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STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant,

v.

F & E OIL, INC.,

Defendant-Appellee.

Supreme Court Case No. 162907
Court of Appeals Case No. 350220
Lower Court Case No. 18-003569-NO
Wayne County Circuit Court

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

Oral argument requested

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1). On February 4, 2022, under MCR 7.305(H)(1), this Court entered an Order directing appellant and Appellee to submit supplemental briefs.

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STATEMENT OF QUESTIONS PRESENTED BY MICHIGAN SUPREME COURT ORDER DATED FEBRUARY 4, 2022

I. Was there a genuine issue of material fact concerning whether the parking lot entrance to the convenience store constituted an effectively unavoidable condition;

Plaintiff-Appellant answers "yes"
Defendant-Appellee answered "no"
Court of Appeals answered "no"

II. Is *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), consistent with Michigan's comparative negligence framework.

Plaintiff-Appellant answers "no"
Defendant-Appellee did not answer
Court of Appeals did not answer

III. Which approach should this Court adopt for analyzing premises liability cases under a comparative negligence framework?

Plaintiff-appellant answers that the Court should overrule the unworkable *Lugo* special aspects doctrine in favor of guidance from the Restatement Second and Restatement Third.

IV. Plaintiff-Appellant also asks, does the *Lugo* special aspects doctrine undermine the constitutional right to jury trial?

Plaintiff-Appellant answers "yes"
Defendant-Appellee did not answer
Court of Appeals did not answer

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INTRODUCTION

This Court has invited supplemental briefing and arguments relative to whether there was a genuine issue of material fact as to whether the condition of the premises confronted by Plaintiff-Appellant, Ahlam Kandil-Elsayed, was effectively unavoidable, whether the *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001), "open and obvious" "special aspects" doctrine as a threshold question of "duty" is inconsistent with comparative negligence and, if so, what approach this Court might apply in the future. Kandil-Elsayed maintains that there was a genuine issue of material fact as to whether the condition was effectively unavoidable. Further, we assert that such an inconsistency indeed exists and that the cases setting forth the special aspects doctrine as a barrier to presenting premises liability cases are not only inconsistent with comparative negligence, but they represent a violation of the constitutional right to trial by jury.

The Court of Appeals below affirmed the trial court's grant of summary disposition under circumstances where the record could not have been more clear that there remained genuine issues of material fact regarding the reasonableness of the land possessor, F & E Oil Inc.'s action and the reasonableness of Kandil-Elsayed's conduct. Nevertheless, because of the effective grant of immunity that the special aspects doctrine created, her case, like so many other worthy plaintiffs before and after her, was dismissed on a finding that no *duty* existed. The special aspects doctrine is an anomaly to premises liability law that should never have occurred and should no longer exist.

The special aspects doctrine should be expressly overruled as an element of duty, and this Court should clarify that the open and obvious defense and any questions related to it are considerations, not of duty, but of standard of care, breach, or comparative

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negligence. Such an approach is consistent with the Second Restatement of Torts and the Third Restatement of Torts, as well as our precedent that predates *Lugo*.

STATEMENT OF FACTS

I. Factual Background

This case involves a very simple set of facts that Michigan citizens routinely confront. On March 3, 2016, Plaintiff-Appellant, Ahlam Kandil-Elsayed, was driving home after running errands. (App., pp 10-11, 20). Needing to fill her gasoline tank, she pulled into Defendant-Appellee, F & E Oil, Inc.'s service station. (App., pp 20-22). After parking, she proceeded toward the building in order to pre-pay for the gasoline using cash. (App., pp 27-28). The entire parking lot, including the pathway of the entrance to the gas station, was covered with snow. (App., pp 29, 31, 57). While snow plows had started to clear the roads, it appeared to her that the area in front of the entrance to the gas station had not been shoveled and there was no salt on the ground. (App., pp 29, 57). As Kandil-Elsayed approached the entrance to the building, she slipped and fell. (App., p 31). It was the ice underneath a covering of snow that caused her fall. (App., p 38). Kandil-Elsayed fell backwards, striking the back of her head on the cement. (App., p 39).

After a short period of time, she was able to get up. She went inside to tell the clerk about the fall. His response was to tell her he "didn't care," and to advise her that he would not help and that she could sue them. (App., pp 33, 43-44). Kandil-Elsayed paid for her gas, fueled up, and went home in order to lay down because of head pain. (App., pp 42-47). Photographs depicting the building's entrance where Kandil-Elsayed fell show a slight slope from the parking lot to the service station's entrance as described by Kandil-

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Elsayed. (App., pp 60-61). These were taken some time after the fall and do not reflect conditions at the time. (App., pp 36-37).

II. Procedural History

Kandil-Elsayed filed her lawsuit March 30, 2018, alleging a premises liability theory of negligence. (App., pp 62-65). On May 10, 2019, F & E Oil filed a motion for summary disposition arguing that the condition that caused Kandil-Elsayed's fall was open and obvious. (App., pp 66-67 and App. pp 68-84). Kandil-Elsayed responded by arguing that the location and nature of the hazard made it effectively unavoidable. (App, pp 85-94). The trial court issued an Order on July 24, 2019, granting summary disposition to F & E Oil.[1] (App., pp 102-103).

Kandil-Elsayed appealed and the Court Of Appeals issued its decision on March 11, 2021. (App., pp 104-105). In concluding that there were no special aspects that would result in the imposition of a duty despite the open and obvious condition of the snow, the Court held as follows:

> plaintiff could have simply left that gas station and went to another or she could have called the station and requested that the attendant come out and take her money for the gas. There are any number of possibilities that plaintiff could have chosen to avoid the snow and ice condition; thus, the trial court properly granted defendants' motion for summary disposition. (App., p 105).

[1] While the trial court's July 24, 2019 Order indicates that it is being granted for the "reasons stated on the record on July 23, 2019," there was no hearing on the record on July 23, 2019. As such, the only hearing related to the summary disposition at the trial court occurred on July 18, 2019. (App., pp 95-101).

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This Application for Leave to Appeal was timely filed by April 22, 2021. This Court issued an Order on February 4, 2022, directing the Clerk to schedule oral argument on the application and directing appellant and appellee to file supplemental briefs.

STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on summary disposition. *Maiden v Rozwood*, 461 Mich 110, 118; 597 NW2d 817 (1999). In deciding a motion under MCR 2.116(C)(10), the Court considers the record evidence in a light most favorable to Kandil-Elsayed as the nonmoving party. *Id*, at 120. All reasonable inferences must also be drawn in favor of the nonmovant, Plaintiff-Appellant, Kandil-Elsayed. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2008). Summary disposition is proper only if the proffered evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 at 121. This Court also has discretion to review any unpreserved issues related to Plaintiff-Appellant's Constitutional rights because declining to do so would result in a miscarriage of justice. See *People v Dorrikas*, 354 Mich 303, 316; 92 NW2d 305 (1958).[1]

ARGUMENT

In its February 4, 2022 Order, this Court first asked whether there is a genuine issue of material fact concerning whether the parking lot constituted an "effectively unavoidable condition." To this question, Kandil-Elsayed has two responses: First, yes,

[1] Plaintiff-Appellant has addressed her constitutional rights to a jury trial in response to this Court's inquiries in its February 4, 2022 Order in Argument II C. The inquiry into whether *Lugo* is compatible with Michigan's comparative negligence system is directly related to Plaintiff's right to a jury trial. As such, Plaintiff-Appellant maintains that this is properly before this Court and has been preserved.

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based upon the present *Lugo* standard and state of the law, as well as the record below, there remained a genuine issue of material fact as to whether the condition constituted an effectively unavoidable condition. Second, however, this inquiry begs the question because the "effectively unavoidable condition" factor – or standard – is a creation of the *Lugo* "special aspects" doctrine, which incorrectly cast this as a question of duty and improperly shifted the focus from the premises itself to the conduct of the invitee, ultimately conflicting with our State's comparative negligence framework.

