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STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant

Supreme Court
Case No. 162907

v

F&E OIL, INC.,

Defendant-Appellee

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

DEFENDANT-APPELLEE'S
SUPPLEMENTAL BRIEF

By: Donald C. Brownell (P4884)
Rick Patterson (P55706)
Stephanie L. Arndt (P66870)
Vandeveer Garzia, P.C.
840 W. Long Lake Road, Ste 600
Troy, MI 48098-6340
P. 248.312.2917
E. dbrownell@vgpclaw.com
sarndt@vgpclaw.com

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INTRODUCTION

Plaintiff comes before this Court asking it to decimate over 100 years of premises liability precedent based on nothing more than hyperbole. Plaintiff's Supplemental Brief is laden with accusations of some secret ulterior motive by Michigan trial courts and Court of Appeals that has no basis in reality:

> In this way, the community standards of care established by juries have been replaced by an aristocratic and judicial determination.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.

(Plaintiff's Supplemental Brief, p. 31) Who does Plaintiff claim has issued such an order? Surely not this Court. Plaintiff also alleges:

> *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.
>
> * * *
>
> 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.

Id. at 20, 21. As discussed below, these types of emotionally-charged statements, rather than scholarly legal analysis, are challenging to respond to. Candidly, it is shocking that Plaintiff could advance such arguments in light of this Court's orders and opinions in *Blackwell v Franchi,* 502 Mich 918; 914 NW2d 900 (2018) and *Estate of Livings v Sage's Investment Group, LLC,* 517 Mich 328; 968 NW2d 397 (2021).

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Plaintiff goes so far as to claim, in an unpreserved argument, that the common law developed by this Court, which finds its origins in 1882, is unconstitutional. Again, without data or analysis, Plaintiff asserts that "*Lugo* resulted in the violation of Michigan citizens' right to jury trial in civil matters contrary to the federal and state constitution." (Plaintiff's Supplemental Brief, 26). Plaintiff then claims:

> 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 ....
>
> * * *
>
> 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.

(Plaintiff's Supplemental Brief, p. 28) Considering the seriousness of these accusations, one would expect a data-driven analysis to follow, but it does not.

Plaintiff's filings are lacking in the substance required for this Court to thoroughly consider this issue either on leave granted or an opinion on the Application filings. While Plaintiff offers a passing suggestion that this Court should adopt a standard consistent with the Restatement 3d or the Restatement 2d, the lack of substance about Plaintiff's suggestion leaves the Court searching for answers. There is no discussion of whether her position is supported by national trends. There is also no discussion about how such a change in the law would have impacted the analysis or outcome of this case.

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As discussed below, Michigan premises liability law need not be rewritten or revised. It is certainly important for this Court to continually examine its common law to determine whether revision is needed; however, as discussed below, Michigan is not an outlier. While it is true that many states do not utilize the special aspects doctrine that has developed in Michigan, there does not appear to be any overwhelming majority viewpoint as it relates to premises liability law. Each state has created common law to fit the needs of its residents, especially in the area of snow and ice.

Michigan's special aspects doctrine, as it has been developed by this Court over many years, meets the needs of Michiganders. It need not be rewritten or revised. It is a doctrine that increases the protections afforded to Michigan invitees who encounter premises dangers that are so open and obvious that no duty exists. Through *Lugo, infra,* this Court has held that a duty exists, even for an obvious danger, if an unreasonably high risk of severe harm exists and the condition is either effectively unavoidable or unreasonably dangerous.

SUMMARY OF ARGUMENT

The sections that follow examine in detail each of the questions posed by this Court in its February 4, 2022 Order. It begins with a discussion of the factual record that was before Wayne County Circuit Court Judge David Allen when he granted Defendant's Motion for Summary Disposition. That record did not support the imposition of a legal duty on Defendant. The wintery conditions that day were known to be constant

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throughout that day, and the snowy parking lot was also known to Plaintiff. Nothing about that situation created an unreasonably high risk of severe harm that would warrant the imposition of a legal duty. The lack of a genuine issue of material fact was also recognized by Judges Letica, Fort Hood, and Cavanaugh when they unanimously affirmed the trial court's decision in an unpublished opinion.

Next, we examine the second question from this Court's order: "whether *Lugo v Ameritech Corp Inc,* 464 Mich 512; 629 NW2d 384 (2001), is consistent with Michigan's comparative negligence framework. In addressing that question, Defendant examines this Court's historical development of premises liability law for invitees. It also examines why *Lugo* is consistent with Michigan's comparative fault framework. As discussed, these are two separate and distinct legal doctrines with important and completely independent purposes.

This Court's decision in *Lugo* increases the protection afforded to invitees. For even those blatantly obvious premises dangers, *Lugo* instructs premises possessors that they will be accountable when the condition is effectively unavoidable or unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.

Since *Lugo,* this Court has refined and developed that jurisprudence in a way that informs both invitees and premises possessors of what is expected of them in the community. Through this Court's jurisprudence, premises possessors know that they must warn of hidden and latent defects on their property. Similarly, this Court has instructed that premises possessors must protect against hidden or latent defects. Finally,

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this Court has instructed premises possessors that they will be liable for even the most obvious condition that is effectively unavoidable or unreasonably dangerous when special aspects create an unreasonably high risk of severe harm. To invitees, this Court has given them notice that a property owner is not an absolute insurer of their safety. Invitees must conduct themselves in a manner so as to be alert of conditions that an average person of ordinary intelligence would be able to discover upon causal inspection. An invitee must be alert to conditions known to them or obvious to them. For those conditions a premises possessor does not owe them a duty.

