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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

RENEE PINSKY, and DAVID PINSKY,

Plaintiffs-Appellants,

v

KROGER CO OF MICHIGAN,

Defendant-Appellee.

Supreme Court Case No. _____

Court of Appeals Case No. 351025

Washtenaw County Circuit Court
Case No. 2019-000208-NO
Hon. Timothy P. Connors (P31762)

Steven A. Hicks (P49966)
Co-Counsel for Plaintiffs-Appellants
216 North Chestnut Street
Lansing MI 48933
(517) 881-5564
steve@chair2consulting.com

Brian Kutinsky (P39107)
MALIN & KUTINSKY PC
Attorneys for Plaintiffs-Appellants
30777 Northwestern Hwy., Suite 300
Farmington Hills, MI 48334
(248) 973-1000
Bkutinsky@themklawfirm.com

Nancy Vayda Dembinski (P54144)
LANDRY MAZZEO & DEMBINSKI
Attorneys for Defendant-Appellee
37000 Grand River Ave., Ste. 200
Farmington Hills, MI 48335-2881
(248) 476-6900
ndembinski@lmdlaw.com

APPLICATION FOR LEAVE TO APPEAL

Prepared by:

Steven A. Hicks (P49966)
Attorney for Plaintiffs/Appellants
216 North Chestnut Street
Lansing, MI 48933-1061
Phone: (517) 881-5564
steve@chair2consulting.com

RECEIVED by MSC 8/17/2021 12:43:52 PM

TABLE OF CONTENTS

Index of Authorities. iii

Opinion Appealed From. vi

Jurisdiction. vi

Questions Presented. vi

Grounds for Appeal. viii

Introduction. 1

Statement of Facts. 2

Standard of Review. 6

Argument. 7

I. LEAVE SHOULD BE GRANTED IN THIS PREMISES CASE TO ADDRESS WHETHER THE OPEN AND OBVIOUS RULE PRECLUDES LIABILITY WHEN A PATRON WAS INJURED ON A TRIPPING HAZARD CREATED BY A STORE EMPLOYEE CLOSING AN AISLE USED BY PATRONS WITH A LOW-HANGING WIRE THAT WAS STRUNG ACROSS THE AISLE THROUGH A DISPLAY CART. 7

A. Reasonable minds could disagree in this premises case about whether the danger posed by a low-hanging wire strung across an aisle used by store patrons should have been discovered upon casual inspection. 7

B. Reasonable minds also could disagree in this premises case about whether the danger posed by a low-hanging wire strung across an aisle used by store patrons created an unreasonably dangerous condition. 9

1. The tripping hazard in this case was unreasonably dangerous because it posed a uniquely high likelihood of severe harm for store patrons as it ensured them a very hard fall to the ground. 9

2. The tripping hazard in this premises case was unreasonably dangerous because it posed a uniquely high likelihood of harm for store patrons. 11

RECEIVED by MSC 8/17/2021 12:43:52 PM

TABLE OF CONTENTS, Continued

II. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER THE OPEN AND OBVIOUS RULE SHOULD PRECLUDE LIABILITY IN MICHIGAN WHERE HARM SHOULD BE ANTICIPATED DESPITE THE OBVIOUSNESS OF THE HAZARD. 13

III. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER LIABILITY SHOULD BE PRECLUDED IN MICHIGAN WHERE THE HAZARD IS OPEN AND OBVIOUS (AND WITHOUT SPECIAL ASPECTS) OR WHETHER OPEN AND OBVIOUS SHOULD BE CONSIDERED BY THE JURY IN ASSESSING THE COMPARATIVE FAULT OF THE PARTIES, AS IT IS UNDER THE RESTATEMENT OF TORTS 3d. 16

Conclusion. 19

Relief Requested. 20

APPENDIX – LIST OF EXHIBITS

Exhibit 1 Court of Appeals Unpublished Opinion 1

Exhibit 2 Court of Appeals Order Denying Reconsideration 7

Exhibit 3 Register of Actions, Washtenaw Co Circuit Court 9

Exhibit 4 Order Denying Summary Disposition 12

Exhibit 5 Transcript, Summary Disposition Hearing 15

Exhibit 6 Transcript, Renee Pinsky's Deposition 25

Exhibit 7 Incident Report/Customer Statement 78

Exhibit 8 Evidence Report with Diagram 84

Exhibit 9 Post-Accident Photograph 88

Exhibit 10 Pinsky's Exemplar Photograph 90

Exhibit 11 Photograph of Pinsky's Right Leg 92

Exhibit 12 Surveillance Video (Submitted Separately) 94

Exhibit 13 Restatement of Torts 2d, § 343A 96

Exhibit 14 Restatement of Torts 3d, § 51 102

Exhibit 15 Kentucky River Medical Center v McIntosh 160

Exhibit 16 Horne v Precision Cars of Lexington, Inc 171

Exhibit 17 Foster v Costco Wholesale Corporation 178

Exhibit 18 Steigman v Outrigger Enterprises, Inc 186

RECEIVED by MSC 8/17/2021 12:43:52 PM

INDEX OF AUTHORITIES

Cases

Bahri v IDS Prop Cas Ins Co, 308 Mich App 420, 864 NW2d 609 (2014) 6

Bertrand v Alan Ford, Inc, 449 Mich 606, 537 NW2d 185 (1995) 13-15

Blackwell v Franchi, 502 Mich 918, 921-922, 914 NW2d 900 (2018) ix

Corey v Davenport College of Business (On Remand),
251 Mich App 1, 649 NW2d 392 (2002) 10-11