I. On the record before the trial court, there was a genuine issue of material fact related to whether the entrance to the store constituted an "effectively unavoidable condition."

A. There was a genuine issue of material fact based on Supreme Court precedent and the record.

Premises liability cases have four elements: Duty, breach, proximate cause, and damages. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2011), citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In *Riddle*, this Court ruled that the trial court incorrectly instructed the jury with regard to the duty of a premises owner to invitees, and that the Court of Appeals "mistakenly concluded that the 'no duty to warn of open and obvious dangers' has been abolished in Michigan." *Id*. at 103. The Court held that the

> adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive – two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action. *Id*. at 95.

Lugo took the analysis a step further and held that a "premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a

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condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo* 464 Mich at 517. The Court explained further that its approach "focusing on the existence or absence of special aspects of an open and obvious danger, will guide the trial courts in considering whether particular open and obvious conditions posed an unreasonable risk of harm better than would be the case without this further exposition of the open and obvious doctrine" *Id*. at 525-526. And further, that "a premises possessor does have a duty to undertake reasonable efforts to make its premises reasonably safe for its invitees. This opinion attempts to provide a further explanation of the scope of that duty." *Id*. at 526.

Lugo's creation of the special aspects doctrine resulted in significant confusion, which is discussed *infra*. Subsequent to *Lugo,* this Court recently considered two significant cases addressing special aspects, *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), and *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328; 968 NW2d 397 (2021). In *Hoffner*, the majority cited the general rule of snow and ice cases from *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), as follows:

> With specific regard to ice and snow cases, this Court has "reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability" under any circumstances. Rather, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, required that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Hoffner*, 492 Mich at 463-464.

Accordingly, the Court – suggesting that its decision does not ignore the *Quinlivan* precedent, *Id*. at 475, noted that its ruling assists understanding the *Quinlivan* precedent

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in context of *Lugo* and its progeny[2] – held that an ice patch on the sidewalk in front of a gym that plaintiff "chose to confront was open and obvious, and plaintiff has not provided evidence of special aspects of the condition to justify imposing liability on the defendants despite the open and obvious nature of the danger." *Hoffner*, 492 Mich at 481-482.

i. Kandil-Elsayed's actions were reasonable under this Court's prior precedent related to special aspects.

The holding in *Hoffner*, that the standard of effective unavoidability is that "for all practical purposes [a plaintiff] must be *required* or *compelled* to confront a dangerous hazard . . . [and that] situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoided, or even effectively so," was the only time this standard has been applied. *Estate of Livings,* 507 Mich at 338, (emphasis in original). The Court in *Estate of Livings* noted further that the Supreme Court has never considered the "effectively unavoidable" standard, as articulated in *Lugo* and *Hoffner*, in the context of plaintiffs who confront open and obvious dangers due to their employment. Rather, courts have followed the Restatement approach. Accordingly, the *Estate of Livings* Court held that

> It is reasonable to anticipate that a person will proceed to encounter a known or obvious danger for purposes of his or her work. Accordingly, an open and obvious hazard can become effectively unavoidable if the employee confronted it to enter his or her workplace for work purposes. *Estate of Livings,* 507 Mich at 345.

Further, the Court noted that this is not, as the defendant claimed, a subjective inquiry that focused on the peculiar facts leading the employee to confront the condition.

[2] As discussed *infra*, this assertion is fundamentally inconsistent with practical reality because *Lugo* has, in practice, essentially completely eradicated cases involving ice and snow hazards, contrary to the *Quinlivan* precedent.

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Rather, "the overall analysis centers on whether a reasonable premises possessor in the defendant's circumstances could reasonably foresee that the employee would confront the hazard despite its obviousness." *Id*. at 346.

In the case at bar, the record indicates that the entrance to the parking lot was completely snow-covered. (App., p 31). While the roads were already being plowed, the driveway and the entire parking lot, including the entranceway to the gas station, was neither cleared nor salted. (App., pp 29, 57). Kandil-Elsayed was employed and spent this day, her day off, running errands. (App., pp 10-11, 20). She was using cash and had to go inside to pre-pay for her gas. (App., p 28).

In affirming the lower court, the Court of Appeals, improperly considered what Kandil-Elsayed theoretically could have done in concluding that the condition was not "effectively unavoidable." (App., p 105). This finding itself is contrary to the purported effectively unavoidable condition principle that *Lugo* alleged to have established as a subset of special aspects. *Lugo* cautioned that the "focus [is] on the objective nature of the *condition of the premises* at issue, *not on the subjective degree of care* used by the plaintiff." *Lugo,* 464 Mich at 524, (emphasis added).

A fair reading of *Lugo* should have resulted in the trial court and Court of Appeals finding that there was, minimally, a genuine issue of material fact as to whether this condition was effectively unavoidable. The record reflected that snowplows were already plowing the roads, yet this land possessor had done nothing to clear or salt his parking lot, which remained open to business invites who had to pre-pay to use cash. Rather than consider any of that, the Court of Appeals instead focused its attention entirely on speculative consideration of what Kandil-Elsayed herself could have done. The

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degradation of premises liability law that *Lugo* represents resulted in a typical knee-jerk conclusion that the condition was effectively unavoidable, with the Court of Appeals concluding that Kandil-Elsayed herself could have just left or called the clerk to come to her to get the money. (App., p 105). These conclusions were not supported by evidence on the record.

ii. Kandil-Elsayed's actions were reasonable under this Court's holding in *Estate of Livings.*

Defendant in *Estate of Livings* made arguments similar to those raised by Defendant-Appellee F & E Oil in the case at bar. In that case, the Court held that skipping work was not a reasonable alternative to confronting the hazard that the premises possessor could reasonably foresee. 507 Mich at 348.

In the case at bar, the Court of Appeals' suggestions are likewise not reasonable. The record reflects that the store clerk was completely indifferent to Kandil-Elsayed's injuries. (App., p 33, 43-44). Although Kandil-Elsayed unequivocally testified that she advised the clerk that he should have shoveled, that she had fallen, he responded that he "doesn't care." (App., p 43-44). Nevertheless, the Court of Appeals concluded that one of her options would have been for Kandil-Elsayed to call the store clerk to retrieve the money rather than for her to confront the unreasonably dangerous condition that F & E Oil permitted to exist on its premises – open to the public and requiring pre-payment for cash.

Further, the Court of Appeals disregarded the fact that Kandil-Elsayed testified that she needed to fill her gas tank. This was a gas station that she previously accessed for this purpose. (App., p 27).

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> plaintiff could have simply left that gas station and went to another or she could have called the station and requested that the attendant come out and take her money for the gas. There are any number of possibilities that plaintiff could have chosen to avoid the snow and ice condition; thus, the trial court properly granted defendants' motion for summary disposition. (App., p 105).

The suggestions that she could have gone elsewhere or "any number of possibilities" were not based on the record before the court, and further, they were not reasonable.

This Court concluded in *Estate of Livings* that an invitee's employment obligations are a factor to be considered in ascertaining whether a condition is effectively unavoidable (see also, *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016)). Here, where Kandil-Elsayed was filling her tank, in order to facilitate her ability to work and otherwise live her life, her conduct was reasonable and therefore the condition was effectively unavoidable.

The *Estate of Livings* attention on the Restatement approach as to what constitutes reasonable considerations supports a finding that there remained a genuine issue of material fact in this case. A reasonable premises possessor in F & E Oil's circumstances could reasonably foresee that, where the entire parking lot is covered in ice and snow, customers who prepay for gas using cash, would confront the hazard despite its obviousness. *Estate of Livings*, 507 Mich at 346. Calling the callous store clerk, or leaving, or other unsupported speculative alternatives, is not reasonable.

B. While there remained a genuine issue of material fact, the considerations of Kandil-Elsayed's conduct have no bearing on the duty analysis.

