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

ON APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

BRIEF *AMICUS CURIAE* FOR ERNST CHARARA & LOVELL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

In this case, the Court instructed the parties to supplement the briefing on the application for leave to appeal to address the following issues: (1) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition; (2) whether *Lugo v Ameritech Corp*, 464 Mich 512 (2001), is consistent with Michigan's comparative fault framework; and if not, (3) which approach the Court should adopt for analyzing premises liability cases under a comparative negligence framework. The Court invited persons or groups interested in the determination of these issues to seek permission to file briefs amicus curiae.

Amicus curiae Ernst Charara & Lovell (hereafter, "ECL") is a personal injury law firm that predominately represents plaintiffs. It represents dozens of clients with premises liability claims and is keenly interested in the determination of issues (2) and (3) and the far-reaching policy concerns the determination will impact.

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INTRODUCTION

For the myriad reasons demonstrated below, *Lugo v Ameritech Corp*, 464 Mich 512 (2001) is not compatible with a comparative fault framework. Moreover, the Second Restatement on Torts, which is fraught with contributory negligence principles, is also incompatible. Conversely, the Third Restatement on Torts is based on modern comparative negligence principles and is entirely compatible with Michigan's comparative fault framework. Accordingly, the Court should overrule *Lugo* and adopt the approach of the Third Restatement.

ARGUMENT

I. *LUGO* IS IRRECONCILABE WITH MICHIGAN'S COMPARATIVE NEGLIGNCE FRAMEWORK.

Michigan's comparative fault framework requires the factfinder to weigh, on case-by-case basis, a multitude of case-specific facts to determine the relative fault of multiple actors. The iteration of the "open and obvious danger" doctrine pronounced in *Lugo* frustrates this requirement and the legislative policy choices expressed in Michigan's comparative fault statue, MCL 600.2956 et. seq. *Lugo's* "special aspects" approach and the "no duty" approach it follows evade comparative fault analysis by invading the province of the jury and turning what historically were and should be questions of fact into questions of law. This in turn removes the factfinder's crucial role of determining relative fault.

MCL 600.2957, which governs determination and allocation of fault, provides in part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

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MCL 600.2960, which governs burden of proof, provides in part: "(1) The person seeking to establish fault under sections 2957 to 2959 has the burden of alleging and proving that fault."

MCL 600.2958, which codified the abolition of the defense of contributory negligence, provides:

> Subject to section 2959[1], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages.

By the plain terms of Section 2958, a plaintiff's contributory negligence, no matter the context, cannot be used to completely bar his or her recovery. Section 2958 contains no express or implied exceptions to this principle.

Notwithstanding Michigan's comparative fault statute, under *Lugo*, a plaintiff in a premises liability action who is contributorily negligent by encountering an obvious danger is generally barred from recovery under Michigan's unique no-duty-absent-special-aspects approach. This approach contravenes the policy choice made by the Legislature when it codified the comparative fault doctrine. As Judge Gleicher penned in a concurrence in *Dorsey v Taubman Auburn Hills Assoc,* 2017 Mich. App. LEXIS 577, at *14-16 (Apr. 13, 2017):

> When the Supreme Court decided Riddle, comparative fault was solely a creature of the common law that had been embraced in Placek. But that changed in 1995 when our Legislature adopted MCL 600.2958, explicitly enshrining the doctrine of comparative fault in all tort actions: The Legislature carved out no exception for premises liability claims despite its awareness of Riddle.
> ***
> The clear and express language of MCL 600.2958 prohibits a court from barring a plaintiff's recovery based on her comparative fault…. [A]pplying the open and obvious danger doctrine violates this prohibition…. Even if a plaintiff cautiously approaches a negligently created or permitted danger and attempts to avoid it, she may not recover. This result simply cannot be reconciled with MCL 600.2958.

[1] Section 2959 bars recovery of noneconomic damages if the injured party is more than 50% at fault.

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Despite the express and unequivocal pronouncements of the Legislature, Michigan courts continue to use a plaintiff's contributory negligence to bar recovery in premises liability cases. Under *Lugo*, an invitee who is injured after encountering an obvious danger (i.e., an invitee who is negligent) is owed no duty by the landholder (i.e., is barred from recovery) unless there were "special aspects" of the danger that make it "effectively unavoidable" or "unreasonably dangerous" (i.e., unless the invitee can demonstrate an exception to the landholder's contributory negligence defense). *Lugo* at 518.

Requiring the negligent invitee to demonstrate "special aspects" in addition to demonstrating the landholder's ordinary negligence effectively requires premises liability plaintiffs who are contributorily negligent to meet a "negligence plus" standard approaching something akin to recklessness or gross negligence before their liability is compared to that of the landowners. There is no textual or structural support in the comparative fault statute for this disparate treatment of premises liability plaintiffs. Under Section 2960, it is the landholder's burden to prove the invitee's fault and the extent of it; it is the burden of the invitee to prove the landholder's fault and the extent of it; but there is no textual basis for holding the invitee to a higher burden. Yet, under *Lugo*, that is exactly what is required. Upon examination of the origins and rationales of the "no duty" and "special aspects" doctrines, it becomes apparent that the clear dictates of Michigan's comparative fault statute are evaded through principles of contributory negligence (or its mirror image, assumption of the risk) that have managed to survive under another name.

A. Michigan's open and obvious danger doctrine after the abolition of assumption of the risk and contributory negligence.

The Court abolished the affirmative defense of assumption of the risk in nearly every context in *Felgner v Anderson*, 375 Mich 23, 43 (1965), ruling that it was subsumed by the defense

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of contributory negligence, *id.* at 56.[2] Subsequently, the Court abolished contributory negligence, noting that "the doctrine of contributory negligence has caused substantial injustice since it was first invoked in England in 1809" and adopted comparative negligence. *Placek v Sterling Heights*, 405 Mich. 638, 652 (1979). Although the open and obvious defense would seem to be just another form of assumption of the risk and/or contributory negligence, it survived after *Placek*. In *Riddle v McLouth Steel Prods. Corp.,* 440 Mich. 85 (1992), the Court ruled that the open and obvious doctrine focused on the landholder's lack of duty as a threshold inquiry and that comparative negligence could only be invoked **after** duty was established, *id*. at 95-96. The *Riddle* Court also adopted the Second Restatement on premises liability as set forth in §§ 343 and 343A.[3] *Id.* at 94-95. The Second Restatement carved out an exception to the landholder's nonliability: the landholder could be liable for injuries resulting from an obvious danger if it should have anticipated the harm despite the obviousness. § 343A(1).

Ten years later, the Court decided *Lugo* which involved a woman who was injured after stepping into a pothole. *Lugo* departed from the Second Restatement exception to the obvious danger rule and introduced the "special aspects" doctrine. The Court took this new approach by interpreting §§ 343 and 343A as meaning that a landholder does not owe a duty regarding obvious dangers unless there are "special aspects" of the obvious dangers that render them "effectively unavoidable" or "unreasonably dangerous". *Id.* at 518.

---

[2] Primary assumption of the risk was not totally abolished; it application was limited to "cases between employee and employer for injuries incurred in the course of employment and where the statutory bar of the workmen's compensation act does not apply . . . and [] cases where it is claimed there has been an express contractual assumption of risk". *Id*.

[3] Notably, the Second Restatement does not compel a "no duty" approach. § 343A states only "(1) A possessor of land is not **liable** to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious, unless the possessor should anticipate the harm despite such knowledge or obviousness." (Emphasis added.) The nonliability presumption for obvious dangers could just as easily be based on lack of foreseeability or lack of breach.