Foster v Costco Wholesale Corp, 291 P3d 150 (2012) 20

Greene v A P Prods, Ltd, 475 Mich 502,717 NW2d 855 (2006) 6

Hoffner v Lanctoe, 492 Mich 450, 461, 821 NW2d 88 (2012) 7, 15

Horne v Precision Cars of Lexington, Inc, 170 SW3d 364, 370 (2005) 16

Hughes v PMG Bldg, Inc, 227 Mich App 1, 574 NW2d 691 (1997) 7

Joyce v Rubin, 249 Mich App 231, 238, 642 NW2d 360 (2002) 7

Kentucky River Medical Center v McIntosh, 319 SW3d 385 (2010). 16

Livings v Sage's Investment Group, LLC, ___ Mich ___,
___ NW2d ___ (2021) . . . . . passim

Lugo v Ameritech Corp, 464 Mich App 512, 629 NW2d 384 (2001) . . . . . passim

MEEMIC Ins Co v DTE Energy Co, 292 Mich App 278,
807 NW2d 407 (2011) 6

Novotney v Burger King Corp (On Remand),198 Mich App 470,
499 NW2d 379 (1993) 7

O'Donnell v Garasic, 259 Mich App 569, 676 NW2d 213 (2003) 12

Placek v City of Sterling Heights, 405 Mich App 638,
275 NW2d 511 (1979) ix

RECEIVED by MSC 8/17/2021 12:43:52 PM

INDEX OF AUTHORITIES, Continued

Riddle v McLouth Steel Prods Corp, 440 Mich 85, 485 NW2d 676 (1992) . . . . . passim

Steigman v Outrigger Enterprises, Inc, 267 P3d 1238 (2011) 19

West v Gen Motors Corp, 469 Mich 177, 665 NW2d 468 (2003) 6

Statutes

MCL 600.2959 17

Court Rules

MCR 2.116(C)(10). . . . . passim

MCR 7.303(B)(1) vi

MCR 7.305(B)(3) viii

MCL 7.305(B)(5)(a) ix

MCL 7.305(B)(5)(b) ix

MCR 7.305(C)(2) vi

Treatises

Prosser, The Law of Torts (4th ed) 10

Rest Torts 2d, §343A .. . . . . passim

Rest Torts 2d, §343A, comment f 10, 13, 15-17

Rest Torts 3d, §51 . . . . . passim

Rest Torts 3d, §51, comment k 18

RECEIVED by MSC 8/17/2021 12:43:52 PM

OPINION APPEALED FROM

Plaintiffs/Appellants, Renee and David Pinsky, seek leave to appeal in this premises liability case from the unpublished per curiam opinion that was issued by the Court of Appeals on May 27, 2021. In that unpublished per curiam opinion, the Court of Appeals reversed the trial court's decision to deny Defendant/Appellee Kroger Company's motion for summary disposition on open and obvious grounds under MCR 2.116(C)(10). [Appx 1, Exhibit 1, Unpublished COA Opinion]. In so holding, the Court of Appeals relied primarily on this Court's prior decision in *Lugo v Ameritech Corp*, 464 Mich 512, 629 NW2d 384 (2001) and its interpretation in *Lugo* of the open and obvious danger rule in Michigan, including its formulation in *Lugo* of the "special-aspects" doctrine that this Court recently discussed in *Livings v Sage's Investment Group, LLC*, ___ Mich ___, ___ NW2d ___ (2021).

JURISDICTION

This Court is entitled to exercise its jurisdiction to review a case after a decision in the Court of Appeals under MCR 7.303(B)(1). In a civil case, a leave application must be filed with this Court within 42 days of when the Court of Appeals either issues its decision or within 42 days after it rules on a timely motion for reconsideration. MCR 7.305(C)(2). Here, the Court of Appeals issued its unpublished per curiam opinion on May 27, 2021. Plaintiffs/Appellants brought a timely motion for reconsideration on June 17, 2021. The Court of Appeals issued an order denying the motion reconsideration on July 6, 2021. [Appx 6, Ex. 2, COA Order Denying Reconsideration, July 6, 2021]. This leave application was filed within 42 days of the Court of Appeals issuing its order denying reconsideration. Accordingly, this Court has discretion to exercise its jurisdiction under MCR 7.303(B)(1).

RECEIVED by MSC 8/17/2021 12:43:52 PM

QUESTIONS PRESENTED

I. Whether leave to appeal should be granted in this premises liability case in order to address whether the open and obvious danger rule in Michigan should preclude liability where, as in this case, a grocery store patron was seriously injured on a tripping hazard created by a store employee just moments before the incident occurred when she closed a checkout lane by positioning a display cart in the middle of an aisle that was used by store patrons and stringing a wire across that aisle below knee level using the display cart?

Plaintiffs/Appellants say “Yes”.

Defendant/Appellee says “No”.

The trial court would say “Yes”.

The Court of Appeals would say “No”.

This Court should say “Yes”.

II. Whether leave to appeal should be granted in this premises liability case in order to address whether the open and obvious danger rule should preclude liability in Michigan, where the defendant should anticipate that harm may result to its patrons even though the condition is open and obvious, because it is foreseeable that its patrons will be distracted?

Plaintiffs/Appellants say “Yes”.

Defendant/Appellee says “No”.

The trial court did not address this question.

The Court of Appeals did not address this question.

This Court should say “Yes”.

RECEIVED by MSC 8/17/2021 12:43:52 PM

III. Whether leave to appeal should be granted in this premises liability case in order to address whether liability should be precluded in Michigan even if the danger posed by a condition on land is open and obvious (and without special aspects as defined by *Lugo*) or whether the open and obvious nature of that condition should be just one consideration for the jury in assessing the comparative fault of the parties, as it is under Rest Torts 3d?

Plaintiffs/Appellants say "Yes".

Defendant/Appellee says "No".

The trial court did not address this question

The Court of Appeals did not address this question.

This Court should say "Yes".