This consideration however, of whether a condition is "effectively unavoidable," is a creature of the special aspects doctrine, which originated from the *Lugo* Court mis-

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casting the open and obvious doctrine as a part of the duty analysis. Continuing to analyze cases based upon this fundamentally faulty premise serves to perpetuate a legal landscape fraught with contradictions and confusion.

The efforts to square real life considerations with the contorted logic of the *Lugo* special aspects test has led to unworkable situations. This Court has previously concluded that working out is not a sufficient factor in the context of this analysis in *Hoffner*. In *Estate of Livings*, however, this Court held that it is not reasonable, as a matter of law, to expect an invitee to skip work in order to avoid confronting a hazard that the land possessor permitted to remain on its premises.

The result of *Lugo*'s legacy are rulings that reflect that in the context of *duty*, if a plaintiff must enter for employment purposes, the condition is effectively unavoidable, but if the plaintiff must enter for a physical workout, even if she has paid for the membership, that is insufficient and that therefore, the possessor of the land at issue has no duty. These seeming inconsistencies are the result of the incorrect premise that *Lugo* established – that being that whether special aspects exist in the context of an open and obvious condition is a question considered in the context of ascertaining whether a *duty* exists.

In this case, the inquiry of whether Kandil-Elsayed confronted an effectively unavoidable condition, was an inquiry that should have been posed to a jury to pass judgment on whether F & E Oil breached the standard of care it owed her or whether she acted negligently such that her right to recover damages was, in any way, negatively impacted.

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As such, the answer to this Court's inquiry in its February 4, 2022 Order is that there was, minimally, a genuine issue of material fact as to whether the condition that Kandil-Elsayed confronted was effectively unavoidable, however, this inquiry has no bearing on the fundamental question of F & E Oil's duty. It is a question that bears on the issue of whether there was a breach of the duty owed to Kandil-Elsayed or possibly, as to whether she was negligent in any way. It is not, however, a question that should be dispositive of the issue of duty itself.

II. The *Lugo* decision is inherently inconsistent with this State's common law and statutory comparative negligence framework.

A. *Lugo* conflated duty and breach.

There has never been any dispute in the even remotely recent history of Michigan premises liability law that those in possession and control of land owe certain duties to invitees.

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves unreasonable risk of harm to invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against danger.
> 2 Restatement of Torts 2d, § 343 (1965).

The liability of the possessor of land may under some circumstances be eliminated if there is a *factual* determination in accordance with the following:

> A possessor of land is not liable to his invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. 2 Restatement of Torts 2d, § 343A (1) (1965).

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It is clear that the above potential relief from liability is *not* couched in terms of duty in the Restatement. Rather, the Restatement alludes to matters that are properly the subject of factual determination arising *not* entirely intrinsically from the condition but from how each party perceived the situation.

Beyond the fact that the Restatement addresses not duty but the possibility of a nearly infinite variety of factual situations that might lead a landowner to anticipate harm or an invitee to not appreciate the gravity of a condition, the Comments to the Restatement discuss two significant areas of potential relief from a hard and fast open and obvious rule requiring dismissal of a case.

The first exception is for distraction, where a possessor should anticipate harm because it has reason to expect that an invitee's attention may be distracted from a condition so that he or she would either fail to discover the condition even if it was obvious, or that he or she would forget the nature of the condition due to being distracted from it. 2 Restatement of Torts 2d, § 343A(1), Comment *f* (1965).

The second exception involves deliberate encounters, meaning that the possessor has reason to expect that the invitee will proceed towards the obviously hazardous condition because the advantages of doing so outweigh the apparent risk. 2 Restatement of Torts 2d, § 343A, Comment *f* (1965).

In adopting an essentially ironclad "open and obvious" rule, the Michigan appellate courts have ignored the above Restatement exceptions, both of which seek to analyze the conduct of the parties on both sides of the case, as opposed to simply looking at a condition and declaring it to be open and obvious and thus avoidable in the absence of negligence. Both of these Restatement exceptions are on their face necessarily fact-

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driven, confirming that the principles set forth in the Restatement were such that they were susceptible to interpretation by jurors, and not as a matter of law–couched as "duty" or otherwise–by judges.

The Court in *Lugo* articulated the general proposition of premises liability law that a "premises possessor does have a duty to undertake reasonable efforts to make its premises reasonably safe for its invitees," but the majority opinion claims to provide a further explanation of the "scope of that duty." *Id.* at 526. While the Court asserted its intent to explain the scope of duty, its efforts have instead resulted in confusion and erosion of the legal distinction between duty and breach. The *Lugo* Court cast the issue of open and obvious and consequently of "special aspects" and "effective unavoidability" as issues of "duty" rather than in the context of breach. The special aspects doctrine "was an abrupt, unnecessary shift in Michigan's approach to open and obvious dangers." *Estate of Livings*, 507 Mich at 357 (MCCORMACK, C. J. concurring).

The problem is that the question of special aspects has been repeatedly analyzed in the context of the plaintiff's conduct. In spite of *Quinlivan*'s very clear direction regarding a possessor's duty to take reasonable measures, reiterated by this Court in *Hoffner*, 492 Mich at 463-464, since *Lugo* the attention in such cases has been on what the plaintiff does or does not do, and not on the reasonable measures that the possessor of land took or did not take.

In his dissent in *Hoffner*, Justice Cavanagh concluded that the majority's ruling was a further departure from the Restatement approach and this Court's historic jurisprudence. He stated the defendants had a duty to clear the ice and snow hazard and that the plaintiff, invitee had a reciprocal right to expect that care would be taken to render

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the only approach to their business to be safe for invitees like them. *Id*. at 493 (CAVANAGH, J. dissenting).

In response to the dissenting opinions, the majority stated that the plaintiff's theory of liability would "in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship." *Id.*, at 470. The Court further claimed that the process that the dissent would resolve by jury every claim involving open and obvious "would essentially render it impossible for any landowner to anticipate what harms must be remedied in advance in order to avoid liability." *Id*. at 481.

The majority in *Hoffner* declared that some terrible chain of events would result from Cavanagh's approach, which mirrored the Restatement. These statements illustrate the mental gymnastics that *Lugo* has required of our courts. Contrary to the majority's pronouncement, no subclass would be created by Justice Cavanagh's reliance on our pre-*Lugo* precedent and the Restatement. What the majority described as a "subclass" is, in fact, the definition of an invitee. Plaintiff in *Hoffner* paid for a membership at Fitness Xpress. *Hoffner*, 492 Mich at 456. She was entering that establishment to engage in the business in which it was engaged. An invitee is one who is on the land for commercial purposes. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000) (this Court held that churchgoer entering for noncommercial purposes was a licensee, not an invitee). "[A] landowner's duty to a visitor depends upon that visitor's status [as a trespasser, licensee, or invitee]." *Id*. at 596, citing *Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987). Possessors of land owe the highest degree of duty to invitees. *Id.* at 597. These fundamental propositions remain the law in Michigan.

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Justice Cavanagh's reliance on the Restatement in his dissent in *Hoffner* in no way would create a subclass of invitees. *Hoffner* was an invitee as defined by the Restatement. Further, as to rendering it "impossible" "to anticipate what harms must be remedied," it is not the least bit of a stretch to suggest that the standard of care for such landowners is that they should take reasonable measures to clear ice and snow from the entrances to their businesses. Whether they acted reasonably in doing so is a question that relates to breach, not duty.

Nevertheless, the legacy of *Lugo* is that the assessment is only as to the reasonableness of a plaintiff and that trial courts are empowered thereby to render these factual determinations, leading to confusion and injustice.