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Since *Lugo*, the Second Restatement's exception to the nonliability presumption, as well as Comment f to § 343A and its examples of when a landholder should anticipate harm, have been virtually ignored.[4] No other state follows the "special aspects" approach. (*See* Appendices A-D.) *Lugo* "has left our state stranded on our own common law island for two decades. No other state had adopted a special aspects inquiry before Lugo, and no other state has done so since." *Estate of Donna Livings v Sage's Investment Group, LLC*, 507 Mich 328, 359, Justice McCormack concurring.

With exceedingly rare exception, *Lugo's* "effectively unavoidable" and "unreasonably dangerous" exceptions appear to exist only in the breach. *See id*. at 358-59 In large part this is due to the hypothetical examples of 'special aspects" provided by the *Lugo* majority: The example given of an obvious danger that was "effectively unavoidable" was standing water in front of the only exit of a commercial building. The example given of an obvious danger that was "unreasonably dangerous" was an unprotected 30-foot-deep pit in a landholder's parking lot.

Lugo marked a significant departure from the Second Restatement's approach to premises liability. Under the Second Restatement, for example, if the only way an invitee could reach a store parking lot was to traverse a six-foot-wide patch of ice or walk 45 minutes around it, there would be a question of fact as to whether a landholder should anticipate the harm from falling on the ice because an invitee might encounter the danger because the advantages of doing so outweighed the risks. *See* § 343A, Comment f. Thus, a jury could determine the landholder was liable despite the obvious danger the ice presented. Under *Lugo*, however, the danger was not effectively unavoidable as a matter of law because the invitee was not compelled to encounter the risk of the

[4] Examples include when the possessor has reason to expect the invitee: will be distracted; will not discover what is obvious; will forget what was previously discovered; will not protect himself against it despite it obviousness; or will encounter the obvious danger because the advantages outweigh the risks.

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ice since it had an alternative, albeit seemingly unreasonable, of walking 45 minutes to avoid it. "[S]ituations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Lugo* at 469. Moreover, the ice was not unreasonably dangerous as a matter of law because slipping on ice is just an ordinary danger, especially when compared to an unprotected 30-foot-deep pit.

Similarly, under the Second Restatement, if there were a one-foot wide, one-foot-deep trench in a sidewalk leading to a store entrance with blinking-light displays all around it, there would be a question of fact as to whether a landholder should anticipate the harm from tripping in the trench despite its obvious danger because invitees might be distracted by the signs. *See* § 343A, Comment f. Thus, a jury could determine the landholder was liable despite the obvious danger. Under *Lugo*, however, the danger was not effectively unavoidable as a matter of law because the invitee was not compelled to encounter the risk; they could go to another store or could return home. Moreover, the one-foot-deep trench was not unreasonably dangerous as a matter of law because tripping hazards like a one-foot-deep trench are just ordinary dangers, especially when compared to an unprotected 30-foot-deep pit.

Thus, under *Lugo*, a landholder is absolved from liability for tolerating obvious dangers even when it should anticipate harm despite the obviousness unless the danger is 'effectively unavoidable" or "unreasonably dangerous", standards which are next to impossible to meet. Given that under the Second Restatement, a landholder has a duty to maintain its premises in a reasonably safe condition for its invitees and that an invitee has a right to assume the business premises it is patronizing is reasonably safe (*see* § 343A, Comment g), *Lugo's* unique pro-landholder bias seems particularly at odds with the Second Restatement's approach. It is time for the Court to depart from the "special aspects" island and return to the common law mainland.

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B. The no duty rule, under which the court makes an initial determination of duty based on a so-called objectively obvious danger, removes what were traditionally factual determinations about breach and foreseeability from the province of the jury and precludes it from assessing liability and allocating relative fault; the "special aspects" doctrine narrows the jury's role further still.

The no duty rule conflates what generally requires case-specific factual determinations about foreseeability and breech with a legal determination about duty. As the Kentucky Supreme Court observed: "An attempt to equate the concept of 'duty' with such specific details of conduct is unwise, because a fact-specific discussion of duty conflates the issue with the concepts of breach and causation." *Shelton v Ky Easter Seals Society, Inc*, 413 SW3d 901, 911-13 (Ky, 2013). "We emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but simply does not relate to duty." *Id.* at 907. *See also* the Mississippi Supreme Court's decision in *Tharp v Bunge Corp*, 641 So 2d 20, 24 (Miss, 1994), rejecting the no duty interpretation of § 343A's nonliability presumption and collecting similar cases from multiple other jurisdictions.

Determining that a danger is objectively "open and obvious" at all times under all circumstances is generally an untenable fiction because so many factors must be weighed. This is true even if the focus is on "the objective nature of the condition on the premises itself." For example, a condition might be obviously dangerous in good lighting conditions but not in bad ones. This requires a determination of how much light is enough. A danger might be obvious from one vantage point but not from another. This requires a determination of exactly where between the vantage points the danger is obvious. A danger might be obvious when it is windy but not when it is calm. This requires a determination of how much wind is required to render it dangerous. Whether a danger is obvious depends heavily on the circumstances under which a person encounters it.

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Comparing the no duty rule of the open and obvious danger doctrine to the no duty rule of the stranger rescue doctrine helps to reveal the problematic nature of the former's approach. Under the no duty to rescue rule, there is no duty to come to the aid of a stranger in peril no matter the circumstances. The court is not required to determine whether the attempted rescue would pose a serious or an insignificant danger to the rescuer. It does not matter whether the danger to the rescuer was obvious or hidden. The court does not determine what reasonable people would conclude about the danger faced by the rescuer. There is not duty to rescue even if it means only making a cell phone call or throwing a lifeline from shore.

In a similar vein, the no duty to rescue rule does not require the court to determine the degree or obviousness of the peril faced by the person needing rescue. The court is not called upon to determine if the person in peril faces certain and imminent death or at worst might suffer a sprained ankle. The no duty to rescue rule does not require the court to resolve any fact specific questions about the given situation confronted by the would-be rescuer or the person in peril.

The no duty rule of the open and obvious danger rule stands in sharp contrast. It generally requires the court to resolve many case-specific factual questions to determine whether a condition is obviously dangerous. *See Steigman v. Outrigger Enters*., 126 Haw. 133, 143 (Haw. December 15, 2011).

> Whether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant's duty are questions properly left to the trier of fact.

And see Shelton, supra, 413 SW3d at 911-13:

> [B]ecause the question of duty is a question of law, we have also treated the foreseeability of harm as a question of law. As a result, especially when cases are before courts on motion for summary judgment, courts are left in "the peculiar position . . . of deciding questions, as a matter of law, that are uniquely rooted in the facts and circumstances of a particular case and in the reasonability of the defendant's response to those facts and circumstances." Too often, in our opinion,

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> as a result of the factual nature of foreseeability, when deciding the duty issue, courts identify the existing duty in fact-specific statements.

As Professor Keeton commented: "There is perhaps no condition the danger of which is so obvious that all customers under all circumstances would necessarily see and realize the danger in the absence of contributory negligence, and this is particularly true if the further principle so often repeated is accepted that the customer or business invitee is entitled to assume that the premises are reasonably safe for his use." W. Page Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U.Pa.L.Rev. 629, 642 (1952)).

The question of whether a danger is obvious under the circumstances is most often inextricably intertwined with the questions of foreseeable harm and breach and these questions often turn on fact-intensive inquiries resulting in answers about which reasonable minds could differ. However, while foreseeability is generally a question of fact for the jury, *Bertin v Mann*, 502 Mich 603, 619 (2018), this question is determined as a matter of law under the duty element in the vast majority of premises liability cases in accordance with *Lugo*. *See Estate of Donna Livings*, 507 Mich at 359, Justice McCormack concurring. Removing these factual determinations from the jury and transforming them into questions of law eliminates the jury's ability to assess liability and allocate relative fault under the comparative fault statute. This frustrates the Legislature's policy choice to delegate to the factfinder the duty to determine the relative fault of all those who cause injury to the jury.

