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STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant,

v.

F & E OIL, INC.,

Defendant-Appellee.

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

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PLAINTIFF-APPELLANT'S REPLY

TO DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

Oral argument requested

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INTRODUCTION

Plaintiff-Appellant submits this Reply brief to address matters that require clarification in light of Defendant-Appellee's Supplemental Brief. The first is to clarify Plaintiff-Appellant's position as it relates to the Restatement Third, and the second is to address Defendant-Appellee's arguments related to preservation of appellate issues.

ARGUMENT

I. Plaintiff-Appellant does not advocate for a full adoption of the Restatement Third, but rather, only as it clearly defines the duty a land possessor owes to individuals such as Plaintiff-Appellant.

With regard to the Restatement Third, Defendant-Appellee has misapprehended Plaintiff-Appellant's position. Plaintiff-Appellant at no time suggested a "carte blanche" adoption of the Restatement Third. (Defendant-Appellee's brief, p 6). It is Plaintiff-Appellant's position that this Court should overrule *Lugo's*[1] "special aspects" doctrine and that, further, the question of whether a condition is open and obvious is not one that should be decided in the context of ascertaining whether a premises possessor owes a duty to an invitee. Rather, a condition's openness or obviousness should be part of a fact-finder's calculation of whether there was a breach of duty. In briefing issues related to the Restatement Third, Plaintiff-Appellant intended to highlight to this Court the language used in the Restatement with respect to its definition of the "duty" owed by a land possessor.

At the risk of reiterating points previously briefed, one distinction between the Restatement of Torts 2d and the Restatement Third is that the Restatement Third more

[1] *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001)

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clearly articulates that a land possessor's "duty" is to take reasonable measures to make its premises reasonably safe for invitees within a reasonable time. Restatement Third, Torts: Liability for Physical and Emotional Harm § 51. The Restatement of Torts 2d, at sections 343 and 343A refers to circumstances under which a land possessor "is liable" or "is not liable." 2 Restatement of Torts 2d, §343, 343A (1965).

While Restatement 2d language at sections 343 and 343A refers to circumstances under which a land possessor "is liable," liability and duty have never been synonymous. "Duty" is defined as the corollary of "right" and is an obligation owed by law from one to another. Black's Law Dictionary, 4th ed. (1968), p 595. "Liable" or liability is the culmination of an analysis of duty, breach, causation, and damages. Black's Law Dictionary, 4th ed. (1968), p 1060. When the Restatement 2d referred to one being "liable," it was anticipating factual findings of a claim as has been our tradition for centuries. *Lugo* conflated "liable" with duty, a definitional error that resulted in uncomfortably placing the trial bench in the jury fact-finding role, leaving Michigan premises liability law a national outlier.

It is Plaintiff-Appellant's contention that this mis-construction of the Restatement of Torts 2d's use of the word "liable" has led to a myriad of interpretations as to *what duty* is owed to invitees culminating in the unworkable *Lugo* special aspects test. The Restatement Third clearly articulates what duty is owed by possessors of land, perhaps in an effort to avoid *Lugo*-like outcomes nationally.

Defendant-Appellee suggests that Plaintiff-Appellant's intent is to have this Court fully adopt the Restatement Third and therefore reject the status-based analysis of duty. This is completely contrary to the repeated reference to status-based analysis in Plaintiff-Appellant's brief. (Plaintiff-Appellant's Supplemental Brief, pp 15, 16, 18, 23, 24, 43). In

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footnote 4 of her Supplemental Brief,[2] Plaintiff-Appellant noted that the Restatement Third makes no distinction between invitees and licensees, but at no time does she suggest that this Court should likewise disregard this long-held distinction. In fact, the status of Plaintiff-Appellant as an invitee is repeatedly noted and the argument that duty is based on a plaintiff's status is likewise, repeatedly noted. ("*Lugo* has resulted in courts ignoring the fundamental principle that duty is based on the status of the parties – on the relationship between the parties. . . . It is important to recall that duty exists because the relationship between the parties gives rise to a legal obligation." Plaintiff-Appellant's Supplemental Brief, p 24 (citations omitted)).