B. *Lugo* is inconsistent with Michigan's comparative negligence framework and it should therefore be overruled.

Duty is based on the status of the parties – on the relationship between the parties. *Stitt*, *Id*. Duty exists because the relationship between the parties gives rise to a legal obligation. *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

The test for premises liability set forth in the Restatement was developed before the advent of comparative negligence in Michigan, in *Placek v City of Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979), and by statute thereafter. MCL 600.2959. Before comparative negligence replaced contributory negligence, it was far easier for the defense to prevail in premises cases, by simply applying the following equation: "If the condition was so egregious that the defendant should have known to correct it or warn about it, how could the plaintiff not have seen it?" This statement is almost exactly a paraphrase of the present open and obvious test. Then, as now, if *any* failure on the part of the plaintiff to perceive the nature of the hazardous condition prevented recovery, there

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was little likelihood for an injured person to recover damages. Therefore, there was likewise little incentive for property owners to remedy visible conditions even though by living with the condition every day, the owners were far more aware of its danger, and even though it could be expected that at least some invitees would fall prey to the dangerous condition.

Well after the advent of comparative negligence in Michigan, and to this day, our appellate courts have continued to say that the Restatement accurately states Michigan law. *Riddle v McLouth Steel Products Corp,* 440 Mich 85; 485 NW2d 676 (1992), *Bertrand v Alan Ford, Inc,* 449 Mich 606; 537 NW2d 185 (1995), and *Lugo v Ameritech Corp, Inc* 464 Mich 512; 629 NW2d 384 (2001). Unfortunately, concurrently with this reaffirmation, the open and obvious test was developed; and, worse, it was framed in terms of duty so as to allow judges to remove cases from consideration by the jury where the plaintiff was *perhaps* essentially contributorily negligent. The case-defeating contributory negligence formulation - that since both parties saw the bad condition, the plaintiff's recovery should be barred - is now the law despite the enactment of comparative negligence, but this time wearing the sheep's clothing of "open and obvious."

As in other areas of the law, comparative negligence should have forced those analyzing premises liability cases, especially juries, to examine the totality of the circumstances rather than just a snapshot of the occurrence. Application of the open and obvious special aspects test is a return to contributory negligence, only worse in the absence of a jury. And contributory negligence is an idea whose time has passed.

> There is little dispute among legal commentators that the doctrine of contributory negligence has caused substantial injustice since it was first invoked in England in 1809. Of significance in this regard is that almost every common-law jurisdiction outside the United States has discarded

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> contributory negligence and has adopted in its place a more equitable system of comparative negligence. Even in this country, considered the only remaining primary location employing contributory negligence, 32 states and the United States Supreme Court in the case of admiralty law have discarded or rejected it in favor of some form of comparative negligence. *Placek,* 405 Mich at 653.

In *Blackwell v Franchi,* 502 Mich 918; 914 NW2d 900 (2018), on order after hearing argument on a mini oral argument on application, and in lieu of granting leave, this Court remanded the case to the Court of Appeals, with Justice Markman dissenting. In his dissent, Justice Markman stated that "[a]lthough *Brusseau* was decided on the basis of contributory negligence, I believe that it would today likely be resolved on the basis of duty." *Id*. at 908, n 8. Replying in an opinion concurring with the Order of Remand, Justice McCormack said, "The dissent owns its doctrinal contortion." Justice McCormack continued as follows:

> But we judges are not authorized to apply contributory negligence principles by recasting them as duty. The Legislature has foreclosed that approach. Michigan, like most other jurisdictions, went from a contributory negligence jurisdiction to a comparative fault jurisdiction decades ago. (Citations omitted for *Placek, supra,* and statute). The Legislature, by requiring that a plaintiff's recovery be reduced by the percentage of her own negligence, mandated that a plaintiff's negligence could not be used as a basis to dismiss a suit altogether. And we have clearly held that the Legislature's adoption of comparative fault did not abrogate the common-law, status-based duties of care of premises possessors.
>
> > Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question of fact for the jury. *The jury* must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent.
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> > Conversely, comparative negligence is an affirmative defense. Michigan adopted this standard to promulgate a 'fair system of apportionment of damages.' *Under this doctrine, a defendant may*

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> *present evidence of a plaintiff's negligence in order to reduce liability.* [*Riddle,* 440 Mich at 96, 98, 485 NW2d 676 (citations omitted, emphasis added).] *Blackwell*, 914 NW2d at 902, 903.

Justice McCormack added,

> In short, we must operate under the comparative fault regime the legislature imposed. Comparative fault is a rule of decision for damages. It does not define the contours of the defendant's legal duty. *Id*. at 904.

The deciding issue in what might be described as typical premises cases morphed from whether the defendant's standard of care had been breached to whether the condition was open and obvious primarily in *Riddle, supra, Bertrand, supra,* and *Lugo, supra.*

In *Riddle,* the Michigan Supreme Court ruled against a plaintiff who fell while walking across an area covered with oil that had been caused by the defendant. Writing for the majority, Justice Mallett reasoned that since a possessor of land has a duty to warn of latent or hidden defects, that duty does not extend to situations where "the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." 440 Mich at 96. This statement of "duty" reeks of subjectivity. "Might," "reasonably," and "expected" are all words whose meanings depend upon the circumstances in which they are presented. So is "obvious," at least at times. And, as we have seen, the Courts have not been consistent as to *what* is obvious–whether it is an area or object or the hazard contained within it, whether or not the hazard is concealed.

Although he specifically stated that the Court of Appeals was wrong to rule that this formulation of duty denied the plaintiff the benefit of comparative negligence, Justice Mallett indeed gave the trial courts the ability to make factual determinations as a threshold matter before allowing the jury to perform its constitutional duty as fact-finder.

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In *Bertrand*, *supra*, two cases were consolidated in the Supreme Court where plaintiffs fell on unmarked steps, one in a parking structure and one in a park near the public restroom. The Court decided that the parks department was not negligent in failing to mark the step in question, or take other action, but that there was a question of fact whether the parking structure should have provided a guardrail. The main reason the consolidated cases were decided as they were in *Bertrand* is revealed at page 614, when Justice Cavanagh stated that under contributory negligence or otherwise,

> [t]his Court has decided many premises liability cases involving steps or differing floor levels. Before this Court adopted comparative negligence, the issue of openness and obviousness often arose as the affirmative defense of contributory negligence, which completely barred recovery. However, before even reaching the issue of the affirmative defense of contributory negligence, the general rule emerged that steps and differing floor levels were not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous. *Bertrand*, 449 Mich at 614 (emphasis in original).

Bertrand was not so much decided through the application of any hard and fast doctrine about "duty" or anything else. It was decided as it was because of the Court's disdain for most cases involving steps.

> In summary, because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore the risk of harm is not unreasonable. *Id,* at 616-617.

Essentially, Justice Cavanagh's reasoning went from the result backwards. Instead of saying that a duty was or was not owed by the possessor of the premises as a threshold matter, he decided that cases involving steps generally involved fault on the part of the invitee, who was not looking where he or she was going with sufficient care

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(i.e., that people who are watching where they are going don't fall on steps) and thus the possessor of the land was not obligated to protect them. It is hard to see this analysis as anything but the application of contributory negligence and an abandonment of any assessment of what the defendant was obliged to do.

Lugo, supra, is the case most identified with the doctrine that if a condition is open and obvious, the possessor of land owes no duty to invitees. *Lugo* fits the old adage that hard cases make bad law. The plaintiff, who testified she wasn't looking where she was walking, fell in an ordinary pothole in a parking lot. If the Court gave in to the temptation to remove virtually all cases involving steps from jury consideration in *Bertrand*, the result in *Lugo* was eminently predictable.

In *Lugo,* Justice Taylor adopted a tortured extrapolation of two Reinstatement sections from *Bertrand*, saying that the open and obvious doctrine of no duty to warn comes into play when "an activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger." *Lugo*, 464 Mich at 516, citing *Bertrand,* 449 Mich at 611. On one hand, no condition remains harmful to a person who perceives and avoids it. On the other hand, if a person is standing next to an unbarricaded drop-off of several feet, that condition is hazardous even if that person avoids injury. Going on to discuss whether the risk of harm from a condition is "unreasonable," a classically subjective word, Justice Taylor said that there is no liability to the defendant in a premises liability case unless there are "special aspects" surrounding the allegedly dangerous condition. And he concludes that "typical open and obvious dangers (such as ordinary potholes) do not give rise to these special aspects." *Lugo,* 464 Mich at 520.