GROUNDS FOR APPEAL

The issues presented on appeal in this premises liability case involve "legal principle[s] of major significance to this state's jurisprudence" under MCR 7.305(B)(3). Here, the Court of Appeals erred by concluding based on *Lugo* that a low-hanging wire strung up below knee level through a display cart and across an aisle used by store patrons was open and obvious and not unreasonably dangerous under the circumstances.

This case also has "major significance to this state's jurisprudence under MCR 7.305(B)(3) because it concerns the same legal standard that this Court addressed in *Livings v Sage's Investment Group, LLC*, ___ Mich ___, ___ NW2d ___ (2021), when it discussed the Rest Torts 2d, §343A. In *Livings*, this Court observed that "the Restatement states that a possessor of land is not liable for injuries caused to invitees 'by any activity or condition on the land whose danger is known or obvious to them unless the possessor

RECEIVED by MSC 8/17/2021 12:43:52 PM

should anticipate the harm despite such knowledge or obviousness.'" Id, slip op at 9, citing 2 Restatement Torts, 2d, §343A, p 218, and Prosser, The Law of Torts (4th ed), p 394. It then applied the comment f to Rest Torts 2d, §343A, and one of the illustrations provided.

Although the factual circumstances in this case differ from *Livings*, the same legal standard should be applied. To the extent that another standard was applied below – one that differs from the Rest Torts 2d, §343A – review is also warranted under MCR 7.305(B)(5)(b) because the Court of Appeals' decision in this case conflicts with *Livings*.

Leave also should be granted under MCL 7.305(B)(5)(a) because the Court of Appeals' decision "is clearly erroneous and will cause material injustice" as continuing to apply *Lugo* and its "special aspects doctrine" eviscerates not only the heightened duty of care previously owed to invitees in Michigan, but also negates the comparative fault rules adopted by the Legislature in favor of a standard more similar to the contributory negligence approach that this Court rejected over 40 years ago. See *Placek v City of Sterling Heights,* 405 Mich App 638, 652, 275 NW2d 511 (1979), as discussed in *Livings*, slip op at 25, and in *Blackwell v Franchi*, 502 Mich 918, 921-922, 914 NW2d 900 (2018).

In *Livings*, several Supreme Court justices "expressed [] reservations about the continued reliance on the special-aspects doctrine" that was adopted in *Lugo*. Id, slip op at 20. This case poses an opportunity to consider not only whether the same legal standard applied in *Livings* under the Rest Torts 2d §343A should be applied in a different set of circumstances – one that also warranted an illustration under Rest Torts 2d §343A – but also whether "continued reliance on the special aspects doctrine" is justified. In short, it asks whether the Rest Torts 3d approach should be adopted in Michigan. Id, slip op at 20.

RECEIVED by MSC 8/17/2021 12:43:52 PM

INTRODUCTION

As things currently stand, Kroger is entitled to summary disposition in this premises liability case under MCR 2.116(C)(10), because the Court of Appeals held, based on *Lugo*, that the danger presented by a low-hanging wire strung up by an employee across an aisle used by patrons via a display cart was open and obvious and not unreasonably dangerous. That holding, however, ignores genuine issues of material fact that existed in this case regarding whether the wire could be observed by store patrons upon casual inspection and whether it posed an unreasonable risk of harm to them even if it was open and obvious.

Here, the Court of Appeals clearly erred by reversing the trial court's holding that genuine issues of material fact existed regarding both whether the hazard was open and obvious and whether it was unreasonably dangerous for store patrons that unexpectedly encountered it. Simply put, the danger posed by a wire strung below knee level from a checkout counter to a display cart positioned in the middle of the aisle is not open and obvious as a matter of law because reasonable minds could disagree about whether it could be observed upon casual inspection by a store patron as he or she approached it. Similarly, reasonable minds could differ about whether it posed an unreasonable risk of harm because it posed a uniquely high likelihood of harm or severity of harm for patrons.

Moreover, to the extent that the Court of Appeals arguably applied *Lugo* as this Court intended, the unjust result in this case also calls into question whether *Lugo* was correctly decided. Specifically, it asks whether *Lugo* was wrong to the extent it jettisoned all applications of the caveat to the open and obvious rule that existed under Rest Torts 2d, §343A. Alternatively, it raises the question whether Lugo's "special-aspects" doctrine

RECEIVED by MSC 8/17/2021 12:43:52 PM

should be followed in Michigan because it effectively creates a contributory negligence rule that stands in stark contrast to the general duty of reasonable care that has been adopted in other jurisdictions with similar comparative fault rules based on the Rest Torts 3d, §51.

This Court should grant leave to appeal in this premises liability case because it involves factual circumstances that demonstrate not only that *Lugo* was wrongly decided but also that the "special-aspects" doctrine that this Court adopted in *Lugo* denies jurors their rightful opportunity to apportion fault between the parties as the Legislature intended.

STATEMENT OF FACTS

Renee Pinsky was seriously injured while she was shopping at Kroger when she tripped on a low-hanging wire that was strung across the aisleway where she was walking.[1] Moments before she tripped and fell down, a store employee created the tripping hazard.[2]

The aisle in question is wider than a typical checkout lane. It is positioned in the center of the checkout lanes provided. To the left, walking in the direction that Pinsky was walking when she tripped and fell down, there are 11 checkout lanes. To the right is checkout lane 12 (and a number of additional checkout lanes). The aisle between checkout lane 11 and checkout lane 12 is wider than other checkout lanes. It accommodates pedestrian traffic in both directions as only checkout lane 12 (and not checkout lane 11) is set up so that patrons will queue up within the aisle in question at that checkout counter.[3]

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[1]Appx 78, Ex. 7, Incident Report/Customer Statement, 2/12/2018.

[2]Appx 94, Ex. 12, Surveillance video from 7:48:03 p.m. until 7:48:39 p.m.

[3]Appx 84, Ex. 8, Evidence Report; Appx 88, Ex. 9, Photograph 2/12/2018.