Furthermore, as demonstrated in the examples above in Section I(A), at 5-6, *Lugo's* "special aspects" doctrine narrows the jury's role further still. It takes additional questions of fact about whether a landholder should anticipate harm despite the obviousness of a danger and turns them into question of law about whether conditions are "effectively unavoidable" or "unreasonably dangerous". Neither approach is reconcilable with Michigan's comparative fault framework.

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C. Courts should not look to the conduct of the plaintiff to determine the duty of the defendant.

Michigan's "no duty" approach focuses on the conduct of the invitee in encountering an obvious danger to determine the landholder's duty. This is conceptually clumsy on several scores. First, there is a general duty to use reasonable care. *Case v Consumers Power Co*, 463 Mich 1, 7 (2000). Second, as the Court observed: "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-39; 254 NW2d 759 (1977).

The relationship between actor and injured person giving rise to the duty in a premises liability action is one of invitor and invitee. The invitee's conduct of encountering an obvious danger does not alter its relationship with the invitor; it remains its invitee. Moreover, the duty owed by a landholder to persons injured on its land is traditionally determined by their status as invitee, licensee or trespasser, with an invitee owed the highest duty. It would seem incongruous to conclude that the highest of duties owed by the landholder did not extend to obvious dangers. *See Shelton, supra* at 907, "Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger."

This conundrum lays bare the fact that the no duty rule of the open and obvious danger doctrine simply uses the invitee's contributory negligence to bar recovery:

> Michigan's common law conflates a landowner's duty with the landowner's defenses. A finding that a danger is "open and obvious" eliminates the landowner's duty to warn or otherwise protect against the danger, thereby serving to immunize the landowner for any negligence in maintaining the premises. . . . Our common law transforms even unreasonable dangers created or tolerated by a landowner into risks that must be born only by the plaintiff. In other words, the plaintiff's failure to exercise reasonable care entirely negates the defendant's duty of care.

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Deas v Hartman & Tyner, Inc, 2019 Mich. App. LEXIS 1390, *10 (Apr. 25, 2019) Judge Gleicher dissenting. As the Texas Supreme Court observed: "A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon his own negligence; it should not affect the defendant's duty." *Parker v. Highland,* 565 SW2d 512, 521 (Tex, 1978).

Finally, while it may not be logically incongruous to conclude that despite the invitor's general duty of due care, it has no duty to **warn** its invitees who encounter obvious dangers (a warning could be deemed superfluous), it does not follow that obviousness of the danger dispatches the landholder's duty to maintain its premises in a reasonably safe condition and ameliorate the obvious danger. *See Zambito v Southland Rec Enterprises*, 383 So 2d 989, 990-91 (Fla Dist Ct App, 1980) (cleaned up):

> While agreeing with the statement that a duty to warn does not arise if the invitee has knowledge of the danger equal or superior to that of the occupier, … the fallacy is in the premise that the discharge of the occupier's duty to warn by the plaintiff's actual knowledge necessarily discharges the duty to maintain the premises in a reasonably safe condition by correcting dangers of which the occupier has actual or constructive knowledge.

See also Osborn v Mission Ready Mix, 224 Cal App 3d 104, 120-22; 273 Cal Rptr 457 (1990):

> [A]lthough the obviousness of a danger may obviate the duty to warn of its existence, if it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability, if the breach of duty was a proximate cause of any injury.

Looking to the invitee's conduct to negate the landholder's entire duty to use reasonable care is simply inconsistent with Michigan's comparative negligence framework. In determining what duty the landholder owes regarding any obvious dangers on its land, the law should look to the specifics of the landholder's conduct in creating or tolerating the risk, not to the conduct of its invitee.

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D. The facts that determine the obviousness of a danger are facts that should determine the relative fault of the parties, not the duty owed by the landholder.

When invitees encounter obvious dangers, they are contributorily negligent. The more obvious the danger, the more they are potentially at fault for encountering it. However, the inverse is also true. When an obvious danger exists on the land, the landholder is contributorily negligent for tolerating it. The more obvious the danger, the more the landholder is potentially at fault for failing to remedy it. The determination of these relative fault issues should be left to the jury in comparative fault jurisdictions. Under a comparative fault framework, the factfinder should treat the extent of a danger's obviousness as determining the extent of the relative fault of the landholder and the invitee.

As the Arizona Supreme Court observed as to landholder liability for obvious dangers:

> [I]t is here -- on the question of reasonable precautions for the safety of invitees -- that the law asks whether defendant acted reasonably in not posting signs prohibiting diving in the park, in not discovering the danger, in not warning or not removing the danger. What is reasonable on the one hand or negligent on the other will depend on the circumstances -- was the danger open and obvious, was it natural or artificial, was the park small or large, was the area often used or remote and inaccessible? Were precautions easy to take or difficult and expensive? All these are factors which determine the reasonableness of the defendant's conduct; **they are questions of negligence, not duty.**

Markowitz v. Arizona Parks Bd., 146 Ariz. 352, 356-357 (1985) (emphasis added).

See also Parker, 565 SW2d at 520, discussing invitee liability for obvious dangers:

> One's conduct after he is possessed of full knowledge, under the circumstances, may be justified or deemed negligent depending upon such things as the plaintiff's status, the nature of the structure, the urgency or lack of it for attempting to reach a destination, the availability of an alternative, one's familiarity or lack of it with the way, the degree and seriousness of the danger, the availability of aid from others, the nature and degree of the darkness, the kind and extent of a warning, and the precautions taken under the circumstances by a plaintiff …. Those are matters which bear upon "the reasonableness of an actor's conduct in confronting a risk . . . under principles of contributory negligence." Farley, supra, 529 S.W.2d

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at 758. See Annot., Premises Liability Inside Hall, 24 A.L.R.3d 388, 391-92 (1969); Keeton, Assumption of Products Risks, 19 Sw. L.J. 61, 67-69 (1965).

Considering the obviousness of a danger encountered by an invitee as a matter of breach and/or foreseeability would allow the jury to determine the relative fault of each party and would be entirely consistent with Michigan's comparative negligence framework. Considering the obviousness of a danger as determining duty is not.

E. Michigan's open and obvious danger doctrine is simply an assumption-of-the-risk-for-landholders defense.

The similarities in the affirmative defense of implied assumption of the risk and the "defensive doctrine" of open and obvious danger would seem too compelling to contend that they are anything other than the same doctrines with different names. Explaining assumption of the risk, the Court stated in *Bertin*, 502 Mich at 613 n 35:

> [I]mplied assumption of risk (i.e., when there has been no express agreement to assume a risk) [] requires the injured participant to have known and appreciated the risk, but such knowledge will be imputed to the participant if the risk was "clear and obvious" or, in other words, reasonably foreseeable. Prosser & Keeton, Torts (5th ed), § 68, pp 487-488; see also Dobbs, § 236 (noting that the standard was whether "a reasonable person in her [i.e., the plaintiff's] position would have appreciated" the risk).

The open and obvious danger "defensive doctrine" similarly applies when an invitee encounters an obvious danger "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". *Lugo* 464 Mich at 516. The only differences between these two virtually identical doctrines are the status of the defendant to which they are available and the rubric used to bar the injured person's recovery. Assumption of the risk was available to virtually every defendant; the open and obvious doctrine is available only to landholders. Assumption of the risk is an affirmative defense which bars recovery; open and obvious danger is a "defensive doctrine"

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that negates the landholder's duty which bars recovery.

