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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

RENEE PINSKY, and DAVID PINSKY,

Plaintiffs/Appellants,

v

KROGER CO OF MICHIGAN,

Defendant/Appellee.

Supreme Court Case No. 163430

Court of Appeals Case No. 351025

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

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PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEFING IN SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

This Court has asked the parties to file supplemental briefing in this premises liability case in order to address four questions. The first two questions concern whether the lower courts erred by holding as a matter of law that liability was precluded in this premises case on open and obvious grounds under *Lugo v Ameritech Corp,* 464 Mich App 512, 629 NW2d 384 (2001). The third question asks whether liability should be precluded in this case under *Lugo* even when a land possessor "should anticipate the harm" as contemplated by Restatement Torts, 2d, §343A, given this Court's holding in *Livings v Sage's Inv Group, LLC,* 507 Mich 328, 968 NW2d 397 (2021). The fourth question asks whether "the open and obvious nature of a condition should be a consideration for the jury in assessing the comparative fault of the parties" as provided by Restatement Torts, 3d.

Pinsky contends that the hazard posed by the cable that was used to close the aisle in question was not open and obvious upon casual inspection and/or it was unreasonably dangerous for store patrons. Alternatively, she contends that the Restatement Torts, 2d, §343A, should be applied because Kroger should have anticipated the harm when it created the hazard even if it was an open and obvious and without special aspects. She also believes that the alleged "open and obvious nature of the condition" should be a jury consideration in assessing comparative fault of the parties under Restatement Torts, 3d.

Here, the Court of Appeals erred by holding that the cable used to close the aisle was an open and obvious hazard. It also erred by concluding that it was not unreasonably dangerous for store patrons that encountered it. The parties' disagreement over how the cable was strung across the aisle was a material factual dispute relevant to both of those

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holdings. The comparison to routine trip and fall scenarios that are not likely to result in harm, much less severe harm, was mistaken where, as in this case, the hazard created a "trip-wire" in an aisle used for ingress/egress by store patrons. Accordingly, the trial court's decision to deny summary disposition should never have been reversed based on *Lugo*.

Moreover, even assuming that the "open and obvious" and "special aspects" tests under *Lugo* were correctly applied below, the lower courts nonetheless erred because that holding conflicts with this Court's decision to apply Restatement Torts 2d, §343A in *Livings*. In *Livings*, this Court applied an illustration to comment f to Restatement Torts 2d, §343A. Here, there is also an illustration that demonstrates that it should be applied to situations where the possessor of land should anticipate that entrants on the land will be distracted.[1] This Court should apply the "distraction" illustration given the facts presented in this case because Kroger should have anticipated harm to its patrons when it created the hazard.

Alternatively, this Court should overrule the "special aspects" test that was created 20 years ago in *Lugo* because it is not consistent with the comparative negligence rules adopted by the Legislature in Michigan. See MCL 600.2959. The jury should consider whether the danger posed by the condition in question was open and obvious when assessing the comparative fault of the parties as contemplated by Restatement Torts, 3d. In so holding, this Court would affirm that both possessors of land and entrants on land must use reasonable care to avoid the harm that can be caused by conditions on the land. It would further ensure that fault would be apportioned accordingly for injuries sustained.

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[1]See illustration 2 to comment of the Restatement, Torts 2d, §343A, which describes a scenario where a weighing scale protrudes into the aisle but is not seen because goods displayed in that same area attract the customer's attention instead.

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BRIEF FACTUAL DISCUSSION

This premises liability case arises from serious injuries that Dr. Renee Pinsky suffered on February 12, 2018, when she tripped on a cable that was strung through a display cart in her local Kroger store in a "make-shift" attempt to close the aisle in question. For brevity's sake, Pinsky will not repeat those facts she previously stated in seeking leave to appeal. But, a few points must be mentioned that are relevant to determining whether the hazard posed by the cable used to close the aisle in question was open and obvious and/or unreasonably dangerous – and whether the harm should have been anticipated.