If Michigan's jurisprudence was truly as 'off the rails' as Plaintiff suggests, surely the Legislature would step in. That is their job. Yet the Legislature has not changed the law. To the contrary, the Legislature has embraced the open and obvious danger doctrine. MCL 691.1402a(5) was amended to specifically include this doctrine:

> "In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, **a defense that the condition was open and obvious**."

(Emphasis added)

While the 'special aspects' component of Michigan's open and obvious danger doctrine has not been embraced by other states, the doctrine is by no means out-of-step. As discussed in response to Question No. 3, many snowbelt states have adopted the open and obvious danger doctrine. Many of these states have, like Michigan, created exceptions to that doctrine that fit the needs of their residents. An examination of the caselaw from those states reveals that there is no true majority view as to the exceptions

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adopted. Some states utilize the continuing storm doctrine for snow and ice cases while others utilize a hybrid doctrine that combines the Restatement with other exceptions. Michigan's special aspects doctrine is no outlier – there is no real trend.

Given Plaintiff's failure to develop a concise position in response to this Court's third question, what approach this Court should adopt for analyzing premises liability cases under a comparative negligence framework, development of an argument on this issue was somewhat challenging. Consequently, Defendant provides the Court with an analysis of how other snowbelt states have addressed similar scenarios. Based on that discussion, it is clear that Michigan premises liability law need not be rewritten or revised. There is no need to overrule decades of precedent. The law, as is, balances the rights and responsibilities of invitees with that of premises possessors in a manner consistent with other jurisdictions throughout this country.

For completeness, however, Defendant will address what appears to be Plaintiff's suggestion that this Court should either adopt Restatement 3d or reaffirm Restatement 2d. While the insightful work of the legal scholars who develop these guides is worthy of consideration, a carte blanche adoption of the Restatements 3d it is not befitting for Michigan. This Court has worked tirelessly to provide guidance, clarity, and predictability to all Michiganders. Changing that now would significantly undercut *stare decisis* and necessitate decades of redevelopment of legal standards when an adequate standard already exists.

Finally, this Supplemental Brief concludes with a response to the hyperbole in Plaintiff's Supplemental Brief. Plaintiff provides this Court with no data supporting these

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accusations. Instead, she cites two decisions, neither of which bind future litigants or this Court. One is an unpublished decision from the United States Court of Appeals for the Sixth Circuit and the second is an unpublished decision from the Michigan Court of Appeals. Surely if Plaintiff's accusations were true, mountains of data could have been provided to the Court. At a minimum, one would expect citation to some scholarly writing examining these issues if such a great atrocity was actually befalling Michigan invitees. Yet nothing of that nature is provided by Plaintiff.

The sky is not falling. The law is balanced, fair, and working as intended. Plaintiff's Application for Leave to Appeal should be denied. Should this Court choose to issue an opinion, it should affirm Michigan's century-old premises liability law as it has developed through the years. Michigan premises liability law need not be rewritten or revised.

LEGAL DISCUSSION

Question 1: Is there a question of fact concerning whether the parking lot constituted an effectively unavoidable condition?

Question 1 involves a discussion of both Michigan summary disposition law and Michigan premises liability law. The summary disposition law guides the application of the premises liability law. Here, a correct application of these two legal standards results in affirmance of the trial court and the Court of Appeals.

This Court reviews all dispositive motions anew – *de novo. El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159; 934 NW2d 665 (2019). MCR 2.116(C)(10) tests the factual

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sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *El-Khalil,* 504 Mich at 160; *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). When considering a motion under MCR 2.116(C)(10), a trial court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is proper if the evidence, affidavits, pleadings, and admissions viewed in a light most favorable to the other party demonstrate that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." *Auto-Owners Ins Co v Seils,* 310 Mich App 132, 145; 871 NW2d 530 (2015). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

Here, the record evidence is to be applied to determine whether Plaintiff was owed a duty by Defendant related to the snowy conditions in the parking lot of the gas station, specifically the entryway. The legal framework that the record evidence is to be applied to was discussed by this Court in *Lugo, supra,* and subsequently in *Hoffner v Lanctoe,* 492 Mich 450; 821 NW2d 88 (2012) and *Estate of Livings v Sage's Investment Group, LLC,* 517 Mich 328; 968 NW2d 397 (2021). In *Lugo,* the Court explained that, in extreme cases, there may be an exception to the general rule regarding open and obvious conditions. One possibility is where a store has only one exit but it is blocked by standing water, creating an effectively unavoidable condition to the patrons who cannot leave the store without encountering the water. The second potential special aspect is unreasonable

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dangerousness, which *Lugo* equated to a thirty-foot unbarricaded pit in parking lot. While Plaintiff wants to portray these standards as an entanglement of subjective and objective considerations, they are not. Our law is neither contorted nor results-driven. The standards are clear, concise, and objective. And it is through its objectively that our Courts are able to develop predictable legal standards that cannot be subjectively manipulated.