As Judge Gleicher opined in dissent:

> At its core, this [open and obvious danger] analysis is nothing more than a surreptitious resurrection of a long-dead tort precept: assumption of the risk. The now-discredited and abandoned assumption of the risk doctrine began as a defense available only in "cases involving the master-servant relationship," but its reach gradually expanded to include "every conceivable kind of negligence action." Felgner v Anderson, 375 Mich 23, 39-40; 133 NW2d 136 (1965). As the Supreme Court pointed out in Felgner, 375 Mich at 42, the defense was applied "as a virtual synonym of contributory negligence[.]" "[T]he gist of the defense is that the plaintiff took his chances." Waltanen v Wiitala, 361 Mich 504, 508; 105 NW2d 400 (1960).
> In Felgner, 375 Mich at 46, the Supreme Court officially eliminated the defense in most applications, characterizing its history in our state as "an indefensible misuse of a legal doctrine whose foundations in justice, even when applied properly, are tenuous at best."

Branch v D & S Prop Mgt, LLC, 2019 Mich. App. LEXIS 8265, at *28-32; 2019 WL 7206105 (Dec. 26, 2019).

See also Keeton, Assumption of Products Risks, 19 Sw. L.J. 61, 67-69 (1965), concluding that the no duty rule is "an alternative formulation of the assumption of risk doctrine"; *and see Harrison v Taylor*, 115 Idaho 588, 592; 768 P2d 1321 (1989) (cleaned up):

> The open and obvious danger doctrine is recognized as a corollary rule to assumption of risk. The words are different but the conduct of a person injured when confronting a known danger is the same.

Outside the context of premises liability, the Court has recognized that assumption of the risk is just part of the jury's comparative fault analysis: "Thus, juries are responsible for deciding the degree to which a plaintiff's negligence (including the assumption of the risk), contributed to an injury, and reducing the damage award accordingly." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 101-02 (1999). It is therefore somewhat baffling why, after recognizing the injustices of the virtually identical defensive doctrines of assumption of the risk and contributory negligence and abolishing them, the Court has allowed the open and obvious doctrine to live on. The rationales

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for all three defensive doctrines – that people should take care for their own safety – are the same. The rationales for abolishing them—that people should not escape the consequences of their negligence causing injury to another simply because the injured person was also negligent – are the same. The same rationale and reasoning that mandated abolishing assumption of the risk and contributory negligence thus mandates abolishing the open and obvious danger doctrine.

Framing the question as one of duty does nothing to change the essence of the doctrine – the landholder's duty is negated by the invitee's encounter with an obvious danger -- it is assumption of the risk or contributory negligence by any other name. Invoking the effects of the draconian contributory negligence doctrine by renaming it and reframing it contravenes the policy of comparative negligence chosen by the Legislature. Moreover, if finding no duty when a plaintiff knowingly encounters an obvious danger does not contravene the Legislature's policy of comparative negligence, then why should encountering an obvious risk not negate the duty of reasonable care in all other circumstances? Why should this principle be confined to premises liability? Upon what legal principle should landholder-tortfeasors deserve preferential treatment over all other tortfeasors?

F. In the 21st Century, there is no principled reason for affording landholders preferential treatment when it comes to tort liability.

Landholders should not be held to a lesser standard of care compared to everyone else when it comes to tort liability. The open and obvious danger doctrine was born in feudal England and the rationale for treating landowners differently than other negligent tortfeasors has long ago evaporated. As one commentator stated:

> Historically, landowners reigned supreme over their premises so that they were immune from liability relating to their land. Landowner sovereignty resulted from the belief that landowners possessed the right to use their land as they so chose. This belief originated in common law feudalism, in which landowners possessed a high status in society. Feudal landowners

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> possessed "vast estates," and it was difficult to maintain safe premises for the many entrants upon their property.
>
> * * *
>
> The reason that landowners at common law had no duty to protect invitees from obvious conditions is that "invitees [were], in most circumstances, expected to protect themselves from obvious dangers. Furthermore, landowners possessed a privileged status in society and courts believed it would be unfair to place upon them the heavy "burden of inspecting and improving [their] primitive land."" These two reasons outweighed the countervailing argument that landowners should be liable for unreasonable dangers on their premises because their "position of control" of their premises allowed them to be the ones best able to remedy hazardous conditions.

James P. End, "The Open and Obvious Danger Doctrine: Where Does it Belong in Our Comparative Negligence Regime?", Marquette Law Review, V. 84, pp. 457-58 (2000).

The two reasons favoring landholders in feudal England have no application in the 21st century. The rationale for granting landowners preferential treatment for injuries resulting from obvious dangers no longer outweighs the countervailing rationale that landowners should be comparatively at fault for unreasonable dangers which they tolerate and are best able to remedy. This quasi-sovereign treatment of landholders should be abolished.

A simple example reveals the unfounded and inexplicable bias in favor of landholders under Michigan's premises liability law: If A dug a one-foot-deep, unprotected trench in the dirt walkway of landholder B's store parking lot to free his stuck vehicle, and invitee C was injured on his way to the store when he fell into the trench, A would be liable to C for the damages resulting from the dangerous condition. A's negligence for creating the danger would be compared to C's negligence for not avoiding it. However, if landholder B dug the same one-foot-deep, unprotected trench in the same dirt walkway of its own parking lot to free his stuck vehicle, and invitee C was injured walking to the store when he fell into the trench, B would have no liability because C was

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injured by an obviously dangerous condition (that had no special aspects). B's fault would not be compared to C's because B had no duty regarding obvious dangers on its premises.[5]

There is simply no principled reason for treating the identical negligent acts of A and B differently in this scenario. Landholders should be held to a standard of reasonable care, just as everyone else. As stated in the Third Restatement, Reporter's Note;

> Leon Green, early in the 20th century, thoughtfully analyzed land-occupier duties, remarking on the extent to which courts had used their "creative power" to manipulate categories to work "miracles," and concluded:
>
> The normal negligence formula of "reasonable care under all the circumstances" was designed for just these cases in which judgment must have the widest range and in which uniformity, except in process, is impossible. The interests of the landowner would be protected under this formula equally as well as the interests of other persons, and he deserves nothing more.
>
> Leon Green, The Duty Problem in Negligence Cases (pt. 2), 29 COLUM. L. REV. 255, 271-272 n.56 (1929).

Restat 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51

> **G. In comparative fault jurisdictions, a no duty rule should never apply in any assumption-of-the-risk context absent an express agreement to assume the risk.**

The assumption of the risk no duty rule historically only applied in the employer/employee context or when there was an express assumption of a risk. It did not apply when the assumption was implied. As this Court explained in *Kreski v Modern Wholesale Electric Supply Co,* 429 Mich 347, 362-63 (1987) (emphasis added):

> Secondary assumption of risk had been employed as an affirmative defense analogous to contributory negligence. It involved a situation in which the plaintiff voluntarily encountered a known risk without manifesting an assent to relieve the defendant of any duty of care owed the plaintiff. *Felgner* abolished assumption of risk used in this sense.

[5] See *Compeau v. Pioneer Resource Co., LLC*, 498 Mich. 928; 871 N.W.2d 210 (2010) ("When a plaintiff's injury arises from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury.").

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> Primary assumption of risk is not technically an affirmative defense, as it involves a situation where the defendant does not owe a duty of care to the plaintiff. *Felgner* restricted primary assumption of risk to "cases between employee and employer for injuries incurred in the course of employment and where the statutory bar of the workmen's compensation act . . . is not applicable and in cases where it is claimed there has been an express contractual assumption of risk . . . ." *Id*. **In other words, primary assumption of risk involves a circumstance where the plaintiff agrees in advance to relieve the defendant of a duty of care owed the plaintiff.**

Michigan's premises-liability-no-duty-rule is not based on an invitee's express contractual assumption of the risk. It is based on an encounter with an obvious risk. There is no sound basis for treating this secondary assumption of the risk as a primary one. As previously stated, the "no duty' construction of the nonliability presumption for encountering an obvious danger is not compelled by Second Restatement. Furthermore, it would seem oxymoronic and logically incoherent to contend that a business invitee entered into an express contractual assumption of the risk by encountering an obvious danger. This would be tantamount to contending that there was an implicit express agreement – a contradiction in terms, to say the least.

