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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 Court No. 18-003569-NO

BRIEF AMICI CURIAE FOR ACUITY, A MUTUAL INSURANCE COMPANY AND INSURANCE ALLIANCE OF MICHIGAN

BY: KAREN LIBERTINY LUDDEN (P48815)
NOVARA TESIJA CATENACCI McDONALD & BAAS, PLLC
Attorney for Acuity Insurance and Insurance Alliance of Michigan
888 West Big Beaver, 6th Floor
Troy, Michigan 48084
(248) 354-0380 / Fax: (248) 250-9927
kll@novaralaw.com

Novara Tesija Catenacci McDonald & Baas, PLLC

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Novara Tesija Catenacci
McDonald & Baas, PLLC

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McDonald & Baas, PLLC

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McDonald & Baas, PLLC

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Court has invited interested persons or groups to seek permission to file briefs amicus curiae regarding whether the Open and Obvious Doctrine articulated in *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001) is consistent with Michigan's comparative fault framework; and if not, which approach the Court should adopt for analyzing premises liability cases under that framework.

Amicus curiae Acuity, a Mutual Insurance Company ("Acuity") writes property and casualty insurance for consumers and businesses throughout the United States, including Michigan. Acuity provides commercial general liability ("CGL") policies for many industries that would be interested in the outcome of this case, including restaurants, retailers, apartment complexes, rental locations, hospitality, offices and snow removal services. Acuity is the 59th largest insurer in the nation and has been in business since 1925.

Amicus curiae Insurance Alliance of Michigan (the "Alliance"), represents over 30 other property and casualty insurers in Michigan. The Alliance is a non-profit, statewide, government affairs and public information association representing the property and casualty insurance industry in Michigan. It serves as a unified voice for the insurance industry, representing auto, home and business insurance companies throughout Michigan. Its mission includes creating a greater public awareness of the business of insurance and the benefits to the Michigan economy of a private entrepreneurial insurance and risk management industry. Its members include the following insurance companies operating in Michigan: The Auto Club Group, AF Group, Allstate, Amerisure,

[1] Pursuant to the disclosure requirements of MCR 7.312(H), amici curiae represent that counsel for Defendant F&E Oil Inc. did not author this brief in whole or in part, nor did counsel or F&E contribute to it financially. This brief was paid for solely with monetary contributions from Acuity and the Alliance. Hanover, the insurer for Defendant F&E Oil Inc. is one of over 30 insurer members of the Alliance, but also did not author this brief in whole or in part and, other than its general payment of dues to the Alliance, did not contribute to it financially.

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Ameritrust, Auto-Owners, CNA, Conifer, Farm Bureau, Farmers & Merchants Mutual Fire, Farmers, Frankenmuth, Geico, Citizens, Hanover, Hastings Mutual, Liberty Mutual, Manufacturing Technology Mutual, Michigan Insurance, Nationwide, Northern Mutual, Pioneer State Mutual, ProAssurance, Progressive, Retailers, Secura, State Auto, State Farm, The Doctors Company, USAA, Westfield and Wolverine Mutual.

Michigan Courts have long recognized that "The insurance industry is of great public interest, and insurance laws are to be liberally construed in the interests of the public, policyholders and creditors."[2] The insurance industry has a strong interest in Michigan courts consistently applying decades of premises liability precedent. Consistent application of the principles of duty, the Open and Obvious Doctrine, and the comparative fault statute allows the insurance industry to better predict losses, more efficiently provide coverage, and pass along these efficiencies to policyholders in the form of lower premiums. That is the interest of the citizens of Michigan. This Court should affirm the application of *Lugo* as consistent with Michigan's premises liability precedent and the comparative fault framework.

[2] *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010); *Atty General v Mich Surety Co*, 364 Mich 299, 325, 337; 110 NW2d 677 (1961).

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McDonald & Baas, PLLC

INTRODUCTION

The Michigan Supreme Court asks how Michigan's longstanding Open and Obvious Doctrine, with its accompanying narrow exceptions best articulated in *Lugo v Ameritech Corp*,[3] fits within Michigan's statutory comparative fault framework.[4] Notable dissents and concurrences have questioned: 1) whether the doctrine belongs in the trial court's analysis of duty, or in the jury's allocation of fault; 2) whether the doctrine is abolished by or subsumed into Michigan's comparative fault statute; 3) whether the doctrine contradicts the 2nd Restatement of Torts, and whether this is important; and 4) whether the 3rd Restatement should be adopted, although few states have done so.

Analysis shows that the doctrine and statute complement each other and together ensure that all textbook elements of a tort claim – duty, breach, causation and damages – are preserved and addressed properly. A court's application of the doctrine to evaluate duty as a matter of law, followed by a jury's application of the statute to allocate fault amongst tortfeasors, captures the spirit of the tort concepts summarized in the 2nd Restatement, even though unnecessary, since Restatements are meant to nationally canvas, not rewrite, laws; the same reason why the 3rd Restatement is irrelevant here.

This Court should not dismantle common law that the Michigan Legislature itself chose not to disturb when it subsequently passed Tort Reform in 1995. Not only would this inexplicably rewrite the law in this state, creating erratic, inconsistent definitions of duty, as determined by individual juries on a case-by-case basis, it would upend the insurance industry, which can only underwrite insurance when it can evaluate risk; a process that is dependent on consistency. Indeed, the premiums for current policies relied on existing decades-old Michigan law during the underwriting process. This Court should uphold the existing law in this state, which is a sensible application of the principles expounded in the 2nd Restatement.

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[3] *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001).
[4] 1995 PA 161.