RECEIVED by MSC 8/17/2021 12:43:52 PM

When Pinsky completed her shopping, she used checkout lane 11.[4] Consequently, she did not initially walk through the aisle where she subsequently tripped and fell down. As she was checking out (in lane 11), a store employee came to the aisle between lanes 11 and 12 and proceeded to position a display cart in the middle of the aisle.[5] That display cart contained baby formula. It had 2 baskets – an upper basket and a lower basket. Both baskets had baby formula and the top basket also had a sign with pictures of babies on it.[6]

After placing the display cart with baby formula in the middle of the aisle between checkout lanes 11 and 12, the store employee took a wire running through the bottom basket of the display cart and connected it to the backside of checkout lane 11.[7] It now stretched across the aisle from checkout lane 12 to the backside of checkout lane 11.[8] Because it was strung through the display cart's bottom rack, the wire angled downwards from where it attached to the checkout lanes so that it was positioned below knee level.[9]

As she was checking out (in lane 11), Pinsky noted that the bag of flour that she purchased was open. The cashier rang up the bag of flour but instructed her that she could just go back and get a new bag (via the aisle in question) after she paid for her groceries.[10]

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[4]Appx 94, Ex. 12, Surveillance video from 7:49:20 p.m. until 7:49:25 p.m.

[5]Appx 94, Ex. 12, Surveillance video from 7:48:03 p.m. until 7:48:39 p.m.

[6]Appx 88, Ex. 9, Photograph 2/12/2018; Appx 90, Ex. 10, Exemplar Photograph.

[7]Appx 94, Ex. 12, Surveillance video from 7:48:03 p.m. until 7:48:39 p.m.

[8]Appx 90, Ex. 10, Exemplar Photograph.

[9]Appx 90, Ex. 10, Exemplar Photograph; Appx 88, Ex. 9, Photograph, 2/12/2018.

[10]Appx 25 , Ex. 6, Pinsky Dep Tr, at p 23.

RECEIVED by MSC 8/17/2021 12:43:52 PM

Pinsky was attempting to do as told when she encountered the low-hanging wire that had just been installed between checkout lanes 11 and 12 in order to close checkout lane 12.[11]

When deposed, Pinsky testified that she was looking "ahead" and "into the store" when she tripped and fell down.[12] But that was not the full extent of what she said. She also testified that she saw "a cart, a small cart with I think it had formula, baby formula in it in the center of the large wide handicapped aisle". She was navigating around that "obstruction" when she tripped and fell down. She "didn't topple over the cart"; instead, she "walked to the side of the cart".[13] In sum, Pinsky testified that she saw the display cart, but not the wire that she tripped on. In her words, "I chose not to walk at the cart in the center, so I was aware of it but I was not aware of anything blocking the area to the side of it."[14]

It was only after Pinsky was on the ground that she saw the wire tangled around her ankles.[15] Photographs taken after she was injured confirm that Pinsky had a straight-line cut/abrasion below her right knee where she encountered the wire that she tripped on.[16]

After Pinsky tripped and fell down, her husband, David, photographed the hazard that she tripped on.[17] To do so, he took "close-up" photographs of the display cart and the

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[11]Appx 94, Ex. 12, Surveillance video from 7:49:20 p.m. to 7:49:25 p.m.

[12]Appx 25, Ex. 6, Pinsky Dep Tr, at p 25.

[13]Appx 25, Ex. 6, Pinsky Dep Tr, at pp 26-27.

[14]Appx 25, Ex. 6, Pinsky Dep Tr, at p 27.

[15]Appx 25, Ex. 6, Pinsky Dep Tr, at p 28.

[16]Appx 25, Ex. 6, Photograph of Pinsky's Right Leg.

[17]Appx 88, Ex. 9, Post-Accident Photograph 2/12/2018.

RECEIVED by MSC 8/17/2021 12:43:52 PM

wire that was attached to it. Unfortunately, the display cart (and thus the wire that was strung through it) was no longer positioned exactly as it was when the incident occurred.[18]

Subsequently, "exemplar" photographs were taken by both sides. The defense's photograph shows the wire running through the upper rack of the display cart, not the lower rack, as it appears in the close-up photograph taken right after the accident. The plaintiff's exemplar photograph shows the wire running through the bottom rack of the display cart.[19]

When she tripped and fell down, Pinsky injured her left arm, face and right leg.[20] She was transported by ambulance to the hospital, because she was complaining of left wrist pain. She was diagnosed with a fracture to the radial head of her left arm. Two months later, she underwent surgery in order to replace the radial head in her left arm.[21]

Pinsky brought a premises claim against Kroger in the Washtenaw Circuit Court. After discovery was performed, Kroger moved for summary disposition under MCR 2.116(C)(10). In short, Kroger argued that her premises case should be dismissed based on *Lugo* because the danger posed by the wire that she tripped on was open and obvious and there were no special aspects that made it an unreasonably dangerous condition.[22] The trial court disagreed, concluding that genuine issues of material fact existed regarding both whether it was "open and obvious" and/or an unreasonably "dangerous condition".[23]

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[18]Appx 88, Ex. 9, Photograph 2/12/2018.

[19]Appx 90, Ex. 10, Exemplar Photograph.

[20]Appx 25, Ex. 6, Pinsky Dep Tr at pp 10-11.

[21]Appx 25, Ex. 6, Pinsky Dep Tr at pp 12-14.

[22]See Kroger's COA Appendix, Ex. 4, Kroger's SD Motion, at p 23.

[23]Appx 15, Ex. 5, Transcript, Summary Disposition Hearing, at p 8.

RECEIVED by MSC 8/17/2021 12:43:52 PM

Kroger sought leave to appeal from that ruling. The Court of Appeals granted leave to appeal and it then subsequently reversed the trial court's holding, because it concluded based on *Lugo* that the hazard was open and obvious and not unreasonably dangerous.[24]

Pinsky sought reconsideration, but her motion was denied.[25] She now seeks leave to appeal to this Court arguing both that her case was wrongly decided under *Lugo* and that this Court should address whether *Lugo* should continue to be controlling in Michigan.

STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280, 807 NW2d 407 (2011). A summary disposition motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423, 864 NW2d 609 (2014). "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). In reviewing a summary disposition motion under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507, 717 NW2d 855 (2006).

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[24]Appx 1, Ex. 1, Court of Appeals' Unpublished Opinion.

[25]Appx 7, Ex. 2 , Court of Appeals' Order Denying Reconsideration.

RECEIVED by MSC 8/17/2021 12:43:52 PM

ARGUMENT

I. LEAVE SHOULD BE GRANTED IN THIS PREMISES CASE TO ADDRESS WHETHER THE OPEN AND OBVIOUS RULE PRECLUDES LIABILITY WHEN A PATRON WAS INJURED ON A TRIPPING HAZARD CREATED BY A STORE EMPLOYEE CLOSING AN AISLE USED BY PATRONS WITH A LOW-HANGING WIRE THAT WAS STRUNG ACROSS THE AISLE THROUGH A DISPLAY CART.

A. Reasonable minds could disagree in this premises case about whether the danger posed by a low-hanging wire strung across an aisle used by store patrons should have been discovered upon casual inspection.

In Michigan, it is well-established that the test for determining whether a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." See *Novotney v Burger King Corp (On Remand)*,198 Mich App 470, 475; 499 NW2d 379 (1993), as cited by the Court of Appeals below in its unpublished opinion. Slip op at p 3. As the Court of Appeals acknowledged below in its opinion, the test "is an objective one that requires consideration whether a reasonable person in the same position would foresee the danger, rather than whether the particular plaintiff knew that the condition was hazardous." See Opinion, p 3, citing *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).[26]

Yet, in its holding, the Court of Appeals erred when it applied the open and obvious rule because it did not faithfully apply that objective test in this premises case. Instead, it relied largely on Pinsky's testimony regarding whether the wire could be seen in photographs taken after she was injured to document the condition that caused her to trip

[26]This Court in *Lugo* previously affirmed that an objective standard must be employed in assessing the nature of the condition found on the premises. 464 Mich at 523. While this Court in *Lugo* did not expressly state the objective test that is used for determining whether a condition is open and obvious, it did so subsequently in *Hoffner v Lanctoe,* 492 Mich 450, 461, 821 NW2d 88 (2012) citing *Novotney*, supra, 198 Mich App at 474-475, and *Joyce v Rubin*, 249 Mich App 231, 238, 642 NW2d 360 (2002).

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and fall down. Clearly, whether Pinsky could actually see the wire after the fact in close-up photographs taken to document the hazard that she encountered is not the same as asking whether she could see it as she navigated around the display cart to which it was attached.

In its unpublished opinion, the Court of Appeals observed that Pinsky "admitted at her deposition that the photos of the incident scene taken by [her husband] David after she fell clearly depicted the cable that caused her fall." Slip op at p 3. It similarly noted that "[a]lthough she did not see the cable at the time [that she tripped and fell down], she testified that she could see the cable in the photographs taken after her accident." Slip op at 4. But, those photographs do not show what she would have seen! To the contrary, those photographs were taken after the fact for the express purpose of documenting the presence of a wire attached to the display cart. When taken, the display cart was not in the same position nor was the wire shown where it draped across the aisle below knee level.

Simply put, whether Pinsky could see the wire in photographs taken after the fact should not be conclusive when it comes to determining whether the hazard was open and obvious because asking whether she could see the wire in photographs is not the same as whether the wire could be recognized as a tripping hazard upon casual inspection. All subsequent photographs in this case were taken for the express purpose of showing what Pinsky tripped on. None of them show what a store patron in her position would have seen. Thus, none should be conclusive in determining whether the wire was open and obvious.[27]

[27]While the video is a closer approximation of what could be seen by patrons using the aisle in question, it also is not conclusive because the viewer is looking for the hazard as it is being created, unlike a store patron whose attention is understandably drawn to the display cart that must be avoided and navigated around. In the video, the store's employee can be seen as she created the tripping hazard, but the wire itself is not easily visualized. See the video starting at 7:48:03 p.m. and ending at 7:48:39 p.m.

RECEIVED by MSC 8/17/2021 12:43:52 PM

Moreover, Pinsky's testimony about the subsequent photographs clearly does not represent what an "average user" would have seen "upon casual inspection" in traversing the area in question, because Pinsky knew to look for the wire attached to the display cart when she reviewed the photographs. Knowing what to look for in those photographs, Pinsky had no trouble finding it. But, a patron using that aisle would not necessarily have seen that low-hanging wire upon casual inspection, especially since it angled downward from the checkout counter to the lower basket, not the upper basket, of that display cart.

Lastly, the Court of Appeals' analysis badly misinterprets Pinsky's testimony about what she was doing before she tripped and fell down. It concludes that she was "'looking ahead into the store', rather than looking at the pathway in front of her". Slip op at 3. In actuality, she was simply trying to navigate around the display cart that its store employee had placed in the middle of the aisle. Her testimony clearly demonstrated that her focus understandably was on the display cart. She recalled that it was a display for baby formula. Thus, she did not see the wire that was strung through the display cart's bottom basket.

B. Reasonable minds also could disagree in this premises case about whether the danger posed by a low-hanging wire strung across an aisle used by store patrons created an unreasonably dangerous condition.

1. The tripping hazard in this case was unreasonably dangerous because it posed a uniquely high likelihood of severe harm for store patrons as it ensured them a very hard fall to the ground.