- The aisle where Pinsky was injured is wider than other checkout lanes as it is located between a checkout counter and the cigarette display.[2]
- That aisle allows customers to queue up next to the checkout counter but it also provides ingress/egress to the store by the cigarette area.[3]
- The videotape shows a store employee moving the baby formula display cart and stringing the cable from the checkout counter through the baby formula display cart and attaching it to the cigarette display.[4]
- The baby formula display cart had large color photographs on it that showed the faces of babies as it contained canisters of baby formula.[5]
- The photographs taken immediately after the incident depict the cable running through the lower section of that baby formula display cart.[6]

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[2]Compare PL-AT Appx 90, Ex. 10, Pinsky's Exemplar Photograph showing aisle between lanes 11 and 12 and PL-AT Appx 94, Ex.12, Surveillance Video showing the narrower width of the area provided for customers queuing up for checkout in lane 11.

[3]PL-AT, Ex. 10, Pinsky's Exemplar Photograph; see also DF-AE Kroger's Appx 003 and 005, Ex. A, Kroger's Exemplar Photograph, and Ex. B, Second Photograph.

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

[5]PL-AT Appx 91, Ex. 10, Pinsky's Exemplar Photograph; see also DF-AE Kroger's Appx 003, Ex. A, Kroger's Exemplar Photograph.

[6]PL-AT Appx 91, Ex. 9, Post-Accident Photographs; see also DF-AE Kroger Appx 007, Ex. C, Post-Accident Photographs.

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- Photographs also showed that Pinsky had a straight-line cut/abrasion below her right knee consistent with the cable being strung from the lower section of the baby formula display cart to the cigarette display.[7]

- Pinsky was navigating around the baby formula display cart when she tripped and fell down. She was "aware of the [baby formula display cart]" and she "walked to the side of the cart". But, she "was not aware of anything blocking the area to the side of [that display cart]".[8]

- The aisle was blocked off only by a thin white cable running from the checkout counter to the baby formula display cart and then to the cigarette display. There was no sign attached to the cable indicating that ingress/egress to the store was closed near the cigarette display.[9]

In answering the leave application, Kroger asserted that "[t]he cable went through the upper tier of the two-tier basket."[10] In support, Kroger relied on an "exemplar" photograph taken after the incident occurred which showed the cable strung through that upper basket. Pinsky, in contrast, described the same cable as strung through the lower basket of the display cart.[11] She also provided an exemplar photograph that supported her accounting and a photograph taken immediately after the incident occurred that showed the cable strung through the lower (not upper) section of the baby formula display cart.[12]

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[7]PL-AT Appx 93, Ex. 11, Photograph of Pinsky's Right Leg.

[8]PL-At Appx 25, Ex. 6, Pinsky Dep Tr, at pp 26-28.

[9]PL-AT Appx 91, Ex. 10, Pinsky's Exemplar Photograph; DF-AE Kroger's Appx 003, Ex. A, Kroger's Exemplar Photograph; PL-AT Appx 91, Ex. 9, Post-Accident Photographs; and DF-AE Kroger Appx 007, Ex. C, Post-Accident Photographs.

[10]See Kroger's Answer to Pinsky's Leave Application, at p 4.

[11]See Pinsky's Application for Leave to Appeal, at p 3.

[12]See Pinsky's Application for Leave to Appeal, at p 3.

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STANDARD OF REVIEW

This Court has asked the parties to address whether material fact questions existed in this case on issues including whether the cable used to close the aisle in question created a hazard for patrons that was open and obvious and/or unreasonably dangerous. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507, 717 NW2d 855 (2006). Simply put, a summary disposition motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423, 864 NW2d 609 (2014). A trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280, 807 NW2d 407 (2011).

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ARGUMENT

I. SUMMARY DISPOSITION WAS NOT WARRANTED IN THIS PREMISES CASE BECAUSE MATERIAL FACT QUESTIONS EXIST REGARDING WHETHER THE CABLE THAT KROGER USED TO CREATE A MAKE-SHIFT BARRIER THAT CLOSED THE AISLE IN QUESTION WAS AN OPEN AND OBVIOUS HAZARD.

In reversing the trial court's decision to deny summary disposition on open and obvious grounds in this premises case, the Court of Appeals observed that "[a] checkout lane closed by a cable is an everyday occurrence that a reasonably prudent person would be expected to see and avoid by choosing an alternative route." See slip op at 4. Without question, checkout lanes in a grocery store are often closed and store patrons accordingly are directed to use other available open checkout lanes. But, the make-shift barrier that was erected in this grocery store was not typical of how most checkout lanes are closed.