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Novara Tesija Catenacci
McDonald & Baas, PLLC

ARGUMENT

I. THE CHALLENGE TO *LUGO* REPRESENTS AN ABRUPT DEPARTURE FROM EXISTING LAW THAT DOES NOT FOLLOW *STARE DECISIS*.

It is important to recognize from the start that this Court is contemplating an abrupt departure from long-established law that has been in place for decades. The Court conveyed as much when it invited commentary as to "*which* approach this Court should adopt for analyzing premises liability cases under a comparative negligence framework"[5] when there is already a single, well-honed approach that the Legislature itself left intact when it passed Tort Reform almost 30 years ago. Only the correction of a palpable error can justify departing from one of the most significant foundations undergirding our legal system; the doctrine of *stare decisis*. There is no such error here, as there is no conflict between the application of the Open and Obvious Doctrine, with its narrow exceptions, and the comparative fault statute.[6] That other states might employ different statutory and common law, does not constitute an error in this state.

Moreover, this Court has articulated that *stare decisis* particularly applies when the Legislature chooses to leave common law undisturbed for long periods of time, and even more so when it passes a statute that does not overrule or modify it. In these instances, this Court has held that *stare decisis* dictates leaving any changes to the Legislature. Given these facts, honoring *stare decisis* is both appropriate and of utmost importance. Now more than ever, there is a need for stability in legal decisions from the High Court to avoid public perception of political pendulum shifts.

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[5] (Emphasis added). *Kandil-Elsayed v F & E Oil, Inc*, No 162907, 2022 Mich LEXIS 327, *1 (Mich Feb 4, 2022).

[6] Hereinafter, the use of the phrase "Open and Obvious Doctrine" is intended to include the narrow exceptions that this Court articulated in *Lugo*. Indeed, there does not appear to be any proponent of the idea that the doctrine would never have any exceptions, such that the existence of any open and obvious condition, under any circumstances, would automatically mean no duty for the landowner.

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McDonald & Baas, PLLC

A. The longstanding law in this state applies the Open and Obvious Doctrine, with its narrow exceptions, as a matter of law to establish duty, followed by the jury's evaluation of comparative fault.

Typically, when a matter comes before the Michigan Supreme Court, there is a dispute over *what* the law in this state is, which requires clarification or illumination by the Court. Here, however, the issue is *whether* the existing law should remain in place. The Open and Obvious Doctrine has been in place for decades, and even its narrow exceptions, which were first referenced in shorthand by Justice Michael Cavanagh as "special aspects," predate Tort Reform. The history of this law is thus summarized here briefly, so the Court can move on to its substantive inquiry; whether it should rewrite this law.

The concept of the trial court establishing the duty of a landowner as a matter of law based on the relationship of the parties and deciding the issue when there is no factual dispute has been the law in Michigan for a century or more and predates even the 1st Restatement. In the 1961 case of *Elbert v Saginaw*,[7] where a toddler fell into a four-foot deep excavation that had remained open for a month, Justice Talbot Smith summarized what was even then established Michigan law by relying on the 1928 decision of *Palsgraf v Long Island R Co*:

> A duty arises because of a relationship between the parties. Should it be found to exist, an actor has an obligation to conform to a certain standard of conduct… The defendants assert that they could not reasonably foresee that a person of plaintiff's class would be injured by the condition created by them… What the defendant is talking about here is duty… This issue is one of law, and is never for the jury. This is not to say, of course, that fact issues may never be involved in the application of the rule. In [the] event "varying inferences are possible, in Mr. Justice Cardozo's words, there is a "question for the jury."

See also *Ackerberg v Muskegon Osteopathic Hospital*,[8] relying on the 1892 decision of *Grand Trunk R Co v Lvs*, which confirms that a jury's role is only generated "when a given state of facts is such

[7] *Elbert v Saginaw*, 363 Mich 463, 476; 109 NW2d 879 (1961), citing *Palsgraf v Long Island R* Co, 248 NY 339, 345; 162 NE 99, 101 (1928).
[8] *Ackerberg v Muskegon Osteopathic Hospital*, 366 Mich 596; 115 NW2d 290 (1962), citing *Grand*

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that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." In *Ackerberg*, a patient fell off a platform with no guardrail.

That there is no duty as a matter of law when a hazard is "obvious," "apparent, "open" "known" or of similar ilk likewise preceded Tort Reform. For example, in the 1988 case of *Williams v Cunningham Drug Stores*,[9] which involved a storeowner's duty of care to invitees during a robbery, the Michigan Supreme Court confirmed that a landowner has no duty to warn invitees of dangers "so obvious and apparent that an invitee may be expected to discovery them himself. Furthermore, 'the occupier is not an insurer of the safety of invitees….'" In *Cunningham Drug*, the Michigan Supreme Court also reiterated the distinction between the role of the court and jury, specifically that the judge decides what constitutes duty and the general standard of care:

> In deciding this question, we note that the court and jury perform different functions in a negligence case. Among other things, the court decides the questions of duty and the general standard of care, and the jury determines what constitutes reasonable care under the circumstances.[10]

Fast-forwarding to 1992, which still preceded Tort Reform, the Michigan Supreme Court again articulated the Open and Obvious Doctrine in *Riddle v McLouth Steel Products*.[11] There, the Court examined a landowner's duty to warn of known or obvious dangers in the context of a steel plant's known oil-covered floor. The Court cited cases back to the 1887 case of *Caniff v Blanchard Navigation Co*,[12] which found as a matter of law that a landowner had no duty toward a plaintiff who fell through an open hatch on a ship being docked in winter "because the danger was not hidden."

Trunk R Co v Lvs, 144 US 408; 12 SCt 679; 29 LEd 149 (1892).
[9] *Williams v Cunningham Drug Stores Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).
[10] (Emphasis added). *Id* at 500-501, citing *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1997), reh den 401 Mich 951 (1977).
[11] *Riddle v McLouth Steel Prods Corp*, 440 Mich 85; 485 NW2d 676 (1992).
[12] *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887).