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Where, in the previous cases, there was a varied discussion of the reasoning behind removing some premises cases from jury consideration, *Lugo* was the first to make the duty of the possessor of land virtually unequivocally dependent on the objective nature of the "open and obvious" hazard as a matter of law. *Lugo* informed the bench and bar that

> the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty. *Id*. at 517.

And *Lugo* was the first case to create the "special aspects" test, which it did in an extremely narrow way.

While paying lip service to the doctrine of comparative negligence, *Lugo* has removed countless cases from jury consideration; and it has had a chilling effect on the filing of premises liability cases. The temptation is extraordinarily strong for a Circuit Judge to look at a picture of where a person fell, and to decide that if he or she can perceive the condition, it must be open and obvious. While purporting to follow the Restatement of Torts, *Lugo* completely rewrote its provisions having to do with the duties of possessors of land, thus removing crucial factual determinations from the jury.

As mentioned above, in *Blackwell, supra,* Justice McCormack clearly perceived the mischief this has wrought upon the common law, common sense law of premises liability.

In his piercing dissent in *Riddle,* Justice Levin pointed out the fallacy of couching any "open and obvious" rule in terms of duty.

> No doubt the standard civil jury instruction committee will revise the instruction in accordance with the opinion of the Court. It is to be hoped that it will understand that it should avoid the use of the word "duty" - there is no

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> duty issue, rather only a standard of care issue. 440 Mich at 116-117 (LEVIN, J., dissenting).
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> ***
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> The origin of the "no-duty" rule is unclear. It may be a vestige of common-law contributory negligence theory and obsolete status definitions. When contributory negligence was an absolute bar to recovery by a negligent plaintiff, courts expressed in terms of the so-called no-duty rule the conclusion that, in certain situations, the plaintiff was contributorily negligent. *Id*. at 118.
>
> ***
>
> Because an invitor undeniably owes an invitee a duty to keep premises reasonably safe, the "no *duty* to warn" rule cannot be unconditionally true. *Id.* at 119. (Emphasis in original.)
>
> ***
>
> *Whether an invitor is negligent because he fails to warn an invitee of an open and obvious danger is a question of the standard of care required in a given set of circumstances, rather than a question of duty. The confusion concerning this aspect of the matter stems from the tendency to analyze virtually every aspect of negligence in terms of "duty." Id*. at 120. (Emphasis added.)

Finally, Justice Levin noted that "duty" refers to a "legally recognized obligation to observe or conform to some particular standard of conduct toward another." *Id*. at 120. Duty in premises law arises from the relationship between the parties, and it is expressed in 2 Restatement of Torts 2d, § 343, above. He then addressed the effect of comparative negligence upon any issue of "duty," however formulated. If "duty" is defined as this legally recognized obligation to observe a standard of care,

> then it follows analytically that the adoption of comparative negligence could not supersede the need to determine, as a matter of law, that a particular defendant did or did not owe a particular plaintiff a "duty," because the application of principles of comparative negligence" assumes the breach of a duty. Plaintiff's comparative negligence could not relieve the defendant of his duty because plaintiff's comparative negligence merely shifts to the plaintiff the burden of sharing with the defendant the loss or damages resulting both from defendant's breach of duty in violation of the standard of care and plaintiff's contributory negligence. *Id*. at 121.

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The practical effect of *Lugo* has been that courts, while giving lip service to the propositions of law that confirm that this is a comparative negligence state, have reverted back to contributory negligence. *Lugo* has resulted in courts ignoring the fundamental principles that duty is based on the status of the parties – on the relationship between the parties. *Stitt*, 462 Mich at 596, citing *Wymer v Holmes*, 429 Mich 66, 71, n1; 412 NW2d 213 (1987). It is important to recall that duty exists because the relationship between the parties gives rise to a legal obligation. *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). Accordingly, there is no need to assess a given plaintiff's conduct to ascertain what duty is owed. That duty is determined, not by actions, but based upon the relationship between the possessor of land and the visitor to that land.

In introducing a standard for assessing duty that focuses entirely on a plaintiff's actions or inactions (and ignoring the land possessor's actions or inactions), the *Lugo* case has proven incompatible with comparative negligence. The very questions that would be posed to a jury on the question of a plaintiff's comparative negligence are now asked in deposition for purposes of assessing duty. The result is a reversion to contributory negligence.

Even this Court's consideration of plaintiff's intent in accessing the possessor's land in *Hoffner* and *Estate of Livings* illustrate this incorrect focus on the invitee's actions, rather than an analysis of the condition of the land. It is this improper shift that has resulted in an incompatibility between the *Lugo* "special aspects" standard and comparative negligence.

Referring back to basic principles of premises liability law, the inquiry is to consider whether there is a hazardous condition on the land. 2 Restatement Torts, 2d, §343. The

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application of the *Lugo* special aspects doctrine however, has entirely usurped or subsumed the question of a plaintiff's comparative negligence and directed the focus from the condition on the land and onto the actions of the plaintiff. As observed by Justice Clement's dissent in *Estate of Livings* this friction may be caused by the fact that our case law evolved and adopted the Restatement 2d, drafted prior to our state's shift from contributory negligence, nevertheless, *Lugo*'s special aspects doctrine did not clarify, as it purported to attempt to do, rather it created a conflation of duty and breach.

The problem with the "effectively unavoidable" question is that it has resulted in a fact-based inquiry calling for a "judgment" on the value of a given plaintiff's purposes in confronting a hazard on the premises of a business. The result is that in some instances confronting the hazard for work purposes is a valid reason to proceed over open and obvious hazardous conditions (see *Estate of Livings* and *Lymon v Freedland*), but confronting such conditions to work out (*Hoffner v Lanctoe*) is not a valid reason to proceed. The seeming inconsistency troubled the dissenting justices in *Estate of Livings* claiming that these call for subjective determinations about the plaintiff's motivations. (see justice Zahra's dissent). The flaw however, is not this Court's holding in *Estate of Livings*, but in the fundamental nature of the special aspects doctrine as a function of duty because in application, there is always – and only – an evaluation of the plaintiff's motivations.

Bertrand cautioned that land possessors are not insurers of safety. 449 Mich at 614. Our legislature in the wake of *Riddle* and *Bertrand* codified this public policy. Under MCL 600.2958, plaintiffs who are more than 50% negligent may not recover damages. Between the safeguards of our common law and the statute, the interests of the public are protected without the need to provide a grant of immunity to possessors of land.

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In finding no special aspects, the Court of Appeals in the case at bar based its decision to affirm summary disposition on a finding that plaintiff could have avoided the fall by just leaving or asking the store clerk to retrieve her money. While *Lugo* cautioned that the inquiry was to focus on the premises, in practice that has never been the case. *Lugo* forced courts to grant immunity to possessor's of land, especially in snow and ice cases, undercutting a plaintiff's right to jury trial.

The problem is that the special aspects doctrine moved the analysis of issues involving a plaintiff's conduct from the breach or comparative negligence analysis to the duty analysis. In this regard, *Lugo* should be overruled.

C. *Lugo* resulted in the violation of Michigan citizens' right to jury trial in civil matters contrary to the Federal and State Constitution.

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any other Court of the United States, than according to the rules of the common law.

It has been held that the Seventh Amendment applies to actions enforcing statutory rights as well as those strictly at the common law, the determining factor in whether there should be trial by jury being whether the law–by statute or otherwise–creates legal (as opposed to equitable) rights and remedies enforceable in an action for damages in the "ordinary courts of law." *Curtis v Loether,* 415 US 189, 194; 94 S Ct 1005; 39 L Ed 2d 260 (1974).

Similarly, the Michigan Constitution preserves trial by jury in civil cases.

> Sec. 14. The right of by jury trial shall remain, but shall be waived in all civil cases, unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by twelve jurors a verdict shall be received when ten jurors agree.