It is worth noting briefly that the objectivity of Michigan's premises liability laws is of critical importance in ensuring a balance of the needs of premises possessors with invitees. This is especially true for small business owners. A small business owner does not know who might patronize their business on any given day or what that person's abilities are. Because of that, they cannot reasonably or cost-effectively prepare for every possible occurrence. Michigan's objective standard to the open and obvious danger doctrine takes that into consideration. It requires small business owners to protect and warn of only those hidden or latent conditions. When evaluating their premises to determine if they are meeting that obligation, they have in mind the average person of ordinary intelligence capable of casual inspection. The objective standard recognizes that perfection is neither practicable or required by the law.

Plaintiff has never challenged that the condition of the parking lot was not known to an average person of ordinary intelligence upon casual inspection. The first part of the open and obvious danger doctrine was never disputed in the trial court or the Court of Appeals. By doing so, Plaintiff conceded that the snowy parking lot was open and obvious.

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The record in this case did not support the applicability of either exception discussed in *Lugo, supra.* Throughout this litigation, Plaintiff has focused on the effectively unavoidable exception to the open and obvious danger doctrine. In *Lugo,* this Court provided the illustration of a commercial building with only one exit for the general public. *Lugo,* 464 Mich at 518. The floor of that exit was covered with standing water. *Id.* In analyzing that circumstance, the Court stated "[w]hile the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable." *Id.*

The concept of "effectively unavoidable" was again visited by this Court in *Hoffner, supra.* There, the plaintiff sought to gain access to his gym. In order to do so he had to traverse an icy sidewalk. There was no dispute that the plaintiff recognized the danger posed by ice on a sidewalk. *Hoffner,* 492 Mich at 454. In analyzing the exception for effectively unavoidable conditions that pose an unreasonably high risk of severe harm, this Court expanded upon its original statement in *Lugo*:

> Unavoidability is characterized by an *inability to be avoided,* an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes.* Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.

Id. at 468. The Court also reaffirmed that the "special aspects" exception to the open and obvious danger doctrine is a narrow exception to be applied to only an unsual open and obvious condition that is unreasonably dangerous. *Hoffner,* 492 Mich at 461, 462.

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Most recently, this Court again considered what was effectively unavoidable in *Estate of Livings, supra.* Similar to *Hoffner,* the *Livings* Court recently stated:

> This standard's application will depend on the facts of the case, but the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances. Cf. *Perkoviq, 466 Mich at 19-20*. If an employee could have avoided the condition through the use of due care under the circumstances, then the condition was not effectively unavoidable. See *id.*

Id. at 347. The *Livings* Court then reaffirmed that this exception to the open and obvious danger doctrine remains a "narrow" exception. *Id.*

Plaintiff incorrectly claims that *Livings* is a clear illustration of how the open and obvious danger doctrine has pivoted from conditions of the land to action of the plaintiff. (Plaintiff's Supplemental Brief, p. 24) That is not the case. *Lugo* described a pool of standing water that prevented safe exit from a building. *Hoffner* then reminded us of the importance of looking at the condition from the perspective of the reasonable invitee in plaintiff's position encountering the alleged effectively unavoidable condition. It is only with that perspective in mind that you can determine if the condition was truly "***effectively***" unavoidable.

Neither subjectivity or a hindsight analysis of comparative fault were determinative of the conclusion that the snow-covered parking lot was not an effectively unavoidable condition. There are two key components to that analysis that Plaintiff cannot factually overcome. First, there is no evidence of any extreme snowfall or other extreme weather condition that would take this out of the traditional case involving a slip-and-fall on ice. Plaintiff testified that it had been snowing throughout the day but

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she was able to complete her errands. (Plaintiff's Deposition, p. 79, Appx. 130) The snow had started that morning, continued throughout the day, and, by the time she completed her errands, the roads were still snow-covered. *Id.* at p. 79, 81; Appx. 130, 131. Second is the irrefutable evidence that the condition was not effectively unavoidable because, when Plaintiff exited the gas station, she did not encounter the ice again or fall again.

Estate of Livings followed *Hoffner* and affirmed the need to view the alleged effectively unavoidable condition from the perspective of the reasonable invitee in plaintiff's position. In *Estate of Livings,* the plaintiff was an employee attempting to enter her place of employment. Because of significant snowfall, she was unable to safely gain access to her place of employment. Needing to get to work, she attempted to traverse the snow-covered walkways and was injured. Looking at the totality of the facts from the perspective of the reasonable invitee in plaintiff's position encountering the alleged effectively unavoidable condition, this Court held that a question of fact existed that must be evaluated by the jury.

Here, the factual scenario is more consistent with *Hoffner* than it is with *Estate of Livings.* Plaintiff was a business invitee – a patron at a gas station. There is absolutely nothing in the record evidence of anything compelling, dire, or exceptional about Plaintiff's visit to Defendant's business. She was on her day off running errands. This was her last errand. (Plaintiff's Deposition, p. 81, Appx. 131) As a lifelong Michigander, Ms. Kandil-Elsayed is familiar with Michigan winters. *Id.* She admitted to her familiarity with traversing snowy and icy conditions over the course of her life. *Id.* She even testified to having previously fallen while traversing snowy and icy conditions. *Id.* at 71, Appx. 82.