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Importantly, in *Bertrand v Alan Ford Inc*, decided on August 15, 1995 – also passed before Tort Reform[13] – Justice Michael Cavanagh, writing for the majority, first coined the expression "special aspects" to describe those narrow occasions when, despite an open and obvious hazard that would otherwise fail to generate duty for the landowner, there could still be a duty to invitees.[14] In articulating the Open and Obvious Doctrine thus, Justice Cavanagh indicated that this conclusion was entirely consistent with the 2nd Restatement and quoted it extensively in support of the Court's ruling, even though the phrase "special aspects" is not used anywhere in the Restatement (nor need it be).[15] Justice Cavanagh wrote:

> With the axiom being that the duty is to protect invitees from unreasonable risks of harm, the underlying principle is that even though invitors have the duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. Consequently, because the danger of tripping and falling a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be **special aspects** of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe.[16]

Justice Cavanagh took pains to quote from §343 and §343A[17] of the 2nd Restatement to articulate the rationale for the Court's holding, stating:

> When §§343 and 343A are read together, the rule generated is that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the

[13] 1995 PA 161 was filed with the Secretary of State on October 10, 1995 and went into effect on March 28, 1996.
[14] *Bertrand v Alan Ford Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995).
[15] Indeed, it does not appear that any party is proffering the position that a landowner has no duty for open and obvious conditions under any conditions whatsoever.
[16](Emphasis added). *Id*.
[17] Justice Cavanagh later suggested in his concurrence in *Lugo* that §343 and §343A should be read separately ("§343A needs to be read as its own rule, and not as an exception to §343") but this generates unnecessary confusion because, if they are read separately in this manner, they literally contradict each other, as will be discussed below. *Lugo*, 464 Mich at 530-531.

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> invitor is required to undertake reasonable precautions. The issue then becomes the standard of care is for the jury to decide.[18]

The comparative fault statute passed as part of Tort Reform was effective March 28, 1996. As will be discussed below, the statute did not address, overturn or codify the Open or Obvious Doctrine or any exceptions thereto, whether called "special aspects" as shorthand or not. The statute simply addresses how a jury is to allocate fault. The statute states:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and noneconomic damages shall not be awarded.[19]

The statute does not address, abolish or subsume the Open and Obvious Doctrine in any way.

In 2001, over twenty years ago, *Lugo* was decided.[20] Written by Justice Clifford Taylor, the majority followed *Bertrand,* where the case involved an invitee to a telephone company who stepped in a pothole on the premises. There, the Court continued the use of Justice Michael Cavanagh's shorthand phrase, "special aspects," and articulated two specific examples of them: (1) an "effectively unavoidable" danger in the form of standing water next to a commercial building's only exit, effectively trapping consumers inside the building; and (2) an "unreasonably dangerous" condition in the form of an "unguarded thirty-foot deep pit in the middle of a parking lot."[21] The Court held:

> [T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and

[18] (Emphasis added). *Id* at 186.
[19] MCL 600.2959.
[20] *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).
[21] *Id* at 523-24.

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> obvious risk unreasonable dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.[22]

The Court ruled that the evidence submitted to the trial court "allows for no genuine issue of material fact with respect to whether plaintiff's claim was barred by the open and obvious doctrine." [23]

The *Lugo* Court also explained that, "In our view, this approach is consistent with §343A of the Restatement, which indicates that a possessor of land is only liable to invitees for harm caused by an obvious condition, if the possessor should "anticipate the harm."[24] Justice Michael Cavanagh concurred in the decision,[25] agreeing "that the plaintiff failed to establish a basis for imposing liability despite the open and obvious nature of the pothole."[26] He further concurred that "a premises possessor is not generally required to protect an invitee from open and obvious dangers" and that "there are exceptions to this general rule."[27]

Fast forwarding again to the recent decision in *Estate of Donna Livings v Sage's Inv Group, LLC*, the Court still did not overturn the extensive precedent summarized above, but rather examined the singular question of whether an employee's need to go to work made a hazard effectively unavoidable. There, Justice Viviano, writing the majority decision, used the phrase "elaborations" to describe the two exceptions to the imposition of duty for open and obvious hazards as occurring "when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*."[28] The

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[22] *Id* at 517.
[23] *Id* at 523-24.
[24] *Id* at 526.
[25]The basis for his separate opinion is the preference that the focus be whether the landowner's actions were "reasonable" à la the 2nd Restatement, which even he admits allows for "special aspects" to be "considered in determining whether liability should be suspended." He concludes that, if the focus could be redirected thus, "the existence of special aspects in a particular case will not necessarily be outcome determinative." *Lugo*, 464 Mich at 543. As will be discussed below, however, this is not the law in Michigan, nor should it be.
[26] *Id*.
[27] *Id*.
[28](Emphasis in original). *Estate of Donna Livings v Sage's Inv Grp, LLC*, 507 Mich 328, 339; 968

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decision also confirms that "despite the fact that our current framework uses different terminology, we have stressed that our law remains consistent with the Restatement approach."[29] The law in this state is thus stable and predictable.

B. *Stare decisis* should be honored, as the exception to its broad application for correction of errors does not apply, particularly when the Legislature did not alter it and has been content with the status quo for decades.

It is precisely because the law is still stable and predictable that s*tare decisis* should be honored here. It represents one of the most fundamental elements of our judicial system; consistent precedent upon which the citizens and businesses of this state – including both small businesses that are policyholders and their insurers who write business in Michigan– can rely. The rare instance when *stare decisis* could be rejected comes only when there is a substantive error that must be corrected. Here, there is no such error. Moreover, this Court has long recognized that when the Legislature leaves intact case law for extended periods, *stare decisis* requires leaving revisions to the Legislature.

As Justice Michael Cavanaugh articulated in the 2010 decision in *Lansing Schools Education Association*,[30] "Under the longstanding doctrine of *stare decisis*, 'principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed. The importance of the *stare decisis* doctrine is well-established, for, as Alexander Hamilton stated, to 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.'"[31] As the United States Supreme Court has also confirmed, *stare decisis*

NW2d 397 (2021), *citing Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012).
[29] *Id* at 344.
[30] *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 366; 792 NW2d 686 (2010).
[31] Citing *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 2315 (1996), *Petersen v Magna Corp*, 484 Mich 300, 314-315; 773 NW2d 564 (2009) and The Federalist No. 78, p 471

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"promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[32]

The application of *stare decisis* in this case is particularly important when there has been such a stable body of law governing the Open and Obvious Doctrine for so long, and there has been no recent intervening event, save an election, that would trigger the need for re-examination, such as a newly amended statute or new set of facts. The facts and issues in this case are similar to those that came before. Nothing has changed.