In mis-casting Plaintiff-Appellant's arguments, Defendant-Appellee then suggests, among other things, that landowners in Michigan's Upper Peninsula will be rendered liable for injuries to trespassers (Defendant-Appellee's Supplemental Brief, p 23). Such scenarios are neither realistic nor suggested by the Plaintiff-Appellant's brief. Plaintiff-Appellant's brief is replete with references to status-based analysis in determining duty. In fact, the brief specifically argues that duty is determined in Michigan based on the status of an individual as either an invitee, licensee, or trespasser. (Plaintiff'-Appellant's Supplemental Brief, pp 24, 43). We agree that this Court should not discard the status-based duty analysis and should retain the invitee/licensee/trespasser status when assessing whether a duty is owed.

Next, Defendant-Appellee suggests that Plaintiff-Appellant seeks to overrule the open and obvious doctrine entirely. Again, this is a misstatement of the substance of

[2] Plaintiff-Appellant notes that this should be labeled footnote 5 in that there was a formatting issue and there are two footnotes labeled "1" in the Plaintiff-Appellant's supplemental brief.

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Plaintiff-Appellant's brief. Throughout the brief, Plaintiff-Appellant noted that the open and obvious defense remains a defense. It is referenced in the introduction at page 1 and in the conclusion at page 43. At page 38, Plaintiff-Appellant specifically articulates that "this Court may clarify, or reiterate, that open and obvious remains an available defense, but that it is not an element of duty." It is the consideration of the open and obvious doctrine at the *duty* stage of the analysis with which Plaintiff-Appellant takes issue, not the application of the defense in its entirety.

II. Defendant-Appellee's reliance on out-of-state authority does not justify retaining the *Lugo* special aspects doctrine.

It is Plaintiff-Appellant's position that this Court need not continue to rely on *Lugo* in order to decide this matter. The *Lugo* special aspects doctrine has not been adopted by any other jurisdiction. *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328, 355; 968 NW2d 397 (2021) (McCormack, C.J., concurring). Defendant-Appellee seems to advocate for adoption of the continuous storm doctrine, which holds that possessors of land have no duty to keep their premises safe by removing snow, ice, and debris from their property while a storm is ongoing. *Alcala v Marriott Int'l, Inc*, 880 NW2d 699, 711 (Iowa 2016) (citing *Reuter v Iowa Trust & Sav Bank*, 57 NW2d 225, 227 (Iowa 1953). This doctrine has never been adopted in this state, and, in fact, this doctrine is falling out of favor in at least one of the jurisdictions cited by Defendant-Appellee in its Supplemental Brief, Iowa.

Iowa is in the process of reconciling its no-duty continuing storm doctrine with its adoption of the Restatement Third. In *Alcala* (the case cited by Defendant-Appellee in its Supplemental Brief), "the Iowa Supreme Court in 2016 refused to question whether the continuing storm doctrine still applied post-*Thompson* because the issue was not raised

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at the trial level." *Alcala* at 711-712. (In *Thompson v Kaczinski*, 774 NW2d 829, 835 (Iowa 2009), Iowa adopted the definition of duty from the Restatement Third). Smith, *A Dereliction of Duty? The Iowa Supreme Court's Careless Treatment of No-Duty Doctrines under the Restatement (Third) of Torts*, 107 Iowa L. Rev., 391, 412 (2021).

As such, the question of the continued application of the no-duty continuous storm doctrine in light of the evolution of law in Iowa – the adoption of the Restatement Third definition of duty – was not addressed by the Court in *Alcala* because of preservation issues, not based on a substantive analysis of its continued viability.

As such, while Defendant-Appellee suggests to this Court that one option is to adopt the no-duty continuous storm doctrine, this approach would represent a devolution, rather than an evolution, of Michigan's jurisprudence in this area.

It is appropriate to look to other jurisdictions for guidance where there is a lack of controlling Michigan precedence. See *Oxley v Dep't of Military Affairs,* 460 Mich 536, 544; 597 NW2d 89 (1999). However, there is no reason for this Court to rely on case law from other jurisdictions to ascertain how best to approach premises liability in the context of ice and snow because we have sufficient Michigan precedent to provide needed guidance. Further, it remains a compelling fact of Michigan jurisprudence that this state has never adopted the no-duty continuing storm doctrine, but rather held in *Quinlivan* that "duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975). It is also notable that Tennessee's approach is consistent with *Quinlivan*. As Defendant-Appellee notes, *Grizzell v Fox*, 48 Tenn App 462;

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348 SW2d 815 (1960), held that premises possessors are "expected to take reasonable steps to remove snow and ice within a reasonable time after it has formed or accumulated." (Defendant-Appellee's Supplemental Brief, p 27).