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As it relates to the day of her alleged fall at Defendant's gas station, there is no dispute that it was snowing throughout the day. *Id.* at 79, Appx. 75. There is also no dispute that the parking lot was snowy. *Id.* at 87, Appx. 84. Plaintiff admitted that it was snowing throughout the day. *Id.* at 79, Appx. 75. She recalls that the road surfaces were snowy. In fact, because of the wintery conditions, she was wearing snow boots. *Id.* at 87, Appx. 84.

After pulling into Defendant's gas station, Plaintiff observed that the parking lot surface was snowy. *Id.* at 92, Appx. 89. She had no difficulty observing her surroundings and where she was walking. *Id.* Plaintiff was familiar with this gas station; she had patronized it on multiple previous occasions. *Id.* at 80, Appx. 76.

On this day, Plaintiff chose to prepay for her gas. (Exhibit C, p. 85-86, Appx. 78-79) She had $20.00 in cash that she was using to purchase her gas. *Id.* at 101-102, Appx. 94-95. Before she could pump her gas, Plaintiff walked into the gas station to pay the clerk. *Id.* at 101, Appx. 94. As she walked toward the gas station, Plaintiff felt the snow under her feet. *Id.* at 88-89, Appx. 85-86. It was while she was walking into the gas station that she claims to have fallen. Plaintiff acknowledges that she was walking over snow to enter the gas station. *Id.* at 89, Appx. 86.

After her alleged fall, Plaintiff entered the gas station and prepaid for her gas. *Id.* at 99, Appx.92. She engaged in a conversation with the clerk. *Id.* at 101-102, Appx. 93-94. She then exited the gas station and retraced her previous steps, without falling. (Exhibit C, p. 103, Appx. 96) Then, she pumped her gas. *Id.* at 104-105, Appx. 97-98. Once fueled,

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she walked back around her vehicle, entered the vehicle, and drove home. *Id.* at 195, Appx. 98.

Plaintiff's testimony and a photograph comprise the totality of the evidence submitted in response to Defendant's Motion for Summary Disposition. There was no weather data. No witness statements regarding some unexpected or unnatural accumulation. No photographs that Plaintiff took with her camera phone that day. Her self-serving testimony was the only evidence that she placed before the trial court in support of her position that the entrance in front of the gas station store presented an unreasonably high risk of severe harm that was effectively unavoidable.

Taking the record evidence in the light most favorable to Plaintiff, the record does not support a finding that there was a genuine issue of material fact concerning whether the entrance in front of the gas station store presented an unreasonably high risk of severe harm that was effectively unavoidable. Looking at the totality of the facts from the perspective of the reasonable invitee in plaintiff's position encountering the alleged effectively unavoidable condition, the condition was (1) not of the type to warrant implication of the exception because it did not present an unreasonably high risk of severe harm and (2) not effectively unavoidable. It was a snow-covered parking lot on a March day in Michigan when it had been snowing throughout the day. For someone like Plaintiff, who is a lifelong Michigander, this is not an unusual or unexpected occurrence. Moreover, it was not effectively unavoidable because Plaintiff's movement was in no way restricted by the condition. There is nothing in the record that would support the contention that the walkway was unavoidable or inescapable. And there is certainly

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nothing to suggest that it was such "for all practical purposes," as described in *Hoffner*. Moreover, as discussed by the Court of Appeals, Plaintiff had the option of whether to confront the condition that day. Consequently, the decisions of the trial court and the Court of Appeals should remain, and leave should be denied.

Question No. 2: Whether *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), is consistent with Michigan's comparative negligence framework?

The Court's phrasing of this question has caused much discussion amongst appellate advocates since this Court issued its order. Since *Riddle v McLouth Steel Products Corp,* 440 Mich 85; 485 NW2d 676 (1992), this Court has been clear that the applicability of the open and obvious danger doctrine goes to the element of duty, which is separate and distinct from any analysis of comparative fault. The phrasing of this question caused many, including this author, to question the future evolution of Michigan premises liability law.

The reflexive response to Question No. 2 is to insert a block quotation from *Riddle v McLouth Steel Products Corp,* 440 Mich 85; 485 NW2d 676 (1992) and remind this Court of the importance of *stare decisis.* As this Court is well-versed in its precedent, Defendant will not recite verbatim the evolutionary history of the open and obvious danger doctrine as contained in *Riddle* at 440 Mich at 90-95. That said, the historical implications of this century-old doctrine as a foundation for Michigan premises liability law should not be forgotten or disregarded.

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The deeper question that the Court seems to be probing is whether *Lugo's* exceptions have reached a point where there has been a convergence of duty with comparative fault. They have not. *Lugo's* exceptions and comparative fault remain legal doctrines that do not intersect in Michigan premises liability law. *Lugo's* exceptions impact duty. Comparative fault is a rule of decision for damages. As it relates specifically to premises liability, Chief Justice McCormack recognized the distinction of these principles in her concurring opinion in *Blackwell*, 502 Mich at 922: "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 …. Comparative fault is a rule of decision for damages. It does not define the contours of the defendant's legal duty."