While there is one circumstance in which a high court might overturn existing law – correcting past errors – there is no error to correct here. The doctrine and the statute have worked together harmoniously for decades and fully reflect the spirit of the summary of various state laws that is presented by the 2nd Restatement, even though they need not.

Importantly, the Legislature chose not to address, override or absorb the Open and Obvious Doctrine when it passed Tort Reform almost three decades ago. The statute speaks only to allocation of fault and does not rescind or discuss the Open and Obvious Doctrine at all. Justice Mallet in 1993 articulated that this fact alone should trigger the application of *stare decisis* and result in considerable restraint in rewriting state law, leaving it to the domain of the Legislature:

> When, over a period of many years, the Legislature has acquiesced in this Court's construction of a statute, the judicial power to change that interpretation ought to be exercised with great restraint. On more than one occasion, our Court has quoted with approval the statement that stare decisis 'is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced by the legislature, by its continued use or failure to change the language of the statute so constructed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature.[33]

(Alexander Hamilton)(Clinton Rossiter ed, 1961).

[32] *Payne v Tennessee*, 501 US 808, 827; 111 SCt 2597; 115 LEd 2d 720 (1991).

[33] (Emphasis added). *Boyd v W G Wade Shows*, 443 Mich 515, 525 n 15; 505 NW3d 544 (1993); 525-

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Stare decisis should be honored here. There is no basis to override it.

II. APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE TO THE LEGAL ISSUE OF DUTY IS A FUNDAMENTAL ELEMENT OF TORT LAW PERFORMED BY THE JUDGE; IT IS NOT PART OF A JURY'S ALLOCATION OF FAULT.

As important as applying *stare decisis* for its own sake is the practical reason why Michigan's Open and Obvious Doctrine should be applied to the legal issue of duty; its framework authenticates and supports the application of the most basic, textbook elements of tort law. Those elements require the trial court's analysis of the relationship of the parties and the obligations that arise from those relationships to establish uniform rules by which society can govern itself. The question has to be, "does a landowner's relationship with its invitee create duty when the danger is open and obvious?" Shifting this work to individual juries both eviscerates the established role of the trial court and upends society's need for consistent rules they can follow. The answer to a business owner's question, "what are my responsibilities to my invitees for an obvious hazard" should not be, "each individual jury will let you know at the end of each individual verdict." Nor can that business owner's insurer evaluate risk when setting premiums through the underwriting process. Moreover, sweeping these judicial responsibilities into the jury's responsibilities gives the impression that if someone falls and injures themselves, there *must* be someone to blame because fault must be "allocated." This contradicts Michigan's law, and insurance policy exclusions, for *force majeure* events. Sometimes no one is responsible for that winter storm.

36, quoting *Dean v Chrysler Corp*, 434 Mich 655, 664; 455 NW2d 699 (1990), quoting *Consumers Power Co v Muskegon Co*, 346 Mich 243, 251; 78 NW2d 223 (1956), quoting 21 CJS, Courts, sec 214, pp 388-390.

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McDonald & Baas, PLLC

A. It is blackletter law that it is the trial court's role to establish and evaluate duty and the general standard of care by considering the relationship between the parties, which is necessary for society to operate optimally.

As taught in presumably every law school in the country, the first of the four elements of a tort claim is duty, established and adjudged as a matter of law by the trial court, unless there is a disputed question of fact.[34] And like unto it, the trial courts establish the general standard of care. This is the fabric of tort law in this state, dating back almost 100 years and one that jurisprudence easily recognizes is necessary to order society.

In *Riddle v McLouth Steel Prods Corp*, the Court explained:

> The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. In other words, the court determines the circumstances that must exist in order for a defendant's duty to arise.

(Emphasis added).[35] See also, *Lugo,* "When no material issues of fact exist, the existence of a legal duty is a question of law for the court to decide."[36]

Establishing the general standard of care is likewise within the domain of the trial court. Again, in *Williams v Cunningham Drug Stores, Inc,* the Court explained, "[T]he court and jury perform different functions in a negligence case. Among other things, the court decides the questions of duty *and the general standard of care*, and the jury determines what constitutes reasonable care under the circumstances."[37]

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[34] First year law students are taught almost universally that negligence consists of four distinct elements: duty, breach, causation, and harm. See, e.g., George C. Christie, Cases and Materials on Torts 108-09 (1983) (citing the four elements); Richard A. Epstein, *Cases and Materials on Torts* 128 (5th ed. 1990) (reciting "duty, breach, causation, and damages" as the elements of a "standard negligence action"); Jerry J. Phillips *et al., Tort Law: Cases, Materials, Problems* 221-22 (3d ed. 2001) (describing an actor's "basic obligations" and citing the four elements from section 281 of the Restatement (Second) of Torts); John W. Wade et al., Prosser, Wade and Schwartz's *Torts: Cases and Materials* 131 (9th ed. 1994) (same).

[35] *Riddle*, 440 Mich at 95.

[36] *Lugo,* 464 Mich at 516.

[37] (Emphasis added). *Cunningham Drug*, 429 Mich at 500.