First of all, the aisle where this incident occurred was not merely a checkout lane as it provided enough space for customers to also use it for ingress/egress to the shopping areas. Simply put, it was wider than a normal checkout lane. It was not positioned immediately adjacent to another checkout lane; instead, it was by the cigarette display area. Checkout lanes flow in one direction – towards the exit. But, aisles that are wider than check out lanes are often used by store patrons to access the store's shopping areas.

By labeling this aisle as a "checkout lane", the Court of Appeals obscured the fact that it was actually a dual-purpose area. Dr. Pinsky was using it as intended when she walked back towards the shopping area so she could replace the torn bag of flour for which she paid. Respectfully, this Court's order granting oral argument in this case does the same thing as it also identifies the aisle in question as a "checkout lane." While it is correct that the aisle includes a checkout lane, i.e., lane 12, it was not exclusively a checkout lane.

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Second, the manner in which the Kroger store employee closed off this aisle was by no means typical, much less an "everyday occurrence" that is commonly seen in grocery stores. Closing off a narrow checkout lane by connecting a chain at or near waist level from one checkout counter to an adjacent checkout counter is typical. So too is closing off a grocery store aisle by using those portable stanchion posts with a retractable barrier strap at or near waist level. But, using a thin white cable that stretched from the closest checkout counter to the cigarette display area via a baby formula display cart is by no means typical.

Unlike a chain at waist-level closing off a checkout lane, the cable used in this case was neither easy to see nor was it positioned high enough to safely impede patrons trying to use the aisle in question. It was instead effectively a "trip-wire" for such patrons. And, it was located in an area where customers would not expect it to be positioned. There are only so many ways to access the shopping areas. This aisle is one of them. To safely block it off so patrons would not use it, something more than a make-shift barrier was needed.

Third, the use of the baby formula display cart as the centerpiece of the make-shift barrier made the presence of the thin white cable used as a barrier less obvious to store patrons using the aisle in question. The fact that the display cart was placed in the middle of the aisle forced patrons to focus their attention on maneuvering around it. The fact that it had faces of babies plastered all over it naturally created a distraction for store patrons that made it less likely that they would see that the aisle was closed via a thin white cable. Display carts are designed to attract the attention of the store's patrons. Pictures of babies are pictures of babies. Presumably most every store patron will enjoy looking at them and some of those patrons will see the display and do as the store intended by buying formula.

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In Michigan, the danger posed by a condition on land is open and obvious only if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." [Emphasis added]. *Hoffner v Lanctoe,* 492 Mich 450, 461, 821 NW2d 88 (2012), citing *Joyce v Rubin*, 249 Mich App 231, 238, 642 NW2d 360 (2002) and *Novotney v Burger King Corp (On Remand),*198 Mich App 470, 474-475, 499 NW2d 379 (1993). The test "is an objective one that requires consideration whether a reasonable person in the same position would foresee the danger, rather than whether the particular plaintiff knew that the condition was hazardous." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11, 574 NW2d 691 (1997); see also *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 5, 649 NW2d 392 (2002), citing *Joyce*, supra.

Here, the Court of Appeals did not faithfully apply the objective test for determining whether the make-shift barrier that Kroger erected was an open and obvious hazard. It relied almost solely on Pinsky's own subjective testimony in this case and it misinterpreted her testimony about what she was doing as she walked back in. Further, it placed undue emphasis on post-accident photographs taken solely to document what she tripped on.

As stated in seeking leave to appeal, the Court of Appeals focused on Dr. Pinsky's testimony about whether she could see the cable in photographs taken after the incident occurred. But, whether she was able to see the cable in subsequent close-up photographs is not the same as asking if she should have seen it upon casual inspection as she navigated around the baby formula display cart. Similarly, the exemplar photographs are misleading because the viewer already knows that the cable was what Pinsky tripped on.

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Nonetheless, the Court of Appeals focused myopically on Pinsky's testimony that she was "'looking ahead into the store'" to conclude she "was not looking" where she was walking before she tripped and fell down. It ignored her testimony that she was trying to navigate around the baby formula display cart. That testimony demonstrated that she was focused on that display cart. She even correctly recalled that it was for baby formula. But, she did not see the cable strung through the display cart and stretched across the aisle.