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While the "presumed waiver" phrase in Section 14 of the Michigan Constitution could be read as suggesting that civil jury trials are only marginally important, the Founders of our country took a different view.

- Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. James Madison, 1789.

- I consider trial by jury as the only anchor ever yet imagined by man, by which government can be held to the principles of its constitution. Thomas Jefferson, 1788.

- Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds. John Adams, 1774.

As per *Curtis, supra,* it is important to note that jury trials were preserved in common law cases involving legal rights and remedies. Equity cases are defined as those where a legal remedy (i.e., money damages) is inadequate to resolve the case. Cases involving equitable rights and remedies were never intended to be decided by juries under the common law. On the other hand, negligence cases, where determination of breach of the standard of care (liability) and the monetary value of the harm done to the claimant (damages), are and always have been classic common law cases intended by the Founders–and universally by our legal system–to be tried by juries.

In cases involving personal injury which are not governed by statute, the Michigan appellate courts have relied heavily upon the Restatement of Torts, which is in essence a recitation of the common law. As such, the Restatement has become part and parcel of the common law of the State of Michigan; and the state and federal constitutional preservation of the right to trial by jury applies to cases where our Courts have said the Restatement applies.

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Unfortunately, our courts have taken a turn away from the Restatement into a tautological, result-driven interpretation of premises law that has in essence destroyed the area of premises liability law that involves injury to invitees. In so doing, our courts have all but obliterated the opportunity to have the conduct of possessors of property or their invitees assessed by a jury, as is mandated by the Michigan and United States Constitutions.

As things stand now, if the existence of a hazard (as viewed and analyzed through the proverbial retrospectoscope) can be perceived by the judge viewing it, it is deemed to be open and obvious, negating a duty on the part of the possessor of the land to warn of its existence or remedy it. The word is certainly out in the courts and to litigants that premises cases are disfavored actions; and our trial and appellate courts have been extraordinarily quick to find that a hazard is open and obvious, reasoning that if something can be photographed, it must be open and obvious, whether or not the *defective nature of the condition* was obvious. Accordingly, there is a culture in the trial and appellate courts in this state to dismiss a case as soon as one can retrospectively conclude that a condition was open and obvious, and to ask questions later, as the saying goes.

For example, in one case decided in the 6th Circuit U.S. Court of Appeals a shopper bumped into a large fire extinguisher which was improperly attached to a wall, and it fell, partially crushing her foot. The Court dismissed the case because the fire extinguisher was open and obvious even though it likely wouldn't have fallen on contact with the plaintiff if it was properly attached. *Johnson v Meijer, Inc,* unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued January 23, 2014 (Case No. 13-1546) (Exhibit 1, copy of opinion).

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In another case in the Michigan Court of Appeals, a man fell and broke his neck as he was descending three rounded pebbled stone steps at noon, with no shadows to tell him where one step left off and another began. There was no railing. The Court conceded that from the photographs, taken from the plaintiff's vantage point as he started to descend the steps, a person looking where he was walking could not tell one step from another; however, the Court said from other photographs taken from a different point of view, the separation of the steps was obvious. Notwithstanding that there is an objective standard concerning the nature of the hazard, the Court went on to say that because the plaintiff *probably* ascended the same steps earlier (there was nothing on the record about this), he should have known of their condition. A summary disposition in this case was upheld by the Court of Appeals. *Ayvazian v Quest Golf Club,* unpublished per curiam opinion of the Court of Appeals, issued September 13, 2016 (Docket No 327792). (Exhibit 2, copy of opinion).

These are just a couple of cases in the experience of one lawyer. Their number is legion, at the trial and appellate levels. These cases are not necessarily offered as precedent for anything; but they have a value beyond being simply anecdotal. They demonstrate that a Pavlovian response to the phrase "open and obvious" often results in hastily considered decisions that go well outside the tenets of the Restatement set forth in earlier premises decisions, where concepts of duty, liability, burden of proof, and standard of care are carefully delineated and kept from overlapping each other. While claiming to adhere to settled tort law, our appellate courts now assume that premises liability cases *de facto* involve open and obvious conditions and should be dismissed unless (and often even though) those conditions are extraordinary, regardless of the

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nature and history of the condition, and essentially regardless of the conduct of the person who was injured. This is not to suggest mendacity on the part of anyone. Rather, the Michigan Supreme Court needlessly confused duty with standard of care in *Riddle, Bertrand,* and *Lugo*. In so doing, a banner was created that has the catchphrase "open and obvious." The temptation to follow a catchphrase in lieu of critical thought can be strong–and it has been in this area of the law.

The application of the open and obvious doctrine as a judge-determined threshold duty has possibly been successful in eliminating some cases from trial that would not have succeeded in any event before a jury; but it has had the (probably) unintended consequence of all but killing premises liability in Michigan and removing numerous cases that would otherwise be meritorious under an analysis of the conduct of the parties and their respective responsibilities.

The tort system has a dual purpose. It attempts to restore injured persons to where they were before they were hurt, to the extent that money can achieve that goal. It also seeks to foster accountability among those who are in a position where their conduct can cause harm to others. This is true whether the potential tortfeasors are drivers, physicians, sophisticated manufacturers, or landowners.

Since *Lugo* became the law in our state, our judges have been called upon to rule as to what is "obvious" and what is "unavoidable," uncomfortably making factual determinations which foreclose the possibility of jury trial. Clearly the ability to avoid or a condition of obviousness involve fact rich judgments. Under our Federal and State Constitutions, the common law tradition of jury determination of factual issues was enshrined as a fundamental right in this society. However, only in premises law are judges

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charged with making factual determinations that then almost always translate into a finding of "no duty" and dismissal. In this way, the community standards of care established by juries have been replaced by an aristocratic and judicial determination. In Michigan premises law, judges are no longer gate keepers in this field, rather they have been ordered to act as if the gate has been permanently sealed.

It seems axiomatic that whether laws seem just or unjust results in respect or distrust of the legal system broadly. This public perception is critical as a high functioning society has a broad and voluntary acquiescence to its laws. Premises law judicial findings of "no duty" where a blind claimant is disenfranchised without even analysis of whether it was known to the possessor of land that a blind person was present (and thus may encounter the hazard) do not convey to the public that the law wishes to be a neutral referee.[3] The result is systemic deterioration and a devaluation of the rule of law.

Traditionally, premises law was characterized as a field with both a duty to warn and a duty to protect. *Lugo* found a way to conflate these aspects and deny access to a constitutionally mandated jury trial's fact findings. This approach is *sui generis* in our law.

By analogy, medical patients sign an informed consent before any procedure. Is the next step in our jurisprudence to, on the basis of duty analysis, claim that the risk sustained in a medical procedure was known through the informed consent (an open and obvious risk) and therefore there was no need for jury consideration of the doctor's level of care in performing the procedure?

[3] *Robinson v Estate of Tyler*, unpublished per curiam opinion of the Court of Appeals, issued (September 11, 2003) (Docket No. 242332). (Exhibit 3, copy of opinion).

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In vehicular liability cases, we drive in conditions involving snow and ice. However, judges are not asked to dismiss all cases involving snowy road conditions upon the analysis that drivers should have stayed home rather than participating in life.

When a plane crashes, our judges are not asked to determine if the travel was avoidable, and if so, to rule that there is no duty of care on the part of the pilot as a crash is an obvious possibility.

It is only the Michigan's law of premises liability which concludes that obviousness of an avoidable hazard (a warning) defeats the landowner or occupier duty of reasonable care under the circumstances. In constructing our law in this manner, trial and appellate courts have been placed in the historically unconstitutional position of finding facts from the bench in derogation of the constitutional right to jury trial fact determination. In this way, Michigan has fostered blight as property owners have no fear of dangerous property resulting in financial costs. Neither the Constitution nor public policy can argue in support of a continuation of the *Lugo* doctrine in its present iteration.