The Court in *Quinlivan* noted further that "[t]he conduct of the invitee will often be relevant in the context of contributory negligence." *Quinlivan*, *Supra*. Since *Quinlivan* pre-dates Michigan's adoption of comparative negligence in *Placek*,[3] the Court in *Quinlivan* referred to contributory negligence in referencing the conduct of the invitee. Nevertheless, under today's statutory comparative negligence scheme, and reaffirming the sound holding in *Quinlivan*, "the conduct of the invitee will often be relevant in the context of [comparative] negligence."

Accordingly, this fundamental understanding that there is a duty to take reasonable measures, within a reasonable time after an accumulation of ice and snow, has been the Michigan approach for decades. The Court in *Hoffner* reaffirmed this holding. *Hoffner v Lanctoe*, 492 Mich 450, 464; 821 NW2d 88 (2012). Michigan has clearly rejected the no-duty continuous storm doctrine and now other jurisdictions are doing so as well. It is not an oversight on counsel's part that Defendant-Appellee failed to cite *Quinlivan* in its Answer to Plaintiff-Appellant's Application for Leave to Appeal to this Court or in its Supplemental Brief. *Quinlivan* aptly articulated the duty owed by a possessor of land to an invitee in the context of natural accumulations of ice and snow.

While Iowa has adopted the Restatement Third approach to duty, no other jurisdiction has chosen to adopt Michigan's *Lugo* special aspects test of duty. There is no compelling reason for this Court to retain it. It has proven unworkable, conflates duty with

[3] *Placek v City of Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979).

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breach and standard of care, and has resulted in a virtual immunization of premises owners. In fact, on the date of the injury giving rise to the case at bar, the governmental entities, which have statutory immunity, were in the process of clearing the roads while the landowner, which had *Lugo*-based immunity, took no measures whatsoever, let alone reasonable measures, to maintain its property. (App., pp 29, 31, 57). This level of indifference should not be permitted to stand.

III. The constitutional right to a jury trial is inherent to the issues this Court ordered the parties to brief. Additionally, Plaintiff-Appellant has otherwise preserved the issue and it is therefore appropriate for this Court to consider it in its analysis of the issues before it.

As held in *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011), "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when ' 'necessary to a proper determination of a case....' ' *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963), quoting *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946). Although this issue was not decided below, a party 'should not be punished for the omission of the trial court.' *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994)."

In the case at bar, the question of Plaintiff-Appellant's right to a jury trial was both preserved and is otherwise fundamental to this Court's consideration of the issues before it. First, Plaintiff-Appellant raised the question of her right to a jury trial before the trial court by requesting a jury at the time she filed her Complaint. The fact of her intent to exercise her constitutional right to a jury trial has always been part of the record in this case.

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Second, the very nature of a motion for summary disposition is a request for a judicial dismissal of a case without submitting it to a jury. As such, Plaintiff-Appellant's fundamental constitutional right to a jury trial was inherently preserved for review by this Court.

Further, this Court's inquiry as to whether "*Lugo* is consistent with Michigan's comparative negligence framework" is a question that contemplates the role of juries inasmuch as it seeks discussion on the question of comparative negligence, which is typically a question for a jury. As such, while the question of the right to a jury trial was not previously briefed, this Court's February 4, 2022 Order to brief *Lugo* and comparative negligence inherently suggested the Court's desire and authority to consider the constitutional right to a jury trial.

CONCLUSION AND RELIEF REQUESTED

Defendant-Appellee encourages this Court to retain *Lugo*'s special aspects doctrine because of the "predictability" that it provides. This "predictability" however, is that slip and fall cases involving ice and snow in Michigan will, more likely than not, continue to be dismissed on summary disposition motions regardless of a land-possessor's blatant disregard for public safety. F & E Oil did nothing to mitigate the foreseeable dangers of the natural accumulation of ice and snow on March 3, 2016. Snowplows had been out, clearing the roadways, but F & E Oil made no efforts to plow or salt, regardless of its pre-payment for cash policy and that it remained open for business. (App., pp 29, 31, 57). This is contrary to Michigan's longstanding tort law to protect "society's interest in freedom from harm." *Detroit Edison Co v NABCO, Inc*, 35 F3d 236 (6th Cir 1994).

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It is time to set aside the unworkable special aspects test of *Lugo*. For guidance, this Court may consider the language of the Restatement Third, or simply revert to the pre-*Lugo* precedent and the Restatement of Torts 2d to place this state's premises liability jurisprudence back on a legal footing that is both consistent with our precedent and public policy.

Respectfully submitted,

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