In addition, the Court of Appeals ignored material fact questions that existed in this case regarding how the make-shift barrier was constructed. Specifically, it ignored the parties' dispute regarding how the cable was strung through the baby formula display cart. It is an important factual point. If the cable was strung through the upper basket of the display cart, the make-shift barrier that it created was more similar to a waist-high chain used to close adjacent checkout lanes or a retractable strap used to close of an store aisle. But, if it was below knee level, as is suggested by the marks on Pinsky's lower right leg, then the make-shift barrier that was erected was effectively a "trip wire" for store patrons.

The Court of Appeals faced a similar question in a case where a 12 year old boy was seriously injured while riding his bicycle when he encountered a four foot high chain installed by the defendants to block an existing path that ran from its parking lot to a nearby municipal hiking/biking trail. In *Pippin v Atallah*, 245 Mich App 136, 626 NW2d 911 (2001), the Court of Appeals concluded that the question of whether the chain installed by the defendants presented an open and obvious hazard was one for the jury's consideration.

In *Pippin*, there was testimony that "the chains were inherently difficult to see because they were silver, relatively small in width, and were stretched across an open setting where one's visual attention would be necessarily fixed on objects further in the

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distance". Clearly, the same could be said about the cable in this case given that Pinsky did not see it until she tripped on it as she was looking forward into the store and she attempting to navigate around the baby formula display cart in the aisle. As in *Pippin*, there was nothing, besides the cable itself, that "create[d] the expectation of such an obstacle".

The Court of Appeals should have reached the same conclusion in this premises case as it did in *Pippin*. Accordingly, this Court should reverse the Court of Appeals' holding that the hazard that this make-shift barrier posed to store patrons was open and obvious. The jury should make that determination after reviewing all the evidence at trial.

II. SUMMARY DISPOSITION WAS NOT WARRANTED IN THIS PREMISES CASE BECAUSE MATERIAL FACT QUESTIONS EXIST REGARDING WHETHER THE CABLE THAT KROGER USED TO CREATE A MAKE-SHIFT BARRIER THAT CLOSED THE AISLE IN QUESTION WAS UNREASONABLY DANGEROUS, EVEN IF IT WAS OPEN AND OBVIOUS, AS IT ALSO CREATED A UNIQUELY HIGH LIKELIHOOD OF HARM OR SEVERITY OF HARM FOR STORE PATRONS.

The Court of Appeals also concluded that "the record does not support a finding that the cable posed an unreasonable risk of severe harm." Slip op at 4. It cited *Lugo* as support for that holding. It further stated that "[e]ven if it did, that alone does not constitute a special aspect warranting imposition of liability upon the defendant for the open and obvious condition." But, in so holding, the Court of Appeals misinterpreted what this Court previously said in *Lugo* when it created the "special aspects" test. It thus unduly elevated the test for whether the cable strung across the aisle created an unreasonable risk of harm.

In *Lugo*, this Court modified how the open and obvious danger doctrine applied to premises liability claims in Michigan. In so doing, it deviated from legal standards that this Court previously applied and it created a new test for open and obvious hazards. Under

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Lugo, liability exists for open and obvious hazards only if there are"special aspects" that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided."

But, even with its holding in *Lugo*, this Court seemingly agreed that both potential for harm and degree of harm may be special aspects that render an open and obvious condition unreasonably dangerous. Potential for harm was hardly a new consideration. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 537 NW2d 185 (1995), this Court used the term "special aspects" to describe how an oddly configured doorway, sidewalk, and step down created a material fact question regarding whether it posed an unreasonable risk of harm.

Severity of harm, in contrast, was not previously identified by this Court as a consideration in determining whether a duty existed. It was only later in *Hoffner v Lanctoe,* 492 Mich 450, 461, 821 NW2d 88 (2012) that this Court elevated the role of severity of harm so that the likelihood of harm is no longer considered.[13] No court before *Lugo* had said that degree of harm was the key to whether the open and obvious defense applied. In *Bertrand,* supra, likelihood of harm was the sole consideration, not the severity of harm.

Now, as seen in this case, severity of harm has become critical to determining whether the condition posed an unreasonable risk of harm. Without severe harm or death, there are no special aspects under *Lugo*. The special aspects test no longer asks whether there is a "uniquely high likelihood" of harm. It asks only whether the condition posed "a

[13]In *Hoffner*, supra, this Court stated that an open and obvious condition is unreasonably dangerous only when it "presents an extremely high risk of severe harm or death". 464 Mich at 462. As support, it cited a footnote in *Lugo* that used that phrasing. 464 Mich at 518, n 2. Since then, the special aspects test has required not merely "a uniquely high likelihood of harm or severe harm" as stated in *Lugo*, but rather, an open and obvious hazard that posed "an extremely high risk of severe harm or death". In *Lugo*, however, that key phrase was used only to defend the majority's view that degree of harm was relevant in determining whether special aspects existed. Id.