H. *Lugo* is also incompatible with Michigan's comparative fault framework because it requires the invitee to establish a negligence-plus standard before a landholder can be held liable and its fault compared.

MCL 600.2957 provides that the liability of each person shall be allocated in direct proportion to the person's percentage of fault. Section 2960 provides that the person seeking to establish the fault of another has the burden of proving it. Nowhere in the comparative fault statute does it require the person seeking to establish the fault of another to also establish a greater degree of blame than his or her own. (The greater-degree-of-blame doctrine was an exception to contributory negligence, *see* footnote 8, *infra*.) Section 2957 does not carve out any exceptions for classes of defendants whereby they are only liable if the plaintiff can demonstrate that their fault rose to a level of misconduct beyond negligence.

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However, under *Lugo*, that is exactly what is required: a landholder's liability can never be compared to that of other persons unless its conduct amounts to some type of negligence-plus standard, either recklessness, gross negligence or some other heightened form of misconduct. That is, the injured person must demonstrate not only the landholder's ordinary negligence in creating or tolerating an obviously dangerous condition, but that that danger was "effectively unavoidable" or "unreasonably dangerous" "[T]he critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo* 464 Mich at 517. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine". *Id.* at 519

The *Lugo* articulation of the standard which must be met before a landholder can be held liable and have his fault compared to that of the injured person sounds alarmingly like a gross negligence or a willful and wanton misconduct standard of liability.[6] Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". *Jennings v Southwood*, 446 Mich 125, 136 (1994) (adopting the statutory definition regarding governmental immunity). The elements of willful and wanton misconduct are:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.

[6] On commentator opined that the *Lugo* formulation imposed a reckless endangerment requirement to trigger a landholder's liability for open and obvious dangers, imposing liability only on "invitors who disregard heightened dangers of which they know or have reason to know". ARTICLE: THE LIMIT TO PREMISES LIABILITY FOR HARMS CAUSED BY "KNOWN OR OBVIOUS" DANGERS: WILL IT TRIP AND FALL OVER THE DUTY-BREACH FRAMEWORK EMERGING IN THERE STATEMENT (THIRD) OF TORTS?",(hereafter "PREMISES LIABILITY") 38 Tex. Tech L. Rev. 1, 59

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Jennings v Southwood, 446 Mich 125, 137 (1994).

Requiring an injured person to demonstrate that a landholder tolerated something akin to standing water in front of the only exit of its commercial building or tolerated a 30-foot-deep, unguarded pit in its parking lot before the injured person can establish liability sounds like a requirement that the injured person establish "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". It also sounds like a requirement that the injured person meet the standards of demonstrating willful and wanton misconduct to trigger liability. Tolerating either of these dangers would seemingly establish the knowledge and ability-to-ameliorate elements as well as "the failure to avert a danger when to an ordinary mind the result is likely to prove disastrous to another" element of willful and wanton misconduct.

Conversely, to demonstrate a breach of the standard of ordinary care, an invitee would not have to demonstrate that the obvious danger tolerated by the landholder had "special aspects that give rise to a uniquely high likelihood of harm or severity of harm". Instead, the plaintiff would only have to establish that tolerating the obvious danger constituted ordinary negligence.

Requiring a heightened standard of misconduct beyond ordinary negligence before a landholder's comparative fault is considered finds no support in the text or structure of Section 2957. Instead, this standard is a judicial creation that amounts to legislating from the bench in contravention of the Legislature's pre-existing policy choices that are reflected in the comparative fault statute.

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I. The open and obvious doctrine is contrary to all public policy rationales except for the one that undergirds contributory negligence and assumption of the risk which were abolished by this Court and the Michigan Legislature as against public policy.

The policy rationale set forth in *Lugo* to justify the no duty and special aspects doctrines was the "overriding public policy of encouraging people to take reasonable care for their own safety." *Lugo* at 389. This policy rationale is precisely the same policy rationale that undergirded the judicially and legislatively abolished contributory negligence and assumption of the risk defenses. Thus, it is difficult to understand why it remains such an overriding concern in the context of premises liability.

Furthermore, the Legislature made the policy choice of implementing comparative fault not only for the purpose of "encouraging people to take reasonable care for their own safety" but also to encourage people to take reasonable care for the safety of others. By ensuring that injured persons will not profit, or even be made whole, from any part of an injury they cause to themselves, the Legislature accounted for the public policy concern expressed in *Lugo* but chose to do so in a different manner. The public policy for barring all recovery when people do not take care for their own safety when another was also at fault was thus rejected by the Legislature in favor of barring recovery relative only to the injured party's degree of fault. The Court should not have implemented its own public policy choice in contravention of that of the Legislature when the Legislature already spoke on the issue.

All the other sound public policy concerns that should be promoted by tort law militate against the no duty and special aspects approach. First, the law should encourage everyone to remedy unreasonably dangerous conditions over which they have control, even when the danger is obvious. Immunizing landholders from their negligence for failing to remedy obviously dangerous conditions incentivizes them to allow obviously dangerous conditions to continue

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unabated. The open and obvious doctrine currently incentivizes landholders to maintain conditions that are the proverbial "accidents waiting to happen". The doctrine thus promotes irresponsible behavior from landholders by discouraging them from ameliorating obvious dangers. *See Tharp, supra,* 641 So. 2d at 25.

The law should also impose upon the party in the best position to eliminate a dangerous condition the responsibility for eliminating it. If a dangerous condition is obvious to the invitee, then almost assuredly it is obvious to the landholder. In fact, the landholder generally has superior knowledge concerning the dangers of its own property compared to an occasional invitee, which places the landowner in a better position to anticipate and take action to prevent injury. *See Kentucky River*, *supra,* 319 S.W.3d at 391-92.

The law should favor compensation of injured plaintiffs and protect persons injured through the unreasonable conduct of others, even when they share some of the blame. When applied as a complete bar to a landholder's negligence, the open and obvious defense precludes injured plaintiffs from recovering from landholders who negligently allow obvious dangers to exist and cause injury. This frustrates this important social policy. See *Steigman , supra*, 126 Haw. at 141.

Additionally, the law should appear logical and just. The law should impose duty commensurate to the degree of danger a condition presents, not in inverse relation to it. However, the *Lugo* iteration of the open and obvious danger doctrine generally does just the opposite – the more obvious the danger, the more immunity the landholder enjoys from its negligence. As the Wyoming Supreme Court observed in *O'Donnell v Casper*, 696 P2d 1278, 1283 (Wy, 1985):

> It is not logical to hold that if the city digs an immense hole in the road that can be seen a block away, that its duty to keep the roads safe vanishes. On the other hand, if the city digs a small hole not easy to see, its duty remains. In other words, the bigger the hole the lesser the duty.

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Finally, *Lugo* has led to inconsistent and unpredictable results. *See Woodard v ERP Operating Ltd Partnership*, 351 F Supp 2d 708, 713 (ED Mich, 2005) "The 'open and obvious' doctrine is one of the most litigated areas of Michigan premises liability law. Despite the fact that Michigan courts have decided hundreds of cases involving the doctrine, inconsistent applications of the doctrine have resulted in a confusing jurisprudence.".

When all the relevant tort law public policy concerns are considered, they strongly militate in favor of abolishing *Lugo's* "no duty" and "special aspects" approach.