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McDonald & Baas, PLLC

While it need not be, this approach is entirely consistent with the 2nd Restatement, whose Comments state that "Once the existence of a legal duty is found, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform…."[38] The 2nd Restatement further agrees that, "Where it is clear upon the evidence that the defendant has or has not conformed to what the standard of the law requires, and that no reasonable [person] could reach a contrary conclusion, the court must withdraw the issue from the jury and direct a verdict . . . ."[39]

Taking this issue outside the confines of premises liability, it is a principal element of *any* type of tort claim that duty and the general standard of care is established as a matter of law by the court, and that same focuses on concepts like the relationship of the parties and the foreseeability of the harm. In the seminal case regarding liability of an insurance agent, *Harts v Farmers Ins Exch*, this Court summarily recites at the commencement of its analysis that "whether a duty exists is a question of law that is solely for the court to decide."[40] *Harts* relied, *inter alia*, on *Murdock v Higgins*, a case involving an assault at a community service office allegedly caused by poor supervision, where this Court held that "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden of the defendant, and the nature of the risk presented."[41]

Murdock relied in turn on *Buczkowski v McKay*, where this Court held that a retailer was not responsible for a customer who was shot with ammunition purchased at the store.[42] There, in a case that predated Tort Reform, this court wrestled with how to articulate duty, but never once did it

[38] Restatement 2d of Torts § 328B comment f (1965).
[39] *Id* at comment g.
[40] *Harts v Farmers Ins Exc,* 461 Mich 1,7; 597 NW2d 47 (1999).
[41] *Murdock v Higgins*, 454 Mich 46, 53; 559 NW3d 639 (1997).
[42] *Buczkowski v McKay,* 441 Mich 96; 490 NW2d 330 (1992).

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McDonald & Baas, PLLC

contemplate shifting this trial court obligation to juries or refashioning the inquiry as a standard of care to be decided by a jury. Instead, it focused on similar elements that are incorporated into the Open and Obvious Doctrine to establish whether the retailer owed a duty: foreseeability, the relationship of the parties and other factors. The Court held, "Whether a retailer has a duty to protect a member of the general public from the criminal act of a customer depends on the relationship between the parties, the nature and foreseeability of the risk, and any other considerations that may be relevant on the issue."[43]

The reason why it is a fundamental principle in tort law that duty and the general standard of care has to be established by the trial court as a matter of law is that it has to be consistent in order for society to operate. Citizens have to know what their legal duties are so that they can satisfy them. Duty cannot vary from jury trial to jury trial, as individual juries across the state struggle to perform law school analysis from scratch, trying to discern what the duty should be. How long would those jury trials be?

In *Ebert v City of Saginaw*, Justice Talbot Smith explained the importance to society of separating the role of the judge from the jury. He explained:

> It is the *sine qua non* of negligence law, the requirement (a "duty") that people in an ordered society must conform to a certain standard of conduct in their relations with one another. Phrased in another way, the problem of duty is simply the problem of the degree to which one's uncontrolled and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society. This determination those of the vicinage are not trained to make, however faultless their composite judgment may be as to which of their neighbors is lying and which is telling the truth. It involves, as we have seen, much of legal history, of precent, of allocations of risk and loss. Prosser puts it succinctly. In discussing the apportionment of responsibilities between judge and jury he states among the duties of the court "the determination of any question of duty – that is, whether the defendant stands in such a relation to the plaintiff that the law will impose upon him any obligation of reasonable conduct for the benefit of the plaintiff. This issue is one of law, and is never for the jury.[44]

[43] *Buczkowski*, 441 Mich at 103.
[44] (Emphasis added). *Elbert,* 363 Mich at 476.

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McDonald & Baas, PLLC

It is thus one of the most basic elements of tort law that drives the distinction between the role of the judge and the role of the jury.

It is also for this fundamental reason that the opening standard jury instructions in this state, written by a State Bar committee appointed by the Michigan Supreme Court, explain that the judge will instruct the jury as to the law:

> **M Civ JI 2.01 Responsibilities of Judge and Jury**
>
> Now I am going to briefly explain to you my responsibilities as judge and your responsibility as jurors.
>
> My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case.
>
> Your responsibility as jurors is to decide what the facts of the case are. This is your job, and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is.[45]

Absent rewriting the basic tenets of tort law, there is no other appropriate way to address duty.

B. Establishing duty and the general standard of care necessarily precedes, and is not part of, the jury's role of allocating fault under the comparative fault statute.

Without the evaluation of duty and the general standard of care by the trial court, the jury cannot reach the issue of allocation of fault, because allocation of fault *assumes* that the first two elements of a tort claim – duty and breach – have already been demonstrated. The trial court's application of the Open and Obvious Doctrine to establish duty thus *precedes* the application of the comparative fault statute by the jury. Moreover, sweeping these important legal precursors into a

[45] (Emphasis added). M Civ JI 2.01.

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McDonald & Baas, PLLC

jury's allocation of fault would send the message that *someone* has to be responsible if a person is injured, even during *force majeure* events. This is not the law in Michigan.

As discussed above whilst addressing *stare decisis*, the natural order of evaluating a tort claim is sensible and has been in place for decades. First, the trial court establishes duty and the general standard of care and addresses whether it has been breached as a matter of law. If the trial court finds that there was a breach, the matter proceeds to the jury to evaluate percentage fault. If the trial court finds that there is a fact question that affects whether a duty was breached, the matter proceeds to the jury to establish those facts. If the trial court finds that there is no factual issue, and that no breach occurred, the case is dismissed as a matter of law.

The reason why this order is so important is that "fault," by definition, presumes a finding of duty and breach. The comparative fault statute includes jury instructions that presume same and define "fault" as a breach of duty:

> **(1)** In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
> **(a)** The total amount of each plaintiff's damages.
> **(b)** The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
> **(2)** In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> * * *
>
> **(8)** As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.[46]

[46] (Emphasis added). MCL 600.6304.

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Thus, the jury cannot proceed to *allocating* fault until the trial court has actually *established* fault. See *Romain v Frankenmuth Ins Co*, where this Court explained, "[U]nder Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another."[47]

That it is the trial court's job to evaluate duty and breach, *before* a jury applies comparative negligence actually precedes Tort Reform. In *Riddle*, Justice Conrad Mallett, writing the majority opinion, relied upon *Placek v Sterling Heights*,[48] where comparative fault was codified even before Tort Reform, to confirm that a comparative negligence system does not remove the role of the court to first establish and address duty. The jury's comparative fault analysis begins only after the court establishes duty:

> The adoption of [common law] comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive – two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.
>
> The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. In other words, the court determines the circumstances that must exist in order for a defendant's duty to arrive…
>
> Moreover, the "no duty to warn of open and obvious danger" rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in in a prima facie negligence case. A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm….[49]

Not only does the law in this state not support the notion that juries should decide duty, commingling judicial responsibilities with the jury responsibilities in this manner creates the dangerous side effect that juries are likely to be misled into believing that there must necessarily be *someone* responsible if

[47] *Romain v Frankenmuth Ins Co*, 483 Mich 18, 22; 762 NW2d 911 (2008).
[48] *Placek v Sterling Heights*, 405 Mich 638, 662; 275 NW2d 511 (1979).
[49] (Emphasis added). *Riddle,* 440 Mich at 96.