Looking back to the statements by the Founding Fathers about the importance of civil jury trials reminds one of the saying that the more things change, the more they remain the same. The best voice of what a community will tolerate on the one hand, and what it demands on the other, has never consistently been the voice of judges or individual politicians, but the community itself, whether in the form of voters or jurors. If we are to remain free, voters and jurors must be heard and heeded. Jurors are the people in "We the People."

Unless it is the desire of government to eliminate premises liability cases entirely, there is no reason to believe that judges are best qualified to apply the rules of the

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common law to each individual case, in the guise of determining "duty" or otherwise. On the contrary, there are hundreds of years of common law tradition and development supporting the right and ability of jurors to decide cases between those in possession of land (such as most jurors) and those who are invitees on land (such as virtually all jurors). And so long as we are going to have premises liability law at all, there is no reason to exempt this one not particularly sophisticated genre of the law from jury consideration when society and the state and federal constitutions allow juries to consider complicated medical malpractice and antitrust cases.

Taken with the cases leading up to and after it, *Lugo* has denied numerous deserving individuals compensation for their injuries. Perhaps even more importantly, these cases have allowed possessors of land to avoid accountability for failing to protect people whom they financially depend upon, and to whom they owe an unquestioned duty.

We respectfully request that to the extent that the case law allows "open and obvious" to be a threshold question of "duty," that case law be overruled, and that juries be allowed once again to consider and decide premises law cases in Michigan consistent with our Constitutional right to jury trials.

III. To assure that our jurisprudence in premises liability cases remains consistent with our comparative negligence framework, this Court should overrule the special aspects doctrine as a consideration of the fundamental question of duty.

A. The *Lugo* special aspects test should be overruled and Restatement Second reaffirmed.

Put simply, duty is a question for the court. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). What constitutes reasonable care under a given set of circumstances is a jury question. *Williams v Cunningham Drugstores, Inc,*

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429 Mich 495, 500; 418 NW2d 381 (1988). The fundamental problem of the *Lugo* decision is that it announced that the open and obvious doctrine is an integral part of the duty analysis. "[T]he open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo* at 516.

This is a departure from the common law preceding *Lugo* as well as the Restatement. This unnecessary detour from precedent has caused significant confusion and fundamental unfairness. In his dissenting opinion in *Estate of Livings*, Justice Zahra suggested that in endorsing the approach set forth in 2 Restatement of Torts 2d, § 343, comment *f*, illustration 5, the majority

> imprudently shifts the focus of the open and obvious danger doctrine's special aspects exception from an objective examination of the condition on the premises at issue to an examination of the individual characteristics or inclinations of the particular person approaching that condition, doing away with the uniformity and predictability that this Court has sought to bring to this area of the law over the last two decades. *Estate of Livings*, 507 Mich at 361 (ZAHRA, J. dissenting).

In fact, that "predictability" has become a return to contributory negligence where virtually every slip and fall on snow and ice is deemed open and obvious. As Justice McCormack cautioned in her consenting opinion in *Blackwell v Franchi*, related to the dissent's conclusion that "[a]lthough *Brusseau* was decided on the basis of contributory negligence, I believe that it would today likely be resolved on the basis of duty." "[t]he dissent owns its doctrinal contortion." 914 NW2d, at 902.

In fact, it is the special aspects doctrine itself that has "imprudently [shifted] the focus of the open and obvious doctrine" from the conditions of the land to the actions of the invitees. Consider the routine inquiry by defense counsel in every slip and fall on ice

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case where the inquiry always includes a line of questions regarding whether the plaintiff was a life-long Michigander. This inquiry is routinely used to assert – often successfully – that the plaintiff should have known it is slippery and therefore no duty exists. And the inquiry occurs in a vacuum with courts engaging in no consideration to the land possessor's equal familiarity of weather conditions in Michigan.

It is precisely because of the observations by Justices Zahra and Clement in their dissenting opinions in *Estate of Livings* that this Court should now consider the long-overdue overruling of the special aspects doctrine in the context of duty. *Hoffner* cautioned that it is impermissible to shift the focus from an objective examination of the premises to an examination of the subjective belief of the invitee. *Hoffner*, 492 Mich at 471. However, this is inherently illogical in the context of the special aspects doctrine when the very inquiry is whether there is some special aspect that requires plaintiff to confront the hazard despite its open and obvious nature. The doctrine itself is fundamentally subjective. It is not a given panel of judges that shift the examination from an objective to a subjective approach. It is the special aspects doctrine that has done so.

Special aspects have no place in the duty analysis. They are relevant to the question of standard of care, breach, or comparative negligence, but not duty. As the Court held in *Riddle*, "[t]he adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive – two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action." *Riddle* at 95. The *Lugo* Court gave no explanation for determining that this should not remain the law. This statement

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was consistent with the Restatement Second and remains consistent with the Restatement Third, which clarifies the point.

In the case at bar, F & E Oil owed a duty and whether that duty was breached or whether Kandil-Elsayed was at all negligent, remain questions of fact. On the record before this Court, there is in fact no evidence to support a finding that F & E Oil did not, in fact, breach its duty because the record reflects that there was no effort made to remove the snow or to salt. Likewise, there is no evidence to support a finding that Kandil-Elsayed was in any way negligent. Regardless, these are not inquiries that relate to the question of duty. F & E Oil undeniably owed a duty. The record raises a genuine issue of material fact as to whether that duty was breached, summary disposition should not have been granted to F & E Oil. This case clearly belongs before a jury and it illustrates why the special aspects doctrine serves no legitimate jurisprudential benefit under a comparative negligence framework, where our courts have expressly rejected contributory negligence and our legislature has codified it. The special aspects doctrine has served to deny plaintiffs a right to a jury trial, to immunize irresponsible land possessors from suit, and has done nothing to curtail litigation in this state.

The Second Restatement discussed how a land possessor is "subject to liability" in section 343. Kandil-Elsayed maintains that this referenced a conclusion as to duty, breach, damages, and comparative negligence by a fact-finding jury. Decades passed with only Michigan jurisprudence interpreting the above as a threshold "duty" analysis. This Court should overrule the special aspects doctrine. This "Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned."

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Robinson v Detroit, 462 Mich 439, 464; 613 NW2d 307 (2000), citing *Holder v Hall*, 512 US 874, 937; 114 S Ct 2581; 129 L Ed 2d 687 (1994).

In its place, this Court should consider a return to the guidance provided in Justice Levin's dissent in *Riddle*, which is buttressed by the clear language of the Restatement Third discussion of a land possessor's duty.

B. This Court may find support in the Restatement Third.

Another fundamental problem with *Lugo* is that the "not liable" "is liable" language of the Restatement Second is open to two interpretations that are at the root of the *Lugo* problem. (see Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 Tex Tech L Rev 1 (2005-2006)). As Justices Cavanagh and Weaver noted in their concurring opinions in *Lugo*, the majority's approach encroached on the issues of comparative negligence. The Restatement Second and its comments caution that there remains a duty, but a defendant may not be liable under certain scenarios. Duty is a question of law, but questions of reasonable conduct are typically jury questions. Given the myriad scenarios related to reasonableness, these questions are generally for a jury.

Much of the confusion in the development of premises liability law in this State turns on the Restatement Second's use of this language, as noted by Justice Clement in her dissent in *Estate of Livings*, rather than to speak in clear terms about "duty."

Not every case that is properly presented to a trial court for a decision on summary disposition rather than to a jury is inherently a question that relates to duty in the context of a premises liability case. That is to say, in the case of *Lugo,* the record presented to

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the trial court did not support that plaintiff's cause of action for premises liability because there was no evidence of a defect in the parking lot – no unreasonable dangerous condition existed – therefore, it was appropriate for the trial court to decide that case on a summary disposition motion rather than to send it to a jury. This inherent flaw in *Lugo* – finding that open and obvious is a part of the duty analysis – has resulted in confusion and significant litigation in this state. As highlighted in Justice Clement's dissenting opinion in this Court's decision in *Estate of Livings* "[l]eft unexplained [by analyses of §343A of the Second Restatement], in this series of hairpin turns is who makes the decision about whether the parties proceed through each of these gates – and, implicitly, whether they are decisions to be made as a matter of fact or law." *Estate of Livings*, 507 Mich at 378 (CLEMENT, J. dissenting).