J. The Court should join our sister states that abolished the no duty doctrine as incompatible with their comparative fault frameworks.

Of the 49 other states and the District of Columbia, only 5 have failed to adopt some form of comparative negligence. These states continue to recognize the open and obvious danger as a complete bar to recovery either as a stand-alone defense or as part of the existing and related doctrines of contributory negligence and/or assumption of the risk. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still recognize both contributory negligence and assumption of the risk. Georgia, Oklahoma, Rhode Island and South Dakota adopted some form of comparative fault but continue to recognize assumption of the risk. Since these states continue to recognize these other forms of contributary negligence as a complete bar to recovery, it would seem incongruous for them not to recognize the related open and obvious danger doctrine as a bar to recovery. Not to do so would create an exception to these defenses for premises liability claims only which would result in landholders being treated less preferentially than all others for the purposes of tort liability. **See Appendix A.**

Other outliers include the Ohio and Louisiana courts, which continue to apply the open and obvious danger doctrine as a complete bar to recovery despite each state's comparative negligence

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schemes. Two other states have partially abolished the doctrine as incompatible with their comparative negligence schemes. In Connecticut, the no duty defense applies only to the failure to warn of an obvious danger, but a landholder's failure to remedy an obvious danger is considered as part of the landholder's comparative negligence. In Wyoming, the open and obvious danger rule is subsumed under comparative fault with regard to artificial dangers, but still applies as a bar to recovery with regard to natural dangers. In West Virginia, the state legislature reinstated the no duty doctrine as a complete bar after the West Virginia Supreme Court abolished it as incompatible with the state's comparative negligence scheme. **See Appendix B.**

The majority of states (22) that adopted comparative negligence continue to adhere to § 343 and § 343A of the Second Restatement of Torts and interpret those sections as meaning that a landholder is not liable for obvious dangers unless it should anticipate that harm would occur despite its obviousness. Notably, whether the landholder should anticipate the harm is generally considered a question for the factfinder under a comparative fault analysis, to be determined by factors such as the ones contained in § 343A, Comment f. **See Appendix C.**

Finally, 14 states that adopted comparative negligence abolished the no duty rule altogether and consider the obviousness of any danger as a factor of comparative fault. These states generally recognize that whether an injury results from a condition that is obviously dangerous turns on fact-specific questions of foreseeability and breach of the duty to use due care by all involved. Generally, these questions are for the factfinder to resolve when determining the comparative fault of each party. These states reject the notion that the question of the landholder's duty can be determined by looking to the conduct of the invitee in encountering an obvious danger. **See Appendix D.**

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For the reasons stated above and in the following section, the approach of these 14 sister states is more in line with Michigan's comparative fault framework. Accordingly, the Court should overrule *Lugo*, abolish the obvious danger defense, and follow the lead of these sister states which consider confronting an obvious danger to be contributory negligence to be compared to the negligence of the landholder.

II. MICHIGAN SHOULD APPLY THE APPROACH OF THE THIRD RESTATEMENT OF TORTS WHEN ANALYZING PREMISES LIABILITY CASES UNDER OUR COMPARATIVE NEGLIGENCE FRAMEWORK.

Michigan should adopt the modern premises liability approach reflected in the Third Restatement of Torts "which aligns more neatly with comparative negligence principles by imposing a blanket reasonable duty of care standard." *Estate of Donna Livings,* 507 Mich at 360-61 (Justice McCormack concurring). The Third Restatement was published in 2012, when comparative fault was the norm in the vast majority of states (46) and embodies the principles of comparative fault. Conversely, the Second Restatement was published at a time when the defense of contributory negligence was the norm in the vast majority of states (44) and it embodies the principles of contributory negligence and its corollary doctrines.

A. The approach of the Third Restatement on premises liability is entirely compatible with the principles of Michigan's comparative negligence framework.

The Third Restatement offers a simplified and streamlined approach to premises liability by generally applying the same reasonable duty of care standard applicable in all other torts sounding in negligence. It provides:

> § 51 General Duty of Land Possessors
>
> Subject to § 52, a land possessor owes a duty of reasonable care to entrants on the land with regard to:[7]

[7] § 52 applies to "flagrant trespassers".

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> (a) conduct by the land possessor that creates risks to entrants on the land;
>
> (b) artificial conditions on the land that pose risks to entrants on the land;
>
> (c) natural conditions on the land that pose risks to entrants on the land; and
>
> (d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.

Restat 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51

The Third Restatement does not treat negligent tortfeasors differently based on their status as landholders but compares the fault of everyone responsible for injury in the same manner regardless of status. It applies the same principles and rules to all torts based on negligence. It does not avoid comparing the ordinary negligence of each person causing injury by requiring business invitees to establish a negligence-plus standard before the landholder's fault is compared. It does not avoid the strictures of comparative fault by framing the issue of the plaintiff's contributory negligence as impacting the duty owed by the defendant. It returns the fact-specific questions of foreseeability and breach to the factfinder where they belong and prevents trial judges from usurping these jury functions under the guise of duty determinations.

Moreover, the Third Restatement expressly recognizes that an invitee's encounter with an obvious danger is a matter of the invitee's contributory negligence and should form part of a comparative negligence analysis. This would simplify the summary judgment analysis and lead to more uniform and consistent results. It provides in part:

> 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.

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Restat 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51, Comment k. *Accord Broussard, supra,* 113 So 3d at 185: Considering premises liability like other negligence cases would "simplify procedural issues" by "letting this class of cases fall into the pattern of the usual negligence case, deciding the question of negligence and breach of duty on the part of the owner by looking only to his conduct and the question of voluntary exposure to risk on the part of the invitee by looking alone to his conduct".

In sum, the Third Restatement approach would not subvert the policy choices of the Legislature as reflected in Michigan's comparative fault statute, would lead to more just results and would promote good public policy.

B. The approach of the Second Restatement on premises liability is not compatible with the principles of Michigan's comparative negligence framework.

The Second Restatement of Torts is not in line with the principles of comparative negligence which are now the norm, including in Michigan. The Second Restatement was published in 1965. At that time, only six states had abolished contributory negligence and the principles of contributory negligence were the norm. See Karangelen, Jennifer J. (2004) "Comments: The Road to Judicial Abolishment of Contributory Negligence Has Been Paved by Bozman v. Bozman," University of Baltimore Law Review: Vol. 34: Iss. 2, Article 6. p.269 (hereafter "Karangelen").[8] The Second Restatement embraces many of these contributory negligence principles, including the principle that, absent some very limited exceptions,[9] a

[8] Ms. Karangelen's comments did not prove to be prescient as Maryland still follows the contributory negligence doctrine.

[9] The exceptions to contributory negligence were generally limited to "the safety statute" "the greater-degree-of-blame" and "the last clear chance". "The safety statute exception provides recovery "if the defendant's negligence consisted of the breach of a statute specifically designed to protect a class of persons unable to protect themselves against defendant's negligence." The greater-degree-of-blame exception provides recovery "if the defendant's conduct was 'intentional' or 'reckless'. Finally, the last clear chance doctrine applies if the defendant had the last clear chance to avoid harming the plaintiff. Karangelen, Vol. 34 at 268 n 33 (cleaned up). **Notably, the conduct and**

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plaintiff's negligence which contributes to his/her injuries generally relieves the defendant of all liability.

The contributory negligence norms in effect at the time were clearly embodied in the Second Restatement on premises liability[10], which provides in relevant part:

> § 343. Dangerous Conditions Known to or Discoverable by Possessor.
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.
>
> * * *
>
> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Under § 343A, the landholder escapes all liability for its own negligence for failing to warn of or ameliorate the same obvious danger which its invitee encountered. The only exception to the complete bar is when the invitee demonstrates that, in addition to the landholder's negligence, the landholder should have anticipated the injury for reasons such as those listed in 343A Comment f. Thus, when the invitee is negligent for encountering an obvious danger and the landholder is negligent for tolerating the same obvious danger, the invitee cannot recover except upon a showing

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circumstances triggering these exceptions would likely be considered when allocating the relative fault of the parties in a comparative fault analysis.