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McDonald & Baas, PLLC

a plaintiff has fallen and injured themselves. It almost guarantees the misperception that, even for *force majeure* events, fault must be allocated to *some* defendant.

That *force majeure* events do not by themselves trigger a duty of landowners is the law in Michigan. Cases too numerous to count have reiterated that Michigan winters create open and obvious icy, slippery conditions that create no duty for the landowner except under special, limited circumstances.[50] Yet, without the trial judge's gatekeeping function in deciding what the duty is and whether it has been breached as a matter of law, that is precisely what a jury would most likely conclude. Duty and breach, as established by the court, must precede the allocation of fault by the jury.

III. THE OPEN AND OBVIOUS DOCTRINE PRECEDED TORT REFORM AND WAS UPHELD BY THE STATUTE, NOT ABOLISHED BY OR SUBSUMED IN IT.

That allocating fault must await a determination by the trial court on duty by applying the Open and Obvious Doctrine is clearly supported by the fact that the Legislature did not address duty, general standard of care, the Open and Obvious Doctrine, its exceptions, or anything related to these concepts when it passed the comparative fault statute. This was a tacit acknowledgement of its continued place in tort law in this state, as is the fact that, it has even been almost 30 years since the *Lugo* decision, and *still* the Legislature has changed nothing.

In addition to the principles of *stare decisis* addressed at the outset of this brief, is hornbook law that when the Legislature passes a statute, it does not erase preceding common law unless it addresses the issue directly. This court has held that "The Legislature is presumed to know of the

[50] *Hoffner*, 492 Mich at 454 ("Michigan … is prone to winter," and "with winter comes snow and ice accumulations . . . ."); *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975); *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 332-333; 683 NW2d 573 (2004); *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002).

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existence of the common law when it acts."[51] Thus, common law stands unless directly abrogated or amended by the Legislature: "The common law remains in force until 'changed, amended or repealed.'" [52] Specifically, this Court has held that, "The abrogative effect of a statutory scheme is a question of legislative intent, and legislative amendment of the common law is not lightly presumed."[53] This Court further states that if the Legislature intends to overturn or modify the common law, it must say so, otherwise, it will be presumed that this was not intended. "The Legislature should speak in no uncertain terms when it exercises its authority to modify the common law."[54] The court will not construe a statute "to abrogate established common-law principles by implication."[55]

In the pertinent case of *Estate of Errett v A Forever Recovery, Inc*,[56] the Court of Appeals considered whether the comparative fault statute, specifically MCL 600.2957, MCL 600.2958, and MCL 600.6304(8), abrogated the common law wrongful-conduct rule. The wrongful-conduct rule bars a plaintiff's claim if it is based, in whole or in part, on his own illegal conduct. The Court of Appeals concluded:

> The Legislature's passage of comparative negligence statutes in 1995 did not abrogate the wrongful-conduct rule. When the Legislature enacted the statutes relevant to comparative negligence, it knew that the common-law wrongful-conduct rule was firmly embedded in Michigan jurisprudence. None of the relevant statutes expressly changes, amends, or repeals the rule. In fact, MCL 600.2957(3) ensures the rule's survival by stressing that codification of comparative negligence did not "eliminate or diminish" preexisting defenses or immunities. Thus, nothing in the language of the statutes clearly indicates the Legislature's intent to modify or nullify the wrongful-

[51] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).
[52] *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012), *quoting* Const 1963, art 3, § 7.
[53] *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010).
[54] *Dawe*, 485 Mich at 28.
[55] See *Lee v Detroit Med Ctr*, 285 Mich App 51, 67; 775 NW2d 326 (2009).
[56] *Estate of Errett v A Forever Recovery, Inc*, No 331521, 2017 Mich App LEXIS 889, at *13 (Mich App, May 30, 2017).

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> conduct rule, and we decline to construe the statutes to abrogate the rule by implication.[57]

Similarly, the Legislature did not abrogate the common law Open and Obvious Doctrine when it enacted the comparative fault statute. In fact, the Legislature specifically preserved the doctrine with the specific language, "Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections."[58]

There is thus nothing in the language of the comparative fault statute that indicates the Legislature's intent to nullify or modify the Open and Obvious doctrine. This Court should thus heed and honor the intent of the Legislature and leave established Michigan law as the status quo, unless otherwise altered by the Legislature.

IV. APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE DOES NOT CONTRADICT THE 2ND RESTATEMENT, BUT IT SHOULD NOT MATTER IF IT DID, NOR SHOULD THIS COURT DISCARD DECADES OF CONSISTENT MICHIGAN LAW IN FAVOR OF THE GENERALITIES PROPOSED IN THE 3RD RESTATEMENT.

While not unanimous, the majority of judicial commentary from this Court's past and present decisions appears to respect the 2nd Restatement and believe that it is being followed. Nevertheless, it is important to note that a Restatement cannot be in the binding law, has never been binding law and cannot possibly be binding law, by its very nature. Thus, whether or not it is adopted verbatim should not be a compelling argument in favor of abandoning the established laws of Michigan. For the same reasons, and even more so, the 3rd Restatement, with its unhelpfully broad generalizations that have been almost universally rejected by state supreme courts over the last ten years, should not be adopted by this Court.

[57] (Emphasis added). *Id* at *7.
[58] MCL 600.2957(3).