To rectify this inherent flaw, this Court may clarify, or reiterate, that open and obvious remains an available defense, but that it is not an element of duty (as *Riddle* articulated). In a dissenting opinion in *Riddle*, Justice Levin clarified the point that the issues related to open and obvious conditions relate to standard of care, and not duty. Justice Cavanagh in his concurrence in *Lugo* reiterated this point.

Prior to *Lugo,* this Court in *Riddle* rejected the *Riddle* Court of Appeals holding that the open and obvious doctrine – the "no duty to warn of open and obvious danger" rule – was inconsistent with comparative negligence and should be abolished. This Court in *Riddle* clearly articulated that the "adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence

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standard are fundamentally exclusive – two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action." *Riddle* at 95.

As Justice McCormack summarized in *Estate of Livings*,

> Section 343 [of 2 Restatement Torts, 2d] creates a general reasonable-care standard that land possessors owe to their invitees. Section 343A, like its predecessor in the First Restatement, creates a presumption of non-liability for known or obvious conditions. But § 343A also explains that this presumption can be overcome if the land possessor should have anticipated the harm even though the condition was known or obvious. *Estate of Livings*, 507 Mich at 353 (MCCORMACK, C.J. concurring).

The problems that we have seen in Michigan premises liability law, as discussed *supra*, emerged from use of the Second Restatement's phrase "is subject to liability" and "is not liable." Courts have interpreted this to negate duty rather than to interpret it as a consideration of standard of care or breach. It is this fundamental misapplication of the Restatements' reference to "liable" that the problematic *Lugo* is born.

In fact, "liability" is the culmination of the duty, breach, causation, and comparative negligence analysis. A strict reading of the language in the Second Restatement does not support the *Lugo* interpretation that incorporated the subjective special aspects test within the concept of duty.

If the interpretation is clear that "not liable" refers to issues of breach, then we have no problem because the analysis related to these factors is left in the purview of a fact-finder when there is a genuine issue of material fact on the question of whether there was a breach. But the result of *Lugo* and its progeny is that the "not liable" "is liable" somewhat imprecise verbiage has permitted courts to interpret it to mean "no duty."

As noted in *Estate of Livings*, no other jurisdiction has adopted the *Lugo* special aspects doctrine. *Estate of Livings*, 507 Mich at 355 (MCCORMACK, C. J. concurring). As

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discussed previously in this brief, the majority in *Lugo* created this unnecessary doctrine, which has resulted in a myriad of cases, that should have been resolved by juries, being instead dismissed by Judge's purportedly acting as gatekeepers consistent with *Lugo*'s de facto reassertion of contributory negligence. To clarify that there is a distinction between duty and comparative negligence (which *Lugo* claimed to acknowledge), this Court may find guidance from the Restatement Third, which unlike the Restatement Second, actively uses the term "duty," and therefore clarifies the duty that possessors of land owe.

Chapter 9 of the Restatement Third is devoted to the duty of land possessors. Section 51 provides as follows:

> Subject to § 52,[4] a land possessor owes a duty of reasonable care to entrants on the land with regard to:
>
> (a) conduct by the land possessor that creates risks to entrants on the land;
> (b) artificial conditions on the land that pose risks to entrants on the land;
> (c) natural conditions on the land that pose risks to entrants on the land; and
> (d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7[5] is applicable. Restatement Third, Torts: Liability for Physical and Emotional Harm § 51.

Comment *k* to §51 addresses open and obvious dangers and states in part, as follows:

> Section 343A(1) of the Restatement Second of Torts requires possessors to take reasonable precautions for known or obvious dangers when the possessor "should anticipate the harm despite such knowledge or

[4] Section 52 applies to "flagrant trespassers." The Third Restatement does not create a distinction between the status of invitees and licensees in the context of premises cases, referring rather to "entrants on the land," however addresses separately issues related to trespassers. Chapter 7 §40 addresses special relationships.
[5] Chapter 7 relates to affirmative Duties.

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> obviousness." The duty imposed in this Section, as amplified in this Comment, is consistent with §343A, . . . Known or obvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves. Nevertheless, despite the opportunity of entrants to avoid an open and obvious risk, in some circumstances a residual risk will remain. Land possessors have a duty of reasonable care with regard to those residual risks. *Thus, the fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability.* This treatment of land possessors is consistent with that of other actors who create risks. See, e.g., Restatement Third, Torts: Products Liability § 2, Comment *g*.
>
> Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, comment *k*. (emphasis added)

Rejecting the Second Restatement's use of "is liable" "is not liable," and embracing the Third Restatement's very clear language that a land possessor retains a duty of reasonable care and that whether the condition is open and obvious bears on an assessment of whether the land possessor employed reasonable care, assures that this Court moves forward in a fashion intended by long held precedent. It resolves the apparent inconsistency between this Court's decision in *Hoffner* and this Court's decision in *Estate of Livings*, and it addresses the legitimate concerns raised by the dissenting opinions in *Estate of Livings*. The clarity of the duty/breach analysis that the Third Restatement provides will assist trial and appellate courts in evaluating the cases before them where there is an open and obvious defense at issue.

The Restatement does not indicate that this revision is a response to Michigan's *sui generis* treatment of premises law. That said, the Restatement Third language does recommend a system of jury factual determinations consistent with our common law and with our Constitutional rights.

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In the case at bar, the inquiry as to duty is what duty is owed to this particular plaintiff. That duty is the duty that is owed to any invitee; a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand*, 449 Mich at 609. The gas station was open for business when Kandil-Elsayed attempted to enter. There is no dispute as to this. As such, she was not a trespasser nor, under these conditions, was she a licensee. She was, without question, an invitee. There was no dispute that Kandil-Elsayed was an invitee of F&E Oil, Inc. The dispute, arguably, is whether F&E Oil breached its duty. The condition at issue involved the only doorway to the business. As such, the duty owed is a duty to exercise due care to protect the invitee from conditions that might result in injury. *Riddle,* 440 Mich at 90.

Under the Restatement Third, it is clear that the entire "effectively unavoidable" inquiry turns on an issue of breach, not of duty. Such judgments regarding the plaintiff's conduct equal questions for a jury. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 51, Comment *k*.

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CONCLUSION AND RELIEF REQUESTED

The dissenting and concurring opinions starting with *Riddle* through *Estate of Livings* provide guidance in how best to move forward.

The open and obvious doctrine remains a defense in premises liability cases. Depending on the facts of a given case, it may result in a court concluding on summary disposition or directed verdict that the case should not proceed to a jury. However, not every open and obvious case, especially those involving snow and ice, should result in dismissal by a court at summary disposition.

The issues relative to the open and obvious nature of a condition are not issues that relate to duty. Duty is based upon the relationship status of the parties. The consideration of whether a condition is open and obvious (whether there were special aspects or effective unavoidability) must occur *after* a threshold determination of duty is made. The purely legal question of law regarding the status of the parties is a judge-based question. The subsequent questions of whether that duty was breached and whether a particular plaintiff was comparatively negligent are questions that should be left to a jury.

In some instances, there may be a plaintiff who fails to present evidence upon which a reasonable jury could conclude that there was a breach of duty. In such instances, summary disposition would be appropriate. The case at bar is not one such instance. There remained a genuine issue of material fact on the question of whether F&E Oil breached its duty owed to its invitee, Kandil-Elsayed. Questions related to her conduct after confronting the hazard that F&E Oil permitted to persist on its premises involved

issues of her comparative negligence, which should also have been left to a jury. Kandil-Elsayed was deprived of her constitutional right to a jury trial.

The Court of Appeal's affirmance of the trial court's grant of summary disposition should be reversed. Further, because it is abundantly clear that it defies practical workability, this Court should overrule the *Lugo* special aspects doctrine as a consideration of duty.

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