[10] See, e.g., § 343A(1), Comment e, noting that a landholder should be absolved from liability if its invitee assumes the risk of obviously dangerous conditions or activities on the land.

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that there were additional characteristics beyond the landholder's ordinary negligence in tolerating the obvious danger. Although *Lugo's* approach takes this negligence-plus standard one step further, the exception in the Second Restatement still sounds to a great degree like a requirement to establish the "greater-degree-of-blame" exception to contributory negligence and is another illustration demonstrating the Second Restatement's embrace of contributory negligence principles. [11] Conversely, absent statutory exceptions like governmental immunity, Michigan's comparative fault statute should not require any person to prove a heightened standard of misconduct to establish liability. It demands that everyone responsible for injury be treated equally.

Although overruling *Lugo's* "special aspects" doctrine would be a step in the right direction, it would be a step not far enough. The Second Restatement's treatment of premises liability is based on contributory negligence principles which are not compatible with comparative negligence. Especially given the "no duty" interpretation adopted by *Riddle*, the Second Restatement suffers from all the infirmities set forth above: it requires a negligence-plus standard to establish premises liability; it gives preferential treatment to tortfeasors based on their status as landholders; it invites courts to invade the province of the jury; it looks to the conduct of the invitee to determine the duty owed by the landholder; it is another form of assumption of the risk and/or contributory negligence; it negates the landholder's duty to use reasonable care without an express agreement; and it promotes other bad policies by encouraging obvious dangers to go unchecked, allows at fault parties to go without accounting; makes injured persons bear the entire burden of

[11] Notably, juxtaposing Michigan's comparative fault framework over § 343A seemingly results in an additional windfall for landholders. Prior to the imposition of comparative fault, if a plaintiffs established the negligence-plus standard of § 343A, they were entitled to 100% of their damages. Their own fault in encountering the obvious danger was not allocated if the injury should have been anticipated; it was all or nothing. Conversely, if comparative fault is applied along with § 343A, if plaintiffs establish the negligence-plus standard of 343A, then their contributory negligence is compared, and their damages reduced accordingly. In other words, they would get something less than all, or nothing.

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their injuries when others are also responsible; and it leads to inconsistent and confusing jurisprudence.

Simply put, the Second Restatement's approach on premises liability does not and cannot achieve the objectives of Michigan's comparative fault framework and following this approach would contravene the policy choices of the Michigan Legislature.

RELIEF REQUESTED

For these reasons, the Court should overrule the "no duty" rule announced in *Riddle* and the "special aspects" rule announced in *Lugo* and instead adopt the approach of the Third Restatement and treat a person's encounter with an obvious danger as part of the person's relative degree of fault under a comparative fault analysis.

Respectfully Submitted,

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APPENDIX A:
Contributory negligence and/or assumption of the risk states.

Alabama: Dolgencorp, Inc v Taylor, 28 So 3d 737, 742 (Ala, 2009) (open and obvious as affirmative defense); Golden v McCurry, 392 So 2d 815, 817 (Ala, 1980) (contributory negligence unless changed by legislature); Ex parte Barran, 730 So 2d 203, 206 (Ala, 1998) (assumption of the risk).

Marylnd: Bd of Co Comm'rs v Bell Atlantic-Maryland, 346 Md 160, 179; 695 A2d 171 (1997) (contributory negligence); Morgan State Univ v Walker, 397 Md 509, 514; 919 A2d 21 (2007) (assumption of the risk).

North Carolina: Smith v Fiber Controls Corp, 300 NC 669, 673; 268 SE2d 504 (1980) (contributory negligence); Freeman v Food Lion, LLC, 173 NC App 207, 211; 617 SE2d 698 (2005) (open and obvious danger)

Virginia: Sawyer v Comerci, 264 Va 68, 74; 563 SE2d 748 (2002) (contributory negligence); Tate v Rice, 227 Va 341, 348; 315 SE2d 385 (1984) (open and obvious danger)

DC: Wingfield v Peoples Drug Store, Inc, 379 A2d 685, 687 (DC, 1977) (contributory negligence); Sinai v Polinger Co, 498 A2d 520, 524 (DC, 1985) (assumption of the risk)

Georgia: Muldovan v McEachern, 271 Ga 805, 807; 523 SE2d 566 (1999) (assumption of the risk); Sones v Real Estate Dev Group, Inc, 270 Ga App 507, 508; 606 SE2d 687 (2004) (assumption of the risk applies to premises liability)

Oklahoma: Tucker v ADG, Inc, 2004 Okla 71, ¶ 21; 102 P3d 660, 669 (open and obvious danger); Okla Stat Ann tit. 23 §12 (assumption of the risk)

Rhode Island: Bucki v Hawkins, 914 A2d 491, 497 (RI, 2007) (open and obvious danger); Kennedy v Providence Hockey Club, 119 RI 70, 77; 376 A2d 329 (1977) (assumption of the risk survives legislative abolition of contributory negligence).

South Dakota: Duda v Phatty McGees, Inc, 2008 SD 115, ¶ 13; 758 NW2d 754, 758 (assumption of the risk); Mitchell v Ankney, 396 NW2d 312, 314 (SD, 1986) (open and obvious danger).

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APPENDIX B:
Comparative negligence states that apply open and obvious defense in some form.

Ohio: Armstrong v. Best Buy Co., Inc., 99 Ohio St. 3d 79, 80 (2003) 788 N.E.2d 1088 (open and obvious danger still valid); *cf.* Stewart v Urig, 176 Ohio App 3d 658, 664; 2008-Ohio-3215, 893 NE2d 245 (contributory negligence and assumption of risk considered as comparative fault).

Louisiana; McCoy v Town of Rosepine, 15-898 (La App 3 Cir 03/09/16); 187 So 3d 562, 566 (no duty if dangerous condition would be "obvious to all") (comparative fault La. C.C. Art. 2323).

Connecticut: Gargano v Azpiri, 110 Conn App 502, 510; 955 A2d 593 (2008) (no duty defense applies only to the failure to warn of an obvious danger, landholder's failure to remedy an obvious danger subsumed under comparative negligence).

Wyoming: Valance v VI-Doug, Inc, 2002 Wy 113, ¶ 10; 50 P3d 697, 701-02 (known and obvious danger rule restricted to dangers resulting from natural causes; otherwise, open and obvious rule subsumed under comparative negligence).

West Virginia: Hersh v E-T Enterprises, Partnership, 232 W Va 305, 318; 752 SE2d 336 (2013) (open and obvious danger doctrine abolished) but reinstated by W. Va. Code §55-7-28a

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APPENDIX C:
Comparative negligence states that apply the Second Restatement § 343A exception.

Alaska: Ferriss v Chugach Electric Ass'n, 557 P2d 763, 769 (Alas, 1976) (open and obvious danger bars recovery unless possessor should anticipate harm despite obviousness as set forth in § 343A of Second Restatement) (comparative fault, Alaska Stat. § 09.17.060).

Arkansas: Van DeVeer v RTJ, Inc, 81 Ark App 379, 389; 101 SW3d 881 (2003) (same); (comparative fault Ark. Code § 16-64-122).

Delaware: Duran v Eastern Ath Clubs LLC, ___A3d___; 2018 Del. Super. LEXIS 2348, at *6-7 (Super Ct, June 7, 2018) (same) (comparative fault Del. Code Tit. 10, § 8132).