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Many past and present Michigan justices have explicitly concluded that Michigan's Open and Obvious Doctrine conforms with the spirit of the 2nd Restatement. In *Estate of Donna Livings*, for example, Justice Viviano summarized this relationship between Michigan law and the 1st and 2nd Restatements thus:

> Our open-and-obvious jurisprudence has long been informed by the Restatement. As far back as 1938, we began relying on the relevant sections and comments of the First Restatement. And we have often utilized the Second Restatement, since its appearance in 1965, going so far as to say that sections 343 and 343A had been "adopted" into our law. In fact, our caselaw has already incorporated one of [sic] other the illustrations listed in comment *f* to section 343A. Despite the fact that our current terminology, we have stressed that our law remains consistent with the Restatement approach. In *Lugo*, we stated that the special aspects test was 'consistent with section 343A of the Restatement, which indicates that a possessor of land is only liable to invitees for harm caused by an obvious condition if the possessor should "anticipate the harm.' Simply put, there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition.[59]

That Michigan common and statutory law governing premises liability is consistent with the principles of the 1st and 2nd Restatement are supported by a review of their history. By way of background, the 1st Restatement canvassed how various states around the country were handling premises liability cases from 1938 to 1965. Even then, the 1st Restatement recognized that there was only a duty to the landowner if he "had no reason to believe that [the invitee] will discover the condition or realize the risk." This is an early articulation of the lack of duty when a condition of the land is open, known or obvious. The 1st Restatement Torts, §343, stated:

> A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he:
>
> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

[59](Emphasis added). *Estate of Donna Livings,* 507 Mich at 343, citing *Bertrand* 449 Mich at 624 (applying Illustration 3) and *Hoffner*, 492 Mich at 479 (noting that the Supreme Court standard reflects case law that relied on these sections and remain consistent with those provisions).

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(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.

In 1965, the 2nd Restatement explicitly articulated that a landowner did not have a duty to an invitee if the hazard was "known or obvious." It went on, however, to carve out the concept that there are certain narrow exceptions to this scenario; ones that arose when "the possessor should anticipate the harm *despite* such knowledge or obviousness." (Emphasis added). Sections 343 and 343A, read together, made this clear:[60]

§ 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.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

[60] *Bertrand*, 449 Mich at 614; 2 Restatement Torts, 2d, § 343, cmt a; 2 Restatement Torts, 2d, § 343A, cmt a.

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This should be of no surprise, since, without *any* exceptions to the Open and Obvious Doctrine, it would apply *universally*, and there is no party or Justice that has expressed the opinion that, if a hazard is open and obvious, there can *never* be a duty, which is what would be the result if there were no exceptions at all to the doctrine.

Moreover, to the extent that Justice Michael Cavanagh's concurrence in *Lugo* diverges from the idea that Michigan's Open and Obvious Doctrine embraces the general concepts of the 2nd Restatement as expressed in 343 and 343A, *read together*, same is misguided for a number of reasons. First, the idea that §343 and §343A "must be read together…[but] that §343A needs to be read as its own rule, and not as an exception to §343" is not tenable because, read independently, they contradict each other. Section 343 says that a landowner *is liable* under any circumstances if he knew of an unreasonable risk and should realize that the invitee would not discover it. Section 343A says that the landowner is *not liable* if the danger is open and obvious unless the landlord should anticipate harm despite that fact. To be reconciled, these two clauses must thus be read together, with 343A functioning as an exception to 343.

Second, to the extent that Justice Cavanagh was wrestling in *Lugo* with whether liability should be viewed through the lens that there is no duty if the danger is open and obvious, versus the lens that there is automatically landowner duty that can then be erased by an invitee's contributory fault sidesteps the current law in Michigan. *There is no contributory fault in Michigan anymore*. Michigan has a statutory comparative fault system to which this Court must yield and, as briefed above, the statute picks up where the trial court's duty ends; after its establishment of duty and the general standard of care and its conclusion as a matter of law with regard to whether the duty and standard have been breached. In fact, §343 and §343A arguably pick up at the same point as Michigan's comparative fault statute; *after* fault has been addressed by the trial court. As Justice

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Cavanagh himself notes, an "imperative point to understand about Restatement §§ 343 and 343A is that they refer to the imposition of liability; *they do not discuss whether a duty exists*."[61]

The fact that the 2nd Restatement does not perfectly reflect the exact mechanism by which Michigan courts evaluate duty, breach, causation and damage, whether under the obsolete contributory fault system or the current comparative fault system, is a function of what must be acknowledged here. Restatements are just that; *restatements*. They are *summaries* of general legal concepts that have been discussed from every possible angle. The 2nd Restatement thus endeavors to describe in two paragraphs how 50 different states view these issues, stirring into one pot those with comparative fault, contributory fault, common law, statutory law or a mix of both. They cannot possibly fit all of these systems perfectly and they simply do not have to. That Restatements are not binding has long been acknowledged in Michigan. In *Yoder Co v Liberty Mut Ins Co,*[62] the Court explained that the "Restatement is not a statute, but an attempt to categorically recite the content of the common law." In *Estate of Donna Livings* this Court held, ("[W]e do not intend to signify that … the Restatement is somehow binding authority. The Restatement remains persuasive authority that we can look to, as we do here, in undertaking our duty to develop the common law." See also, *Rowe v Montgomery Ward & Co*,[63] "While we acknowledge the Restatement as persuasive authority on the subject of contracts, this Court is not, nor is any other court, bound to follow any of the rules set out in the Restatement."

This is why the Restatements, while useful for law school textbooks and those who write legal commentaries about them, cannot be binding. They are not law. Nothing makes this more apparent than the 2012 publishing of the 3rd Restatement, which widens the lens even farther as to make the

[61](Emphasis added). *Lugo*, 464 Mich at 531.
[62] *Yoder Co v Liberty Mut Ins Co*, 92 Mich App 386, 390; 284 NW2d 810 (1979).
[63] *Rowe v Montgomery Ward,* 437 Mich 627, 652; 473 NW2d 268 (1991).