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substantial risk of death or severe injury." Slip op at 4. As such, the test for open and obvious hazards no longer resembles what this Court stated in *Lugo*, much less *Bertrand*.

Here, the Court of Appeals erred by concluding that the record did not show that the cable posed an "unreasonable risk of harm" because that holding ignored evidence that it created a "uniquely high likelihood of harm" as discussed in *Lugo*. It also mistakenly held that the cable did not present a uniquely high likelihood of severe harm for store patrons.

A. The cable used to close the aisle was unreasonably dangerous because it posed a "uniquely high likelihood of harm" for store patrons.

The Court of Appeals erred by holding as a matter of law that the cable used to close the aisle was not unreasonably dangerous as there was a uniquely high likelihood of harm. In *Lugo*, this Court held that a viable premises claim exists in Michigan "if there are special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided". [Emphasis added]. It did not say that a condition is unreasonably dangerous only "if it posed 'a substantial risk of death or severe injury'", as the Court of Appeals concluded in its unpublished opinion, citing *Lugo*, 464 Mich at 518. Slip op at 4-5.

Under *Lugo*, a condition will be considered unreasonably dangerous, if, as in this case, it is highly likely that patrons will be injured. Setting up a tripping hazard is a perfect example of why a condition may be unreasonably dangerous even if it is not certain to cause severe harm. If the likelihood remains high that patrons will encounter the condition, then it was unreasonably dangerous, even if it was also likely that no one would be killed. Here, material fact questions clearly existed concerning whether the cable strung across the aisle in question created a uniquely high likelihood that store patrons would be harmed.

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Simply put, the Court of Appeals wrongly concluded that "[a] checkout lane closed by a cable is an everyday occurrence that a reasonably prudent person would be expected to see and avoid by choosing an alternative route." Id, slip op at 4. But, in truth, this hazard was not the same one typically presented when a checkout lane is closed. It was instead a makeshift attempt to close off not only the checkout lane but an aisle used by patrons. As such, it was a textbook case for "special-aspects" much like the oddly configured walkway in *Bertrand.* This Court held that there was sufficient evidence in *Bertrand* to create a material fact question regarding unreasonable risk of harm. The same is true in this case. It should not have been dismissed on open and obvious grounds under *Lugo*.

B. The cable used to close the aisle was unreasonably dangerous as it also presented a "uniquely high likelihood of severe harm" for patrons.

The tripping hazard in this case also is not comparable to a defect in the surface of the land as in *Lugo* where the plaintiff fell after he encountered a pothole in a parking lot. Here, there was a cable strung across a store aisle below knee level. When Pinsky ran into it, she went down hard because it took her legs out from under her body. She injured her nose and face when she fell flat on the ground. She also shattered her right elbow because she could not effectively brace herself when she fell to the ground. While she was fortunate not to suffer a traumatic brain injury (or death) due to the hard fall that she took when she was upended, material fact questions nonetheless exist regarding whether the condition was unreasonably dangerous due to the likelihood that patrons would be severely harmed.

Effectively, *Lugo* and much of its progeny have defined the likelihood of harm in a way that only the most egregious defects - the thirty-foot deep hole example in *Lugo* – need to be remedied. But, the test that was adopted in *Lugo* does not compel such results.

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Here, the Court of Appeals erred by holding that severe harm was not a likely result of the store employee creating a makeshift barrier across an aisle that was used by store patrons. To the extent that post-Lugo cases have misinterpreted its holding, this Court should clarify or revisit *Lugo* because the special aspects test now applied to open and obvious hazards in Michigan is not consistent with what this Court actually said in *Lugo*, much less *Bertrand*.

III. LIABILITY SHOULD NOT BE PRECLUDED IN THIS PREMISES CASE ON OPEN AND OBVIOUS GROUNDS UNDER *LUGO* BECAUSE KROGER SHOULD HAVE ANTICIPATED THE HARM AS CONTEMPLATED BY RESTATEMENT TORTS 2D §343A AND DISCUSSED IN *LIVINGS* WHEN IT STRUNG CABLE ACROSS THE AISLE IN QUESTION USING A DISPLAY CART THAT ATTRACTED ATTENTION.