Illinois: Crider v Crider, 225 Ill App 3d 954, 956; 167 Ill Dec 798; 588 NE2d 439 (1992) (same) (comparative fault 735 Ill. Comp. Stat. §5/2-1116).

Indiana: Merrill v Knauf Fiber Glass, GmbH, 771 NE2d 1258, 1266 (Ind Ct App, 2002) (same) (comparative negligence Ind. Code § 34-51-26).

Iowa: Konicek v Loomis Bros, Inc, 457 NW2d 614, 618 (Iowa, 1990) (same) (comparative fault Iowa Code § 668.3(1)(b)).

Kansas: Wellhausen v Univ of Kan, 40 Kan App 2d 102, 106; 189 P3d 1181 (2008) (same) (comparative fault Kan. Stat. Ann. §60-258a(a)).

Kentucky: Shelton v Ky Easter Seals Society, Inc, 413 SW3d 901, 914 (Ky, 2013) (same) (comparative fault Ky. Rev. Stat. Ann. §411.182).

Maine: Isaacson v Husson College, 297 A2d 98, 105 (Me, 1972) (same) (comparative negligence Me. Rev. Stat. Ann. Tit. 14, § 156).

Massachusetts: Dos Santos v Coleta, 465 Mass 148, 154; 987 NE2d 1187 (2013) (no duty to warn; open and obvious danger bars recovery unless possessor should anticipate harm as set forth in § 343A of Second Restatement for failure to remedy danger despite obviousness) (comparative negligence Mass. Gen. Laws Ann Ch. 231, § 85).

Minnesota: Baber v Dill, 531 NW2d 493, 496 (Minn, 1995) (open and obvious danger bars recovery unless possessor should anticipate harm despite obviousness as set forth in § 343A of Second Restatement) (comparative negligence Minn. Sta. § 604.01(1).

Missouri: Holzhausen v Bi-State Dev Agency, 414 SW3d 488, 496 (Mo Ct App, 2013) (same) (comparative negligence Gustafson v Benda, 661 SW2d 11, 15 (Mo, 1983)).

Montana: Richardson v Corvallis Pub Sch Dist No 1, 286 Mont 309, 322; 950 P2d 748 (1997) (same) (comparative fault Mont. Code Ann. § 27-1-702).

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Nebraska: Aguallo v City of Scottsbluff, 267 Neb 801, 814; 678 NW2d 82 (2004) (same) (comparative fault Neb. Rev.Stat. § 25-21, 185.11)

New Jersey: Zentz v Toop, 92 NJ Super 105, 113; 222 A2d 290 (Super Ct App Div, 1966) (same) (comparative negligence.J. Stat Ann. § 2A:15-5.1)

North Dakota: Groleau v Bjornson Oil Co, 2004 ND 55, ¶ 19; 676 NW2d 763, 769 (same) (comparative fault N.D. Cent. Code § 32-03.2-02)

Oregon: Ault v Del Var Props, LLC, 281 Or App 840, 850; 383 P3d 867 (2016) (same) (comparative negligence Or. Rev. Stat. Ann. § 31.600).

Pennsylvania: Hitchner v Bartell, 159 A3d 53 (Pa Super Ct, 2016) (same) (comparative fault 42 Oa. Cons. Stat. § 7102).

South Carolina: Callander v Charleston Doughnut Corp, 305 SC 123, 126; 406 SE2d 361 (1991) (same) (comparative fault Nelson v Concrete Supply Co, 303 SC 243, 245; 399 SE2d 783 (1991)).

Utah: Hale v Beckstead, 2005 Utah 24, ¶ 25; 116 P3d 263, 269 (same) (comparative fault Utah Code Ann. § 78B—5-818(2).

Vermont: LeClair v LeClair, 204 Vt 422, 429 n 4; 2017 Vt 34, ¶ 11; 169 A3d 743 (same) (comparative fault 12 V.S.A. § 1036).

Washington: Iwai v State, 129 Wash 2d 84, 95; 915 P2d 1089 (1996) (same) (comparative negligence Wash. Rev. Code Ann. §§ 4.22.005-015).

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APPENDIX D:
States that abolished the open and obvious danger defense.

Arizona: Markowitz v Ariz Parks Bd, 146 Ariz 352, 356; 706 P2d 364 (1985) (invitee encountering obvious danger not bar to recovery but is part of comparative fault analysis).

California: Reyes v Kosha, 65 Cal App 4th 451, 462 n 3; 76 Cal Rptr 2d 457 (1998) (same).

Colorado: DeWitt v Tara Woods Ltd Partnership, 214 P3d 466, 468 (Colo App, 2008) (open and obvious defense abolished by statute, Colo Rev Stat 13-21-115 et. seq.; obviousness of danger considered as part of comparative negligence analysis).

Florida: Zambito v Southland Rec Enterprises, 383 So 2d 989, 990 (Fla Dist Ct App, 1980) (invitee encountering obvious danger is not bar to recovery but part of comparative fault analysis); De Cruz-Haymer v Festival Food Market, Inc, 117 So 3d 885, 888 (Fla Dist Ct App, 2013).

Hawaii: Steigman v Outrigger Enterprises, 126 Haw 133, 135; 267 P3d 1238 (2011) (same)

Idaho: Harrison v Taylor, 115 Idaho 588, 595-96; 768 P2d 1321 (1989) (same).

Mississippi: Tharp v Bunge Corp, 641 So 2d 20, 23 (Miss, 1994) ("For the open and obvious defense to be a complete bar to a negligence claim, the plaintiff must be one hundred percent (100%) negligent himself. Miss. Code Ann. § 11-7-15.")

Nevada: Foster v Costco Wholesale Corp, 128 Nev 773, 781; 291 P3d 150 (2012) (Open and obvious danger not a defense but part of assessing whether reasonable care was employed under comparative fault, citing. Restatement (Third) of Torts: Phys. & Emot. Harm § 51.

New Hampshire: Sargent v Ross, 113 NH 388, 395; 308 A2d 528 (1973) (The mere fact that a condition is open and obvious, as was the steepness of the steps in this case, does not preclude it from being unreasonably dangerous, and defendants are not infrequently "held liable for creating or maintaining a perfectly obvious danger of which plaintiffs are fully aware") (comparative fault N.H. Rev. Stat. Ann. § 507:7-d).

New Mexico: Klopp v Wackenhut Corp, 113 NM 153, 157; 1992-NMSC-008, ¶ 12; 824 P2d 293 ("Simply by making hazards obvious to reasonably prudent persons, the occupier of premises cannot avoid liability to a business visitor for injuries caused by dangers that otherwise may be made safe through reasonable means.") (Comparative negligence Scott v Rizzo, 96 NM 682, 685; 1981-NMSC-021, ¶ 8; 634 P2d 1234.)

New York: Cupo v Karfunkel, ___AD2d___; 767 NYS2d 40, 43 (App Div, 2003) (obviousness of danger considered as part of comparative fault analysis).

Tennessee: Green v Roberts, 398 SW3d 172, 177 (Tenn Ct App, 2012) (open and obvious danger does not, ipso facto, relieve a defendant of a duty of care; if the foreseeability and gravity of

harm posed from a defendant's conduct, even if open and obvious, outweighed the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care.) McIntyre v Balentine, 833 SW2d 52, 57 (Tenn, 1992) (comparative fault).

Texas: Del Lago Ptnrs v Smith, 307 SW3d 762, 772 (Tex, 2010) (abolished a "no-duty" doctrine; instead, plaintiff's knowledge of dangerous condition relevant to determining comparative negligence).

Wisconsin: Rockweit by Donohue v Senecal, 197 Wis 2d 409, 423; 541 NW2d 742 (1995) (open and obvious danger is element considered by jury in apportioning negligence and not bar to recovery).

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