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most general of statements with regard to premises liability; one so general that precious few courts have embraced the 3rd Restatement in the ten years since it was published.[64] The 3rd Restatement retreats to a supreme generalization of tort law in the country, without regard to whether a particular state has a comparative fault statute, contributory fault statute or no statute at all. It states in pertinent part:

> §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:
>
> (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.[65]

In fact, it arguably suggests that there is an "automatic" duty by the landowner in any circumstances and, as briefed above in detail, this is simply not correct law in this state.

There is no reason to follow the 3rd Restatement and ample reason to avoid it. This Court should explicitly reject the 3rd Restatement.

V. THE INSURANCE INDUSTRY CANNOT UNDERWRITE RISK IF EVERY JURY DECIDES DUTY DIFFERENTLY.

Another compelling reason to maintain established Michigan law and to reject the notion that duty should be established by individual juries is that altering the law makes it difficult for small businesses to know and meet their legal obligations and thus impossible for their insurers to assess

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[64] Instead, in 2018, Public Act 520 was passed by the Michigan Legislature. It included an express provision that the Restatement governing liability could not be followed unless it was specifically expressed in a statute: "In an action brought in a court in this state, the court shall not apply a principle from the American Law Institute's "Restatement of the Law, Liability Insurance" in ruling on an issue in the case unless the principle is clearly expressed in a statute of this state, the common law, or case law precedent of this state."

[65] Rest 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 51.

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McDonald & Baas, PLLC

risk. Without an accurate assessment of risk, insurers cannot pass savings on to their insureds in the form of reduced premiums, because their underwriting analysis necessarily has to take that uncertainty into account. Without affordable insurance, there is harm to both small businesses and their insurers, both of whom support the economy of this state.

Insurers are not guarantors of any unfortunate event that causes injury. They provide a service to Michigan businesses by spreading risk amongst pools of businesses to ensure that individual liabilities can be covered because they are distributed amongst the larger pool of insureds. Said another way, insurance equalizes the known, but unpredictably-distributed costs of liability in the United States, a litigation-centric country. By evaluating and distributing risks this way, insurers allow Michigan businesses to undertake work that would be impossible if the associated risks had to be borne by the individual business owner.

The way that insurers provide insurance products thus requires the application of actuarial principles to estimate risks in relation to premiums. This is the underwriting process. "Underwriting is the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. The risk assessment task of underwriting is typically conducted prior to the issuance of an insurance policy to allow the insurer to ascertain the probability of its incurring liability for any loss that the insured might sustain and, therefore, whether it wishes to assume the risk of that loss."[66]

To the extent that a state's legal systems are unreliable or inconsistent, the evaluation of risk has to take that into account. To the extent that they are stable and consistent, savings can be passed on to policyholders. "When the 'event' intended to be covered cannot easily be fixed and the liability for the consequent injury extends long into the future, often well after expiration of the policy,

[66] (Emphasis added). *AJT Props v Lexington Ins Co*, 26 Pa D & C 5th 302, 314-15 (CP, 2012).

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Novara Tesija Catenacci
McDonald & Baas, PLLC

considerations of inflation, upward spiraling jury awards, and legislative and judicial adoption of newly developing concepts of tort law mean that actuarial factors, including fixing premium rates and establishing adequate reserves, are highly speculative. The result, logically, is the establishment of a premium rate schedule sufficiently high to accommodate 'worst scenario' jury verdicts returned years after the error, omission, or negligent act."[67]

To give a practical example, the typical underwriting process requires an application and often involves a telephone or personal interview with the applicant as to the type of business and safety measures and features in place. Without coherent, consistent and predictable articulation of legal duty, however, the business owner has to guess what measures he has to take to protect invitees against known and unknown hazards, whether it be a sudden blizzard or a crack in the pavement. This uncertainty makes it impossible for insurers to assess if those safety efforts would be sufficient to satisfy legal duty in Michigan. This necessarily results in a higher premium, to ensure there is a sufficient pool for claims. These premiums may prove prohibitive for some businesses, which will not be able to operate uninsured or could otherwise go bankrupt if an uninsured claim is made. This is not good for Michigan.

Finally, not only does the predictability of the law matter for future policy premiums, it matters for existing policies. All existing policies were underwritten in reliance on the stable laws established by this Court over decades of consistent application of the Open and Obvious Doctrine. Premiums were set based on duty being established and evaluated in conformity with the doctrine. There is no way to retroactively change premiums based on a paradigm shift in the law, which leaves both policyholders and insurers in an unintended predicament that harms both; the premiums charged are likely insufficient to meet the claims that would result if this Court discarded the law in place.

[67] (Emphasis added). *Stine v Continental Cas Co*, 419 Mich 89, 99; 349 NW2d 127 (1984).

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McDonald & Baas, PLLC

This Court should heed the words of the Massachusetts Supreme Court: "Insurers are entitled to rely on existing law in managing policies and claims. Policyholders likewise can be charged with such knowledge. A contract of insurance contemplates risks according to the law at the time of its making. Absent an important reason to do so, we do not disturb retroactively the contractual arrangements of the insurer and the insured."[68] This Court should heed these compelling reasons and leave the present law as is. In the long run, public policy is best served by adhering to the consistent application of law.

RELIEF REQUESTED

For the reasons set forth above, it is unnecessary for the Court to rewrite state law at this time. *Amici* urge the Court to affirm the decisions of the Court of Appeals and the trial court's grant of summary disposition in favor of the Defendant.

Respectfully submitted,

NOVARA TESIJA CATENACCI McDONALD
& BAAS, PLLC

/s/ Karen Libertiny Ludden
KAREN LIBERTINY LUDDEN (P48815)
Attorney for Acuity Insurance and
Insurance Alliance of Michigan
888 West Big Beaver, 6th Floor
Troy, Michigan 48084
(248) 354-0380 / Fax: (248) 250-9927
kll@novaralaw.com

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[68] *Tamerlane Corp v Warwick Ins Co*, 412 Mass 486, 490-91; 590 NE2d 191 (1992) (emphasis added).