As the Court of Appeals noted below, Michigan law has traditionally held that "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." Slip op at 3, citing *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96, 485 NW2d 676 (1992). [Emphasis added]. Unfortunately, there was no further discussion below of that caveat to the open and obvious danger doctrine in Michigan, presumably because the "special aspects" test formulated in *Lugo* was read as supplanting Restatement Torts 2d, §343A.

In *Riddle*, supra, this Court relied upon Restatement Torts 2d, §343A to support its conclusion that liability may exist in cases where the defendant "should anticipate the harm despite knowledge of it on behalf of [its patron]." In *Bertrand*, supra, this Court also applied Restatement Torts 2d, §343A as an exception to the open and obvious danger doctrine in Michigan. But, in *Lugo*, the special aspects test was created for open and obvious hazards

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without the majority clearly addressing how Restatement Torts 2d, §343A should be applied or whether it should be limited to factual scenarios like that presented in *Bertrand*.

After *Lugo* was decided, subsequent appellate court decisions applied *Lugo* as if it completely supplanted the Restatement Torts 2d §343A. While often quoting from *Riddle*, as the Court of Appeals did below, or *Bertrand*, the special aspects test from *Lugo* was rotely applied in subsequent open and obvious cases while the concept of "anticipated harm" under Restatement Torts 2d, §343A was mentioned, but then simply disregarded. See *Joyce,* 249 Mich App at 238 (quoting the same provision on anticipated harm from *Riddle* as caveat to open and obvious before applying special aspects test under *Lugo*).

In *Livings v Sage's Investment Group, LLC,* 507 Mich 328, 345, 968 NW2d 397 (2021), this Court correctly observed that it had previously relied upon the Restatement Torts 2d, §343A in *Bertrand.*[14] It also recognized that the special aspects test from *Lugo* had been applied too restrictively in *Livings*, and by doing so, the lower courts had ignored Restatement Torts 2d, §343A. Accordingly, this Court in *Livings* applied Restatement Torts 2d, §343A not only by quoting comment f – the same comment applied in *Bertrand* – but by applying a different illustration provided under comment f of Restatement Torts 2d, §343A. See *Livings*, supra, at 341 (applying illustration 5 because "it maps almost perfectly onto the current case" and it "appears to provide a reasonable approach to this issue").

[14]In *Bertrand*, this Court applied illustration 3 under comment f to Restatement Torts 2d, §343A, to make the point that some open and obvious hazards still present an unreasonable risk of harm from which invitees must be protected. Id, 449 Mich at 624.

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As in *Livings* (and *Bertrand*), there is an illustration from Restatement Torts 2d, §343A that applies to the factual circumstances in this case. Here, the relevant illustration under Restatement Torts 2d, §343A is Illustration 2, which states the following:

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

Illustration 2 basically mirrors what happened in this case. Here, a cable strung across an aisle impeded store patrons from safely walking. In Illustration 2, a weighing scale protruded into an aisle of a store and created an open and obvious tripping hazard.

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

Here, Pinsky similarly testified that she was looking at the display cart for baby formula when she tripped and fell down. In short, she too was focused on displayed goods. Consequently, Kroger should have anticipated that she would be harmed by its makeshift attempt to close off the aisle with a wire strung up below knee level through its display cart.

The illustrations under comment f to Restatement Torts 2d, §343A also have been applied in other jurisdictions. In *Kentucky River Med Center v McIntosh*, 319 SW3d 385 (2010). the Kentucky Supreme Court addressed a similar question when it refused to preclude liability on open and obvious grounds by applying Restatement Torts 2d, §343A. In short, the Court held that the defendant hospital should have anticipated the harm

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despite the open and obvious nature of the hazard. In so holding, the Kentucky Supreme Court relied on its own earlier precedent discussing Illustration 2 under comment f to Rest Torts 2d 343A. See *Horne v Precision Cars of Lexington, Inc*, 170 SW3d 364, 370 (2005).

In *Horne*, the defendant auto dealership parked a Pontiac Firebird that was on display outside so that it partially obscured a concrete parking barrier in the parking lot. The plaintiff was injured while he was looking at the Pontiac Firebird because he tripped on the parking barrier that stuck out from underneath it as he walked around the Firebird. If parked correctly, the parking barrier would not have posed a tripping hazard for patrons.