The fundamentals of duty guide the response of whether *Lugo* is consistent with Michigan's comparative negligence framework. Although not a premises liability case, this Court discussed the fundamentals of duty in *Buczkowski v. McKay*, 441 Mich 96, 100-01; 490 NW2d 330 (1992). There, the Court stated that "[d]uty is actually a question of whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other." (cleaned up, citing *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); Prosser & Keeton, Torts (5th ed), § 53, p 356). "Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowksi*, at 101, cleaned up, citing also *Friedman v Dozorc*, *supra,* and *Antcliff v State Employees Credit Union*, 414 Mich 624, 631; 327 NW2d 814 (1982).

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In the context of premises liability, the open and obvious danger doctrine asks whether a defendant has obligations for the benefit of the particular plaintiff even when a plaintiff knew or should have known of the dangerous condition of the premises. *Lugo* takes that analysis one step further and says, when the condition possesses an unreasonably high risk of severe harm, does a duty exist for conditions that are effectively unavoidable or unreasonably dangerous? Nowhere in this analysis is a discussion of what the plaintiff did in response to that condition. That is a comparative fault discussion.

It is of critical importance to the stability of Michigan premises liability law that the open and obvious danger doctrine remains an issue of duty. This analytical structure allows for the determination of the sum total of the considerations impacting the obligations of a defendant before any consideration is made regarding possible negligence of the plaintiff. The importance of this is underscored by the following statement made by this Court in *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 22; 762 NW2d 911 (2009):

> Therefore, under Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another. Thus, when the Legislature refers to the common-law term "proximate cause" in the comparative fault statutes, it is clear that for claims based on negligence "'it must first be determined that the [person] owed a legal duty to the plaintiff.'" Additionally, MCL 600.6304(8) includes in the definition of fault "a breach of a legal duty . . . that is a proximate cause of damage sustained by a party." **Before there can be "a breach of a legal duty," there must be a legal duty. Without owing a duty to the injured party, the "negligent" actor could not have proximately caused the injury and could not be at "fault" for purposes of the comparative fault statutes.**

(Emphasis added)

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As instructed in *Romain,* there must exist a legal duty before any determination of comparative fault can be made. That is exactly what the open and obvious danger doctrine, as explained in *Lugo*, accomplishes. If the special aspects doctrine creates a duty, one of the natural next steps that flows from that duty is an analysis of comparative fault. Moreover, as discussed in response to Question No. 3, Michigan is not an outlier in considering the open and obvious danger doctrine as a part of duty.

The inclusion of the open and obvious danger doctrine in duty provides the necessary clarity and predictability for all Michiganders. Including the open and obvious danger doctrine as an element of duty informs premises possessors of the conduct required of them. It instructs them that they must warn of hidden and latent defects. They must take steps to protect against hidden and latent defects. And, because of *Lugo,* they must take active steps to address unusual open and obvious conditions that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee or are effectively unavoidable. As an element of duty, it informs invitees that they must take reasonable steps for their own safety, including keeping a lookout for conditions that are known or should be known to them because they are readily observable.

The inclusion of the open and obvious danger doctrine in duty also informs other industries who interact with premise possessors. For example, it informs the insurance industry. Including the open and obvious danger doctrine as a component of duty provides clarity and predictability to underwriting departments to understand the risks that they are insuring against for a premises possessor.

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Plaintiff argues that *Lugo* and comparative fault have converged as a result of this Court analyzing effectively unavoidable and unreasonably dangerous conditions. That argument is incorrect. When analyzing *Lugo's* exceptions, a court does so from the perspective of a reasonable invitee in plaintiff's position encountering the alleged effectively unavoidable condition. Again, nothing about the particular plaintiff's conduct comes into play in analyzing the nature of the premises. The focus of the analysis is, and has always been, the condition of the premises.

This Court's consideration of the condition of the premises from the perspective of the reasonable invitee in plaintiff's position acknowledges and applies the *Lugo* Court's use of the adverb "effectively" in describing whether a condition is unavoidable. In determining whether a duty should exist, the *Hoffner* Court instructed that we were to look to "an *inability to be avoided,* an *inescapable* result, or the *inevitability* of a given outcome" in determining unavoidability. *Id.* at 462. That determination can only be made by looking at what a plaintiff was doing at the time to determine whether a reasonable plaintiff could have found the condition to be "effectively unavoidable."

Comparative fault, by contrast, focuses on the specific plaintiff's conduct – versus a reasonable plaintiff. Comparative fault focuses on the specific plaintiff's conduct and whether fault should be assessed for that specific conduct. For example, a plaintiff who attempts to jump across *Lugo's* thirty-foot pit, instead of waiting for help, the jury could assess significant comparative fault while at the same time finding a duty. Or, drawing from *Livings,* assume that the jury determined that the conditions made the entryway effectively unavoidable, and the plaintiff selected the most treacherous of all possible

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paths to seek entry. A jury could certainly attribute fault to the plaintiff while still finding a duty owed by the defendant.

Here, Plaintiff's comparative fault was never reached because no legal duty existed. She conceded that the condition of the snow-covered parking lot was open and obvious; the applicability of that first step of the analysis was never disputed. That being so, the only possible means of establishing a duty was if the condition was effectively unavoidable. However, Plaintiff failed to establish a genuine issue of material fact that the condition presented an unreasonably high risk of severe harm that was effectively unavoidable.

