5744

The Members of the Michigan Association for Justice support HB 5744, which will repair Michigan's modified comparative negligence statute.

What the Legislation would do

House Bill 5744 (Kandrevas) will stop the courts from treating an elderly woman, a blind man, or a veteran with an artificial leg as though they had the same capacity to avoid a risk as everyone else. The current court created rule requires an objective standard based on the hazard or risk, with no regard to the subjective care or capacity of the injured party. So a person with a disability is not given any consideration of that disability in weighing his or her ability to avoid the risk. The standard is objective. The bill would require our courts to return to the comparative negligence standard enacted by the State and require examination of the individual circumstances of each incident.

Currently, the Court created rule and legislatively enacted law are at odds with one another. The current situation is effectively what was called a contributory negligence system, where negligence on the part of the injured person bars all recovery. Except that the current situation is worse, because at least under a contributory negligence system, the person's circumstances (blindness, age, infirmity, disability, etc) would be weighed in considering whether or not he had acted reasonably. Michigan's open and obvious doctrine doesn't even allow for such things to be considered.

Open and Obvious – The Supreme Court changes the law

Although the modified comparative negligence system (explained below) is still the law on the books, the law that was adopted by the Legislature has been superseded by a legal doctrine called "Open and Obvious" created entirely by the Supreme Court.

In *Lugo v Ameritech Corp, Inc*, (464 Mich 512; 629 NW2d 384 (2001)) the Michigan Supreme Court barred a woman who was injured as she walked across a parking lot from pursuing her claim. The Court summarily dismissed her case because as she was watching out for moving vehicles, she did not see the pothole that caused her to trip and fall. According to the *Lugo* Court, courts deciding open and obvious cases should "*focus on **the objective nature of the condition of the premises** at issue, **not on the subjective care used by plaintiff**." Lugo at 523–24 (emphasis added).*

This Court created rule has led to increasingly ridiculous findings in favor of negligent business and property owners. Because the Open and Obvious doctrine makes "obvious" risks the responsibility of the injured party instead of the person who could have repaired them, injured parties are accountable for not noticing risks in the dark, around corners, under water, visible only if you could see through objects or from a different direction, they are even accountable for not seeing from multiple directions simultaneously. [1]

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[1] A danger obscured by darkness is open and obvious: *Parkhurst v Bartz*, issued August 21, 2001 (Docket No 223576); *Sablosky, supra; Pisapia v 551 Office Bldg*, issued June 7, 2005 (Docket No 250317); *Forcelli v Princeton Enterprises*, issued May 12, 2005 (Docket No 251305); *Judd, supra; Myers v McLaren Regional Med Ctr*, issued March 3, 2000 (Docket No 208264); *West v Olympia Entertainment*, issued March 19, 2002 (Docket No 229044); *McConnal v West Side Concrete Co*, issued June 20, 2006 (Docket No 267390).
Under water is open and obvious: *Mugianis v Walled Lake*, issued April 20, 2006 (Docket No 266339). *Mary K Hall v Comcast of Michigan*, (Docket No. 2008-088395-NO)
Around corners: *Michalak v Atlas Coney Island*, issued April 27, 2004 (Docket No 243224).
Behind objects: *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005) (ice behind a snowbank was open and obvious).

There is even a case where a blind man was held to be responsible for not having "seen" the "obvious" risk of a pool of water on the floor.[2] As if this interpretation of "obviousness" wasn't enough, the courts have also thrown out an injured persons' claim if there was any other way he or she could have avoided the injury, no matter how far fetched.[3] In fact, as the injured party, you aren't even able to rely upon the instructions of the premises owner as to a safe route.[4]

Premise liability

Premises liability law makes a land or premises owner or possessor responsible for certain injuries suffered by persons who are present on the premises. The degree to which a duty is owed to someone by the owner or possessor is dependent on how and why the person is on the property. The level of duty a business owner owes to customers is significantly different that owed to the social guests of a home owner. For example, a business owner is expected to create a safer environment than a home owner.

Generally, an injured person has to prove that the reason they were injured was something that was under the control of the premises owner or possessor and that the premises owner or possessor knew or should have known that this risk existed and, in spite of this, failed to make the premises safe.

Michigan's law – Modified Comparative Negligence

Michigan has adopted a "modified comparative negligence" standard, it was enacted in 1995 as part of the State's so-called "tort reforms".

Under such a standard a fact finder (usually a jury) compares the fault of each party. For example: A property owner who failed to clean up a dangerous spill in a timely manner is only partly at fault if the person that slipped due to the spill was "texting" at the time of the fall. If the fact finder determined that the property owner was 40% at fault, and the person texting was 60% at fault. The injured person's damages would be reduced by 60%.

The "modified" part of Michigan's comparative negligence law bars an injured person from *any claim* for non-economic damages (what we'd call "pain and suffering") if he or she was more than 50% at fault for the injury. In the example above, the texting person who fell would receive no non-economic damages and only 40% of the economic damages.

See in multiple directions at once: *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001) (must look down to see pothole while looking around to avoid traffic); *Rambo v Warren Dental Assoc,* issued June 6, 2006 (Docket No 264552) (must look down while simultaneously looking up to avoid bumping head); *Brubaker v St Matthew Lutheran Church,* issued December 27, 1994 (Docket No 160151) (same analysis).
Only visible from another perspective: *Emmons v Acres,* issued July 27, 2004 (Docket No 246996).

[2] In the case of *Sidorowicz v Chicken Shack Inc.*, Unpub. Court of Appeals Docket No. 239627 (January 17, 2003) a blind man slipped on water which had accumulated in a bathroom stall. The Court ruled that water on a bathroom floor in the restaurant was open and obvious. The man's case was dismissed even though he was blind, because the water "would have been open and obvious to an ordinarily prudent person."

[3] *Joyce v Rubin,* 249 Mich App 231, 242; 642 NW2d 360 (2002) (fired resident nanny could have removed her property on a non-snowy day); *Baillie v Dietz Org,* issued November 25, 2003 (Docket No 242055) (tenant could have taken different route to dumpster, or waited for another day); *Haley v Davis Inc,* issued August 16, 2005 (Docket No 253003) (homeless person could have come back later to inspect an apartment); *Devine v Rubloff Dev Group,* issued April 4, 2006 (Docket No 259166); *Koss v A & A Transportation Services,* issued September 21, 2006 (Docket No 269411) driver could have avoided a dark, icy parking area by parking in front, contrary to his employer's); *Fuller v Shooks,* issued October 24, 2006 (Docket No 269886). *James v Sandyoak Village,* issued July 18, 2006 (Docket No 267615) (one trapped in a laundry room could have waited for water at the exit to dry).

[4] *Crawford v Detroit Entertainment,* issued August 22, 2006 (Docket No 266289) (landowner immune for directing a patron across an icy spot).