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

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

In reversing the trial court's decision, the Court of Appeals failed to address whether Kroger should have anticipated harm to its patrons when it created a tripping hazard by

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stringing a cable across an aisle using a display cart intended to draw its patrons' attention. Thus, the Court of Appeals erred by concluding that the tripping hazard in this case was open and obvious because it did not consider whether the display cart was a distraction.

To the extent that Kroger contends that Pinsky did not testify that she was distracted by the baby formula display cart as she navigated around it, it has misread her testimony. To the extent that Kroger also contends that this argument was not preserved below, it is mistaken as Pinsky has consistently argued that the cable strung across the aisle was not open and obvious on casual inspection and distraction is just part of that same argument.

IV. THIS COURT SHOULD ADOPT THE RESTATEMENT TORTS 3D, §51, AS THE OPEN AND OBVIOUS NATURE OF THE HAZARD SHOULD BE A JURY CONSIDERATION IN ASSESSING THE PARTIES' COMPARATIVE FAULT AS IS REQUIRED BY EXISTING COMPARATIVE NEGLIGENCE RULES IN MICHIGAN.

The Court of Appeals' holding in this premises liability case is troubling in large part because Kroger created the make-shift barrier that caused Pinsky to trip and fall down. Even if the hazard posed by the cable strung across the aisle using the display cart was open and obvious, which Pinsky contends it was not, there is something fundamentally wrong with a doctrine that immunizes a business from liability for hazards it created for its patrons. It is also hard to reconcile that result with the Legislature's decision to hold all parties responsible to the extent that their fault caused the resulting harm. MCL 600.2959.

As thing currently stand in Michigan (under *Lugo*), individuals always have a duty to use reasonable care to protect themselves from harm. Business owners, in contrast, owe no duty of use due care if the hazard is open and obvious unless special aspects can be shown, i.e., the hazard was "effectively unavoidable" or it posed an "extremely high risk of severe harm". Such a forgiving standard protects the business owner that does not

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address open and obvious hazards that could be easily remedied. And, as in this case, it protects a business owner that created a hazard for its own patrons. As a consequence, it clearly undercuts the long-standing tort law goal of ensuring that dangerous conditions on land be addressed by possessors of land because they are best positioned to do so.

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

> [A] land possessor owes a duty of reasonable care to entrants on the land with regard to:
>
> (a) conduct by the land possessor that creates risks to entrants on the land;
>
> (b) artificial conditions on the land that pose risks to entrants on the land;
>
> (c) natural conditions on the land that pose risks to entrants on the land; and
>
> (d) other risks to entrants on the land when any of the affirmative duties ... is applicable.

Here, the first 2 subsections undoubtedly apply to the factual circumstances in this case as Kroger created the hazard and/or it was an artificial, i.e., not natural, condition on land. Clearly, a duty would be owed in this case if the Restatement Torts 3d, §51 was applied.

The open and obvious nature of the dangerous condition also would be considered. While it would not automatically preclude liability (as it largely does now under *Lugo*), it would remain part of the assessment of whether reasonable care was employed by the possessor of land. See Restatement Torts 3d, §51, comment k, which states the following:

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> . . . . Known or obvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves. Nevertheless, despite the opportunity of entrants to avoid an open and obvious risk, in some circumstances a residual risk will remain. **Land possessors have a duty of reasonable care with regard to those residual risks. Thus, the fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability.** . . . .
>
> An entrant who encounters an obviously dangerous condition and who fails to exercise reasonable self-protective care is contributorily negligent. Because of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence. **The rule that land possessors owe no duty with regard to open and obvious dangers sits more comfortably – if not entirely congruently – with the older rule of contributory negligence as a bar to recovery.** . . . . [Emphasis added].

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

The Restatement Torts 3d, §51 has already been adopted in several jurisdictions. In *Foster v Costco Wholesale Corp*, 291 P3d 150, 153 (2012), the Nevada Supreme Court adopted the approach taken by Restatement Torts 3d, §51 in a case where a customer tripped over the corner of a wooden pallet that was partially obscured by a box. The Court held that "a landowner owes a duty of reasonable care to all entrants on land for risks on its property" and "the fact that a dangerous condition is open and obvious does not automatically shield a landowner from liability but rather bears on whether the landowner exercised reasonable care with respect to that condition and issue of comparative fault."