Plaintiff took the position that the Court of Appeals' statements regarding patronizing another gas station or calling the attendant for help were impermissible comparative fault considerations. They were not. The Court of Appeals was looking at the condition – the snow-covered entryway - from the perspective of the reasonable invitee in plaintiff's position encountering the alleged effectively unavoidable condition. It is only from this perspective that the Court of Appeals could determine whether that condition was truly effectively unavoidable.

This Court's decision in *Lugo, supra* remains consistent with Michigan's comparative negligence framework. *Lugo's* exceptions and comparative fault remain legal doctrines that do not intersect in Michigan premises liability law. Nothing factual in Plaintiff's briefing suggests otherwise. *Lugo's* exceptions impact duty. Comparative fault is a rule of decision for damages. Each doctrine remains appropriately in its analytical structure. Michigan premises liability law need not be rewritten or revised.

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Question No. 3: Assuming *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), is inconsistent with Michigan's comparative negligence framework, which approach should this Court adopt for analyzing premises liability cases under a comparative negligence framework?

Given Plaintiff's failure to develop a concise position in response to this Court's third question, development of a discussion on this issue from the perspective a response presents some difficulty. That said, it appears to be Plaintiff's contention that the Restatements 3d is the best solution for this Court moving forward. Omitted from that discussion, however, is how these provisions would apply to the facts of this case or whether a different result would occur if Judge Allen had applied the Restatements 3d to Defendant's Motion for Summary Disposition. Additionally, despite discussing Restatements 3d, Plaintiff also seems to suggest Restatement 2d. It is unclear from Plaintiff's analysis how either of her proposed approaches under the Restatements would improve Michigan jurisprudence. The focal point of Michigan's premises liability law has always been the predictability and stability it provides to both plaintiffs and premises possessors. That predictability and stability would be gone with Restatements 3d. Restatements 3d would result in significant change to Michigan.

Before discussing the Restatements cited by Plaintiff, Defendant would note that any suggestion that *Lugo* is incorrect because of its interpretation of the Restatements is misplaced. The Restatements are not some sort of sacrosanct legal authority that must be followed. The Restatements are a guide, at best. Nowhere in Michigan law has the Legislature delegated its lawmaking and public policy decisions for the State of Michigan

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to the legal scholars involved in drafting the Restatements. Similarly, nowhere in this Court's long history has it delegated its decisions of the common law for the State of Michigan to the legal scholars involved in drafting the Restatements. While this Court is certainly free to look to the Restatements, it is equally as free to choose to depart from certain aspects of the Restatements. This Court recognized this at footnote 12 in *Livings*: "The Restatement remains persuasive authority that we can look to, as we do here, in undertaking our duty to develop the common law. See *Price v High Pointe Oil Co, Inc,* 493 Mich 238, 258; 828 NW2d 660 (2013) ('This Court is the principal steward of Michigan's common law . . . .') (citation and quotation marks omitted)."

It is also important to point out that the *Lugo* Court unanimously agreed that summary disposition was proper in that case. While Plaintiff focuses her analysis on the statements of Justice Cavanaugh and Justice Kelly in their concurrences, even those Justices agreed that summary disposition was proper. For example, the concurring opinions by Justices Cavanaugh and Justice Kelly agreed that, even applying the Restatements more directly, summary disposition was proper in that case. Therefore, despite all seven Justices of the *Lugo* Court being fully aware of the development of the law regarding comparative fault, the Justices unanimously agreed that summary disposition was proper – based on either the open and obvious danger doctrine favored by the majority or the Restatements approach taken by the minority.

Furthermore, not only has our common law embraced the open and obvious danger doctrine and *Lugo's* exceptions for "special aspects," the Michigan Legislature has

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also embraced that doctrine in the context of governmental immunity. MCL 691.1402a(5) was amended to specifically include this doctrine:

> In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, **including, but not limited to, a defense that the condition was open and obvious**.

(Emphasis added)

One of the most significant changes that would result through complete adoption of Restatement 3d would be the end of status-based duty rules. There would no longer be a distinction in the legal duties owed to invitees, trespassers, and licensees. Restatement 3d adopts a unitary duty of reasonable care to entrants on the land. Under the Restatement 3d, the same legal duty will be owed to an unknown, unanticipated trespasser as would be owed to a customer or business associate. Restatement 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51.

The removal of status-based duty rules would have a significant impact in Michigan. For the owner of vacant land in Michigan's Upper Peninsula, they would now have legal duties to unknown and unanticipated trespassers who invade their vacant land. Similarly, a farmer in Ionia would now be called upon to defend claims of a plaintiff who injured themselves in a hole while improperly and unknowingly traversing the farmer's land. Not only will this subject them to litigation that they would have otherwise not been a party to, but the possible financial impact of such claims creates an appreciable disincentive to own property that you cannot regularly supervise.

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Second, the Restatements 3d creates a multi-factor analysis for determining the duty owed that will further create uncertainty for premises possessors and plaintiffs. As noted in the comments, "[t]he primary factors to consider in determining whether reasonable care has been exercised are the foreseeable likelihood of harm, the foreseeable severity of any potential harm, and the burden required of the land possessor to eliminate or reduce the risk. In addition, if the risk is one resulting from natural conditions on the land, the fact that the land possessor did not create the risk is relevant to whether reasonable care was exercised. See § 37, Comment *h*, and § 40, Comment *d*." Restatement 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51. These considerations remove the level objectivity that has been secured through this Court's jurisprudence. The repeated focus of this Court's jurisprudence thus far has been clarity and predictability. With the Restatements 3d, however, that focus is thwarted because you can have neither clarity or predictability when five factors have to be balanced just to determine if a duty is owed.