The hazard in this case is not comparable to a defect in the surface of the land such as in *Lugo* where the plaintiff fell after he encountered a routine pothole in a parking lot. Here, there was a low-hanging wire strung across a store aisle below knee level. When Pinsky ran into it, she went down hard because it basically took her legs out from under her

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body. She injured her nose and face when she fell flat on the ground. She also shattered her right elbow because she could not effectively brace herself when she fell to the ground.

Yet, the Court of Appeals saw this case like other trip and fall cases when it held that "the cable was neither unavoidable nor posed an unreasonable risk of severe harm." Fundamentally, a tripping hazard like a wire strung across an aisle used by store patrons is not the same as a surface defect on the land because the potential for severe harm clearly is much greater when a person is completely upended as Pinsky was in this case.[28]

In support of its holding, the Court of Appeals cited *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7, 649 NW2d 392 (2002) which, in turn, relied on *Lugo* for the decidedly unscientific conclusion that it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury" or a substantial risk of death. Id, citing *Lugo*, 464 Mich at 518-520. While no evidentiary support was provided for that broad conclusion when this Court first made it in *Lugo*, it nonetheless has become an integral part of how premises cases are assessed by the Michigan courts under *Lugo*.

In *Corey*, the plaintiff slipped and fell "on snowy and icy steps" located outside one of college's dormitories. Id, 251 Mich App at 2. The Court of Appeals concluded that there was no unique likelihood of severe harm being sustained by the plaintiff because the steps "were not very high" and could have been avoided. Id at 9. The Court of Appeals reached

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[28]The risk of harm posed by falling down as Pinsky did in this case should not be underestimated. According to the Center for Disease Control, falls are consistently the biggest cause of unintentional injuries in the United States. Every year, falls account for more than one-third of this country's unintentional injuries. In fact, across all ages, falls rank much higher than motor vehicle accidents as a cause of unintentional injuries and deaths. Falls caused more than 30% of unintentional injuries in 2015, while motor vehicle accidents caused less than 10%. See CDC Nation Center for Health Statistics data that is available online at https://www.cdc.gov/injury/wisqars/ and can be searched.

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a similar conclusion in this premises case, citing both *Corey* and *Lugo*. But, it do so even though no apt comparison can be made between those cases and how Pinsky was injured.

Effectively, *Lugo* and much of its progeny have defined the likelihood of harm in a way that only the most egregious defects - the thirty-foot deep hole example in *Lugo* – need to be remedied. But, the test that was adopted in *Lugo* does not compel such results. Here, the Court of Appeals erred by holding that severe harm was not a likely result of the store employee creating a makeshift barrier across an aisle that was used by store patrons.

2. The tripping hazard in this premises case was unreasonably dangerous because it posed a uniquely high likelihood of harm for store patrons.

The Court of Appeals also erred by holding that the tripping hazard in this case was not unreasonably dangerous because there was a uniquely high likelihood of harm and that is enough under *Lugo* (even if one assumes the likelihood of severe harm was not high).

In *Lugo*, this Court held that a viable premises claim exists in Michigan "if there are special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided". [Emphasis added]. It did not say that a condition is unreasonably dangerous only "if it posed 'a substantial risk of death or severe injury'", as the Court of Appeals suggested in its unpublished opinion, citing *Lugo*, 464 Mich at 518. Slip op at 5.

Simply put, the risk of severe harm posed by a 30 foot deep hole was one way to demonstrate an unreasonably dangerous condition. But, it was not the only way to do so.

Under *Lugo*, a condition also will be considered unreasonably dangerous, if, as in this case, it is highly likely that patrons will be injured. Setting up a tripping hazard is a perfect example of why a condition may be unreasonably dangerous even if not certain to cause severe harm. If the likelihood remains high that patrons will encounter the condition, then it was unreasonably dangerous, even if it was also likely that no one would be killed.

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Without question, a low-hanging wire in an aisle regularly traversed by patrons poses a uniquely high likelihood that patrons will be harmed, unlike a pothole in a parking lot (as in *Lugo*) where the likelihood of harm (and severity of harm) both would be very low.

Oddly, few post-*Lugo* cases have addressed likelihood of harm as a "special aspect" that is capable of rendering even an open and obvious condition unreasonably dangerous. By and large, post-*Lugo* cases have focused on whether an open and obvious condition was "effectively unavoidable" or whether it created a unreasonable risk of "severe" harm.

In *O'Donnell v Garasic*, 259 Mich App 569, 676 NW2d 213 (2003), however, the Court of Appeals found that multiple "inadequacies" when viewed 'in the aggregate" rendered the stairway where plaintiff was injured unreasonably dangerous. *Id* at 570. In short, the Court held that "the totality of the circumstances" resulted in the condition having "special aspects" and the open and obvious rule thus did not preclude the claim. *Id* at 578.

Simply put, in *O'Donnell*, multiple defects with the stairway made the likelihood of harm unduly high, because it was not safe to be used as it was intended. The same can be said about an aisle intended for use by patrons where a tripping hazard was created.

Fundamentally, the outcome in this premises case is not consistent with the test established by this Court in *Lugo*. This Court recognized in *Lugo* that even open and obvious dangers may be unreasonably dangerous, if the likelihood of harm is unduly high.

Here, the Court of Appeals wrongly concluded that "[a] checkout lane closed by a cable is an everyday occurrence that a reasonably prudent person would be expected to see and avoid by choosing an alternative route." Id, slip op at 4. But, in truth, this hazard was not the same one typically presented when a checkout lane is closed. It was instead a makeshift attempt to close off not only the checkout lane but an aisle used by patrons.

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In sum, it was a textbook case for "special-aspects" much like the oddly configured walkway in *Bertrand v Alan Ford, Inc,* 449 Mich 606, 624-625, 537 NW2d 185 (1995), where this Court found a material fact question existed as to unreasonable risk of harm. Thus, it should not have been dismissed on open and obvious grounds even under *Lugo*.

II. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER THE OPEN AND OBVIOUS RULE SHOULD PRECLUDE LIABILITY IN MICHIGAN WHERE HARM SHOULD BE ANTICIPATED DESPITE THE OBVIOUSNESS OF THE HAZARD.

The Court of Appeals also erred by not recognizing that Kroger had a duty to protect its patrons from the tripping hazard that it created because it should have anticipated harm regardless of whether the condition was so open and obvious that patrons should have discovered it. Recently, in *Livings*, this Court addressed a similar oversight when it affirmed the Court of Appeals' holding that a premises claim was not precluded on open and obvious grounds, citing for support an illustration under comment f to Rest Torts 2d 343a.

Stringing a wire below knee level across an aisle used by store patrons is not an "everyday occurrence" as the Court of Appeals concluded below. While it may be common to close off a checkout lane with a waist-high cable connecting 2 adjacent checkout lanes, it is not common to do so across a wide aisle used by patrons, nor is it common do so in a "jury-rigged" fashion, especially by using a display cart that was not intended for stopping (or re-routing) pedestrian traffic on the store's premises. Having created the hazard, Kroger should have anticipated the harm that resulted even if the condition was open and obvious.

As the Court of Appeals correctly noted below, Michigan law holds that "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." Slip op at 3,

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citing *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96, 485 NW2d 676 (1992). [Emphasis added]. But, unfortunately, that was all the Court of Appeals had to say about that caveat to *Lugo* as it did not apply it and instead applied the "special aspects" test only.

In *Riddle*, this Court relied upon Rest Torts 2d §343A to support its conclusion that liability may exist in cases where the defendant "should anticipate the harm despite knowledge of it on behalf of [its patron]." In *Bertrand*, this Court similarly discussed Rest Torts 2d, §343A and applied it as an exception to the open and obvious rule. Subsequently, in *Lugo*, this Court crafted (ostensibly from *Bertrand*) a new test for open and obvious conditions in Michigan. But, in doing so, this Court did not expressly hold that Rest Torts 2d, §343A no longer applied. Accordingly, *Riddle* (and thus Rest Torts 2d §343A) should have been applied here instead of merely paying "lip-service" to the notion that *Riddle* and its consideration of whether harm should be anticipated was still valid law.

Instead of doing so, the Court of Appeals failed to address whether Kroger should have anticipated harm to its patrons when it created a tripping hazard by stringing a low-hanging wire across an aisle using a display cart intended to draw its patrons' attention. Thus, the Court of Appeals erred by concluding that the tripping hazard in this case was open and obvious because it did not consider whether the display cart was a distraction.

To the extent that the defense may argue that the "special-aspects" doctrine adopted in *Lugo* supplanted any need for further analysis under Rest Torts 2d §343A (or this Court's earlier cases that both cited and relied upon it, including *Riddle* and *Bertrand*), this Court should examine whether the state of the law in Michigan needs to be clarified.

As noted in *Livings*, slip op at 15, this Court has relied previously upon Rest Torts 2d, §343A. In fact, the Court claimed that it was doing so in *Lugo*, and it repeated that

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claim again when it decided *Hoffner,* 492 Mich at 479. Even so, subsequent appellate court decisions in Michigan have clearly viewed *Lugo* as supplanting the Rest Torts 2d §343A.

In *Livings*, however, this Court applied Rest Torts 2d §343A. It did so by quoting not only comment f – the same comment applied in *Bertrand* – but by applying an illustration provided for that comment under Rest Torts 2d §343A. See *Livings*, slip op at 13 (applying illustration 5 from comment f to Rest Torts 2d §343A because "it maps almost perfectly onto the current case" and it also "appears to provide a reasonable approach to this issue".

As in *Livings*, there is an illustration from Rest Torts 2d §343A that clearly applies to the factual circumstances in this case. Thus, Rest Torts 2d, §343A also should be instructive in this case. Here, the relevant illustration is Illustration 2. It states the following:

> The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

Illustration 2 mirrors what happened in this case. Here, a low-hanging wire impeded patrons from safely walking through the aisle in question. In Illustration 2, a weighing scale was protruding into an aisle of a store and created an open and obvious tripping hazard.

Yet, under Illustration 2, the store is subject to liability to a customer who "does not discover the scale, stumbles over it, and is injured." As in this premises case, the potential for liability stems from the fact that "behind and about the scale" the store "displays goods to attract its customers" and the customer was "intent on looking at the displayed goods."

Here, Pinsky similarly testified that she was looking at the display cart for baby formula when she tripped and fell down. In short, she too was focused on displayed goods.

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Consequently, Kroger should have anticipated that she would be harmed by its makeshift attempt to close off the aisle with a wire strung up below knee level through its display cart.

The illustrations under comment f to Rest Torts 2d 343A also have been applied in other jurisdictions. In 2010, the Kentucky Supreme Court addressed a similar question when it refused to preclude liability on open and obvious grounds by applying Rest Torts 2d, 343A and its caveat for circumstances where the defendant should have anticipated the harm despite the open and obvious nature of the condition. See *Kentucky River Med Center v McIntosh*, 319 SW3d 385 (2010). In doing so, the Kentucky Supreme Court relied on its prior ruling in a premises case that discussed Illustration 2 under comment f to Rest Torts 2d 343A. See *Horne v Precision Cars of Lexington, Inc*, 170 SW3d 364, 370 (2005).

In sum, this Court should grant leave to appeal so that it can consider whether Rest Torts 2d, §343A should be applied given the factual circumstances in this premises case. And, if so, whether the law should be clarified so that it is clear that there is a caveat to the open and obvious rule that must be applied based on Rest Torts 2d, §343A regardless of whether this Court concludes that the "special-aspects" doctrine in *Lugo* is worth keeping.

III. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER LIABILITY SHOULD BE PRECLUDED IN MICHIGAN WHERE THE HAZARD IS OPEN AND OBVIOUS (AND WITHOUT SPECIAL ASPECTS UNDER LUGO) OR WHETHER OPEN AND OBVIOUS SHOULD BE CONSIDERED BY THE JURY IN ASSESSING THE PARTIES' COMPARATIVE FAULT, AS IT IS UNDER THE REST TORTS 3d §51.

In *Livings*, several justices on this Court questioned not only whether "continued reliance" on Lugo's "special-aspects doctrine" was warranted, but also whether the "Third Restatement's approach" should be considered as it "aligns more neatly with comparative negligence principles by imposing a blanket reasonable duty of care standard" . Id, slip op

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at 20, citing 2 Rest Torts 3d, Liability for Physical and Emotional Harm, §51, at p 242. This premises case presents an appropriate opportunity for this Court to consider that question.

The Court of Appeals' holding in this case is troubling in large part because Kroger actually created the hazard that caused Pinsky to trip and fall down. Even if the hazard was open and obvious, which Pinsky contends it was not, there is something fundamentally wrong with a doctrine that simply immunizes a business owner from liability for hazards it created. It is also hard to reconcile that result with the Legislature's decision to hold all parties responsible to the extent that their fault caused the resulting harm. MCL 600.2959.

As thing currently stand in Michigan (under *Lugo*), individuals always have a duty to use due care to protect themselves from harm, but possessors of land owe no duty of care at all if the condition is open and obvious (even if it is one that the defendant created). Such a standard perversely protects even the possessor of land that does nothing at all to protect its invitees from open and obvious hazards that could be easily remedied. As such, it undercuts the long-standing tort law goal of encouraging that dangerous conditions on land be addressed by possessors of land because they are best positioned to do so.

Rest Torts 3d, §51 offers a different approach that is more consistent with the existing comparative negligence rules in Michigan. It provides that a general duty of reasonable care is owed by a possessor of land to all entrants on land (other than flagrant trespassers). It describes when that general duty of care is owed by stating the following:

> [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;

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> (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 ... is applicable.

Here, the first 2 subsections undoubtedly apply to the factual circumstances in this case as Kroger created the hazard and/or it was an artificial, i.e., not natural, condition on land. Consequently, a duty clearly would be owed in this case if the Rest Torts 3d was applied.

The open and obvious nature of the condition, however, would also be considered. While the open and obvious rule would not automatically preclude liability (as it largely does now under *Lugo*), it would continue to be part of the assessment of whether reasonable care was used. See Rest Torts 3d, §51, comment k, which states the following:

> . . . . 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.** . . . .
>
> An entrant who encounters an obviously dangerous condition and who fails to exercise reasonable self-protective care is contributorily negligent. Because of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence. **The rule that land possessors owe no duty with regard to open and obvious dangers sits more comfortably – if not entirely congruently – with the older rule of contributory negligence as a bar to recovery.** . . . . [Emphasis added].

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It also would be considered in assessing whether the plaintiff used reasonable care to protect himself from the hazard encountered as that bears on comparative negligence. That approach would apply the open and obvious danger doctrine in a fashion consistent with the Legislature's decision to adopt comparative fault in Michigan for premises cases.

The Rest Torts 3d likewise has been adopted in other jurisdictions. See *Foster v Costco Wholesale Corp*, 291 P3d 150 (2012) (adopting the approach taken by Rest Torts 3d, §51 and holding that "a landowner owes a duty of reasonable care to all entrants on land for risks on its property" and "the fact that a dangerous condition is open and obvious does not automatically shield a landowner from liability but rather bears on whether the landowner exercised reasonable care with respect to that condition and issue of comparative fault). See also *Steigman v Outrigger Enterprises, Inc*, 267 P3d 1238 (2011) (rejecting open and obvious defense as bar to liability due to comparative negligence laws).

In sum, this Court should grant leave to appeal so that it can consider whether the Rest Torts 3d should be applied to premises liability cases in Michigan instead of *Lugo*. In the 20 years since Lugo (and its "special-aspects" doctrine) was adopted in Michigan, no other jurisdictions have applied it; however, some states have applied Rest Torts 3d (as it is consistent with comparative fault rules already adopted). Unlike *Lugo*, Rest Torts 3d imposes a duty on all parties and holds all parties responsible for their proportionate fault. Such a result is consistent both with justice and it is what the Legislature clearly intended.

CONCLUSION

The Court of Appeals erred by holding that summary disposition should have been granted in this premises case on open and obvious grounds. Here, material fact questions

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existed regarding whether the hazard could be seen by store patrons on casual inspection and whether it posed an unreasonable risk of harm even if it truly was open and obvious. Moreover, the Court of Appeals' holding in this premises case cannot be reconciled with its suggestion that the law in Michigan under Riddle is consistent with Rest Torts 2d §343A. Accordingly, leave should be granted to review the Court of Appeals' decision in this case. This Court also should consider whether the Rest Torts 3d provides a more sensible approach to premises liability cases in Michigan because comparative fault is now applied.

RELIEF REQUESTED

Plaintiffs-Appellants, Renee Pinsky and David Pinsky, respectfully request that this Honorable Court grant leave to appeal in this premises case in order to review the Court of Appeals' decision to reverse the trial court's decision to deny summary disposition on open and obvious grounds under MCR 2.116(C)(10). Further, Plaintiffs/Appellants request that this Court grant leave to appeal in this case to address whether Rest Torts 2d, §343A should have been applied to deny summary disposition on open and obvious grounds under *Lugo*. They also ask this Court to consider whether Rest Torts 3d should be applied.

Respectfully submitted:

Dated: August 17, 2021

/s/ Steven A. Hicks

Steven A. Hicks (P49966)
Co-Counsel for Plaintiffs/Appellants
216 North Chestnut Street
Lansing MI 48933
(517) 881-5564
steve@chair2consulting.com