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Similarly, in *Steigman v Outrigger Enterprises, Inc*, 267 P3d 1238 (2011), the Hawaii Supreme Court rejected the open and obvious danger doctrine as a complete defense to liability in premises cases because that result would conflict with its comparative statutes. As in Michigan, the Hawaii Legislature eradicated contributory negligence almost 30 years ago when it adopted a modified comparative fault system so that fault would be apportioned between the parties unless the plaintiff's fault was greater than the defendants in which case no damages could be recovered. Hawaii Revised Statutes § 663-31 (1993).

In Michigan, the Legislature abolished contributory negligence in tort cases in 1996. See MCL 600.2958. Like Hawaii did, the Michigan Legislature adopted a modified comparative fault system. See MCL 600.2959. But, unlike Hawaii, Michigan's modified comparative fault statute precluded recovery of non-economic damages in cases where the plaintiff's fault was greater than that of the defendant, or the defendants, if aggregated.

Notwithstanding that legislative change in 1996, the appellate courts in Michigan continued to apply the open and obvious danger doctrine to preclude liability in premises cases. In support, the Michigan courts have relied on this Court's holding in *Riddle*, supra. But, *Riddle* was decided by this Court before the Michigan Legislature acted in 1996 by adopting its own version of a modified comparative fault system – one that barred recovery of non-economic loss damages by a plaintiff more than 50% at fault for his or her injuries.

In *Placek*, supra, this Court observed that the Michigan Legislature had the power to restore contributory negligence as a defense in tort cases. It similarly had the power to modify the comparative negligence system that *Placek* imposed in Michigan. In 1996, the Legislature did exactly as this Court suggested when it enacted MCL 600.2959, and thus,

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changed the modified comparative fault rules in Michigan to preclude recovery of damages for non-economic loss in cases where the plaintiff's fault exceeded that of the defendants.

Yet, *Riddle* has continued to be applied to premises cases in Michigan as if the Legislature never acted. *Placek* recognized that the Legislature could change the comparative fault rules. But, after it did, *Riddle* was not revisited to determine if its holding that the "duty element is 'fundamentally exclusive'" from the common law comparative negligence standard should be applied equally to statutory comparative negligence rules.

The commentators recognized in adopting Restatement Torts 3d, §51 – see comment k – that the open and obvious danger doctrine was a contributory negligence rule that was no longer justified in a comparative fault system when they stated the following:

> The rule that a land possessor was not subject to liability for any open and obvious danger is much easier to justify in an era when contributory negligence constituted a complete bar to recovery. An entrant who fails to take self-protective measures may be contributorily negligent and, if so, that would avoid any liability by the possessor. However, **such a rule cannot be justified after contributory negligence becomes a comparative negligence defense.** . . . [Emphasis added].

Simply put, the shift to comparative fault rules, whether legislatively or judicially, led to the reassessment of the balance between duty and breach under Restatement Torts 3d, §51.

Yet, the Michigan courts have refused to acknowledge in premises liability cases the changes that its Legislature made to tort law decades ago by adopting a modified comparative fault system. Instead, possessors of land in Michigan have enjoyed comparative fault rules that limited the right to recover damages without having to bear the same burden to use due care to ensure that entrants on land were protected from harm. This Court should now correct that unjust result by adopting Restatement Torts 3d, §51.

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CONCLUSION

This Court should reverse the Court of Appeals' holding that Pinsky's claim was precluded on open and obvious grounds. This Court also should revisit its decision in *Lugo* and overrule its "special aspects" test because it deviated unnecessarily from existing Michigan common law as stated in *Bertrand*. Alternatively, this Court should overrule Lugo because it is not consistent with comparative negligence rules in Michigan. In the 20 years since Lugo was adopted, no other jurisdictions have applied its "special-aspects" doctrine. Unlike *Lugo*, Restatement Torts 3d, §51 imposes a duty on all parties and holds all parties responsible. Such a result is consistent with justice and it is what the Legislature intended.

RELIEF REQUESTED

Plaintiffs-Appellants, Renee Pinsky and David Pinsky, respectfully request that this Honorable Court reverse the trial court's decision to deny summary disposition on open and obvious grounds under MCR 2.116(C)(10) and remand this case to the trial court for further proceedings including a jury trial as liability was not precluded in this premises case.

Respectfully submitted:

Dated: July 1, 2022

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