When applied to a case such as this, the manner in which the balancing would have to occur would certainly result in an inundation of jury trials. Every premises liability case would involve a multi-faceted analysis that would require the finder of fact to balance the foreseeable likelihood of harm, the foreseeable severity of any potential harm, the burden required of the land possessor to eliminate or reduce the risk, and, if the risk is one resulting from natural conditions on the land, the fact that the land possessor did not create the risk. All of those factors would be considered just to determine whether a duty is owed. That means that the particular duty owed to each

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plaintiff would be fact-driven, fact-specific scenario that is not subject to predictable means of evaluation.

The approach in the Restatements 3d does not appear to have gained overwhelming support in other snowbelt states. In fact, research reveals that many states within the snowbelt have recognized that snow and ice are exceptions to general premises liability law. Many of those states have embraced what is commonly known as the "continuing storm doctrine." Other states have embraced what appears to be a hybrid approach between the Restatements and the open and obvious danger doctrine. Yet other states, like Ohio, appear to continue to recognize the open and obvious danger doctrine.

The continuing storm doctrine holds that a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance, walkway, platform, or steps. The general controlling principle underlying this doctrine is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it. Below is a list of states that have adopted the continuing storm doctrine:

- Connecticut: *Kraus v Newton*, 558 A2d 240, 243 (Conn 1989);
- Delaware: *Laine v Speedway, LLC*, 177 A3d 1227, 1228 (Delaware 2018);
- Georgia: *Columbus Doctors Hosp v Thompson,* 482 SE2d 705 (Georgia 1997);
- Iowa: *Alcala v Marriott Int'l, Inc*, 880 NW2d 699, 711 (Iowa 2016) also noting that inclement winter weather could constitute a storm even if it is not a blizzard;
- Kansas: *Agnew v Dillons, Inc*, 822 P2d 1049, 1054 (Kan Ct App 1991)

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- Minnesota: *Mattson v St Luke's Hospital of St Paul*, 89 NW2d 743, 745 (Minn 1958);
- New Jersey: *Pareja v Princeton Intern Props*, 252 A3d 184, 191 (New Jersey 2021);
- New York: *Solazzo v NYC Transit Auth*, 843 N.E. 2d 748, 749 (New York 2005), also called the storm in progress doctrine;
- Pennsylvania: *Goodman v Corn Exch Nat'l Bank & Tr Co*, 200 A 642, 643-44 (Pa 1938);
- Virginia: *Walker v Memorial Hospital*, 45 SE2d 898, 902 (Va 1948).

Ohio has taken the position that, because of their climate, a premises possessor is not generally liable for issues related to snow and ice; stating the axiom that snow and ice are part of wintertime life in Ohio. *See Boushack v Grisez Inv, LP*, 58 NE3d 528 (5th Dist 2016) citing *Lopatkovich v Tiffin*, 28 Ohio St 3d 204, 503 NE2d 154 (Ohio 1986). In Ohio, a business owner owes no duty to protect an invitee from dangers that are known to the invitee or are so obvious and apparent to the invitee that he or she may be reasonably expected to discover them and protect him or her against them. *Sidle v Humphrey*, 233 NE2d 589 (Ohio 1968). In the context of non-snow/ice conditions, it appears that Minnesota continues to also apply a similar standard: A property owner has a reasonable duty to protect persons from being injured by foreseeable dangerous conditions on the property, unless the risk of harm is "obvious." *Peterson v WT Rawleigh Co,* 144 NW2d 555 (1966).

Tennessee has taken the approach that the obviousness of the hazard is one factor to be considered in evaluating the premises possessor's duty. See *Coln v City of*

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Savannah, 966 SW2d 43 [(Tenn. 1998) *overruled on other grounds by Cross v City of Memphis*, 20 SW3d 642 (Tenn. 2000). As it relates specifically to snow and ice, it is the law in Tennessee that a premises possessor is expected to take reasonable steps to remove snow and ice within a reasonable time after it has formed or accumulated. *Grizzell v Foxx*, 348 SW2d 815 (Tenn. 1960).

In addition to the cases cited above, other jurisdictions have adopted what appears to be a hybrid approach regarding the liability of a premises possessor for an open and obvious condition. The rule of law in North Dakota is that landowners owe a general duty to lawful entrants to maintain their property in a reasonably safe condition in view of all the circumstances. However, a landowner may be relieved of his liability to invitees if the physical harm is caused by a dangerous condition that is open and obvious. This relief from liability, however, is not absolute; "[i]f a landowner permits dangerous conditions to exist on the premises the landowner must take reasonable measures to prevent injury to those whose presence on the property reasonably can be foreseen." *Fast v State*, 680 NW2d 265 (North Dakota 2004).

South Dakota courts have also acknowledged that landowners are not expected to ensure a safe condition, but rather must warn of a dangerous condition only if the condition existed for a time long enough to "justify the inference that he had knowledge of its existence." *Kryger v Dokken*, 386 NW2d 481, 483 (South Dakota 1986). Furthermore, if a danger is reasonably obvious or known to the invitee, the landowner is excepted from liability unless he expects harm will occur in spite of the invitee's knowledge of the danger. *See Stenholtz v Modica*, 264 NW2d 514, 516 (South Dakota 1978).

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The cases cited above demonstrate that a variety of means exist within the context of premises liability law to address the duty held by premises possessors. The mere fact that Michigan has not adopted a winter-specific rule of law, does not make it out-of-step with other jurisdictions. Likewise, the fact that Michigan's special aspects doctrine has not been adopted in other jurisdictions does not make it out-of-step. However, if the Court is persuaded to change the rule of law in Michigan as it relates to premises liability, a winter-specific rule of law such as the continuing storm doctrine is worthy of consideration.

The hybrid, objective approach that this Court adopted in *Lugo* is appropriate for the needs of Michiganders and is consistent with Michigan's comparative negligence framework. Michigan's premises liability law provides Michigan premises possessors with consistent, predictable knowledge of the circumstances of when they may be liable for injuries sustained on their property. Likewise, it provides invitees with knowledge of how they should govern themselves when confronted with dangerous conditions on the property of others. The law is balanced, fair, and working as intended. Michigan premises liability law need not be rewritten or revised.

A response to Plaintiff's Supplemental Brief

a. Plaintiff's harsh indictment on our courts lacks merit.

Plaintiff's harsh indictment on our courts without any record evidence or statistical support is offensive. Plaintiff's ire for the open and obvious danger doctrine is

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broadcast loud and clear with the following statements that have no foundation in this record:

- "… *Lugo* has, in practice, essentially completely eradicated cases involving ice and snow hazards, contrary to the *Quinlivan* precedent." (Plaintiff's Supplemental Brief, p. 7 n 2.

- "The efforts to square real life considerations with the contorted logic of the *Lugo* special aspects test has led to unworkable situations." *Id.* at 11.

- "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.'" *Id.* at 17.

- "[Bertrand] was decided as it was because of the Court's disdain for most cases involving stairs." *Id.* at 20.

- "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." *Id.* at 22.

- "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." *Id.* at 28.

- "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 …." *Id.* at 29.

- "In this way, Michigan has fostered blight as property owners have no fear of dangerous property resulting in financial costs." *Id.* at 32.

It appears that Plaintiff's ire has clouded her ability to objectively analyze the decisions being rendered by this Court and the Court of Appeals in the context of premises liability. This Court's decision in *Blackwell,* from 2018, remanded the case to the Court of Appeals to determine whether the defendants had a duty to warn the plaintiff of the condition. In *Estate of Livings,* at 2021 decision, this Court affirmed the trial court's

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denial of summary disposition as a genuine question of material fact existed as to whether the condition was effectively unavoidable. Additionally, in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008) the Court of Appeals held "we decline to extend the doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition." Then, in *Lymon v Freedland*, 314 Mich App 746, 763-64; 887 NW2d 456 (2016), the Court of Appeals held that summary disposition was not proper where a reasonable juror could conclude that a home health aide caring for an elderly patient was compelled to traverse a snow-covered, icy walkway in order to render aid to her patient.

These are all published, precedentially binding decisions of our appellate courts that instruct both Court of Appeals panels as well as trial courts of the importance of correct application of the open and obvious danger doctrine, including the *Lugo* exceptions, to a factually developed record. Nothing in these binding decisions suggests a return to contributory negligence, a secret order to dismiss cases, or a disdain for premises liability.

b. Plaintiff's constitutional challenges are not preserved for review.

It should also be noted that Plaintiff's constitutional challenges to Michigan premises liability law are not preserved. None of these arguments were included in the filings before the trial court or the Court of Appeals. These arguments were not even included in Plaintiff's Application for Leave to Appeal here. Nor was the constitutionality

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of Michigan premises liability law included in the list of questions issued by this Court for supplemental briefing.

Considering that arguments related to the constitutionality of Michigan premises liability law have never before been raised, they are not preserved for review pursuant to *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (explaining that generally a failure to timely raise an issue waives review of that issue on appeal); *Hess v West Bloomfield Twp*, 439 Mich 550, 557; 486 NW2d 628 n 6 (1992) (holding that an "issue was not preserved for review by this Court because it was not raised in the trial court"); and *Spencer v Black*, 232 Mich 675, 676; 206 NW 493 (1925) (holding that an issue raised for the first time on appeal was not properly before this Court).

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CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellee respectfully requests that this Court DENY this Application for Leave to Appeal. Alternatively, Defendant-Appellee request that this Court issue an opinion that affirms both the trial court and the Court of Appeals. Finally, should this Court decide to issue an opinion that changes the legal standards applied in Michigan premises liability actions, Defendant-Appellee requests that this matter be either affirmed on the basis of the law that existed at the time of the trial court's decision or remanded to the trial court for application of that new standard.

VANDEVEER GARZIA, P.C.

Date: April 18, 2022

By: _/s/Donald C. Brownell_____

DONALD C. BROWNELL (P48848)
RICK PATTERSON (P55706)
STEPHANIE L. ARNDT (P66870)
Attorney for Defendant-Appellee
840 W. Long Lake Road, Suite 600
Troy, MI 48098-6330
P. 248.312.2917
E. dbrownell@vgpclaw.com
sarndt@vgpclaw.com