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STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,	Supreme Court No. 162907
Plaintiff-Appellant,	Court of Appeals No. 350220
v	Wayne County Circuit Court No. 18-003569-NO
F & E OIL, INC.,	
Defendant-Appellee.	

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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JURISDICTIONAL STATEMENT

The Michigan Association for Justice relies on this Court's February 4, 2022 MOAA order. (2/4/22 Order).

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QUESTIONS PRESENTED

I. **Whether *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001) and its progeny should be overruled because the "special aspects" rule was wrongly decided, has perpetuated the long-abolished doctrines of contributory negligence and assumption of risk and, accordingly, is inconsistent with Michigan's comparative negligence framework.**

II. **Whether this Court should abolish the open and obvious doctrine under 2 Restatement Torts, 2d, § 343A and hold, consistent with Restatement Torts, 3d, § 51, comment k, that the obviousness of a danger does not extinguish the possessor's duty, but is a factor for the jury to consider in determining the comparative fault of the parties.**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state.[1]

In *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328; 968 NW2d 397 (2021), this Court partially ameliorated the "special aspects" doctrine created in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). The *Livings* majority held that "a hazard can be deemed effectively unavoidable if the plaintiff confronted it to enter his or her place of employment for purposes of work." *Id* at 349. Chief Justice McCormack, joined by Justices Bernstein and Cavanagh, concurred, stating in part:

> I hope this Court will one day consider the legacy of *Lugo* and the special aspects doctrine. For now, the majority correctly determines that an open and obvious condition can be considered effectively unavoidable when an employee must confront it to go to work. Rather than continually finessing and refining this outlier doctrine, we should ask whether the Second Restatement's approach (as adopted by many of our sister jurisdictions) would provide more stability and predictability for Michigan. Or perhaps it is time for this Court to consider the Third Restatement's approach, which aligns more neatly with comparative negligence principles by imposing a blanket reasonable duty of care standard. See 2 Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 51, p 242.

Id at 360-361 (McCormack, CJ, concurring).

In this case, the Plaintiff, Ahlam Kandil-Elsayed, while a business invitee on Defendant's premises, was injured when she slipped and fell on snow Defendant knowingly maintained blocking the building entrance Plaintiff needed to access in order to purchase gasoline for her vehicle. Defendant, who held the gas station open for its invitee customers, owed Plaintiff "the

[1] Pursuant to MCR 7.312(H)(4), the MAJ verifies that no counsel for a party authored this brief, in whole or in part, and no party or party's counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

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highest level of protection under premises liability law," requiring Defendant "not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which (required Defendant) to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). Notwithstanding, the lower courts ruled that Plaintiff's action is barred because the snow was open and obvious and not a "special aspect" under *Lugo*. In particular, the lower courts held that the snow was not "effectively unavoidable" since Plaintiff could have left the premises without purchasing gasoline. (Plaintiff's Supplemental Brief, p 3).

On February 4, 2022, this Court entered a MOAA order directing consideration of "(1) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition; (2) whether *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), is consistent with Michigan's comparative negligence framework; and if not, (3) which approach this Court should adopt for analyzing premises liability cases under a comparative negligence framework." (2/4/22 MOAA Order). The order invites "[p]ersons or groups interested in the determination of the issues presented in this case … (to) move the Court for permission to file briefs amicus curiae." (Id).[2]

Because the issues presented are of major significance to the state's jurisprudence and

[2] The Court issued a related MOAA order in *Pinsky v Kroger Co of Michigan* (No. 163430), raising, in part, whether "under *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328 (2021), *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001), and 2 Restatement Torts, 2d, § 343A, the open and obvious doctrine does not preclude relief where a land possessor should anticipate the harm;" and whether "liability should be precluded in Michigan even if the danger posed by a condition on land is open and obvious without special aspects as defined by *Lugo*, or 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 set forth in the Restatement Torts, 3d." (Pinsky 4/22/22 MOAA Order). The Court will hear oral argument in *Pinsky* and this case concurrently. (Id).

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confront an "outlier" rule that has caused manifestly unjust results, undermined public policy, and spawned over 730 reported cases, the MAJ now respectfully submits this amicus curiae brief. For the reasons presented, it is long past time to overrule *Lugo's* "special aspects" doctrine, which was wrongly decided and inconsistent with Michigan's comparative negligence framework. Of the many preferable alternatives available, the MAJ recommends that this Court abolish the open and obvious doctrine under 2 Restatement Torts, 2d, § 343A, and hold, consistent with 2 Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 51, comment k, pp 251-252 and our comparative negligence regime, that the obviousness of a danger does not extinguish the possessor's duty, but is a factor for the jury to consider in determining the comparative fault of the parties.[3] The MAJ respectfully requests that this Court reverse the lower court rulings.

STATEMENT OF FACTS

The MAJ relies on the statement of facts in Plaintiff's application for leave and supplemental brief. The record establishes the following material facts, which bear summarizing:

1. Defendant held open its gas station and convenience store for customers. (Defendant's MSD – Appendix, pp. 70, 73).

2. Needing to fill her tank, Plaintiff pulled into Defendant's premises to purchase gasoline. (Plaintiff's Supplemental Brief, p. 2).

3. While on the premises, Plaintiff undisputedly was Defendant's business invitee. (COA Opinion – Plaintiff's Appendix, p. 105; Defendant's Supplemental Brief, p. 12).

4. The entire parking lot, including the area in front of the building entrance

[3] Since the Plaintiff undisputedly was Defendant's business invitee under current Michigan law and was owed the same duty under both the Second and Third Restatements, it is unnecessary for this Court to presently consider whether to adopt the approach in Third Restatement § 51 eliminating the possessor's duty distinctions based on traditional entrant classifications [invitee, licensee, or trespasser].

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customers needed to access to purchase gasoline, was covered with snow. (Plaintiff's Supplemental Brief, p. 2; Defendant's MSD – Appendix, p. 73). Plaintiff does not dispute that the snow was open and obvious. (Plaintiff's Supplemental Brief, p. 3).

5. Needing gasoline, Plaintiff approached the building. (Plaintiff's Supplemental Brief, p. 2). She slipped and fell, and was injured, on snow in front of the entrance that Defendant had not shoveled or salted. (Id).

6. Plaintiff testifies that when she notified the station clerk of her fall, the clerk responded that he "didn't care," would not help Plaintiff, and that she could sue them. (Id).

7. The trial court granted Defendant's motion for summary disposition, ruling that the snow was not "effectively unavoidable" and, therefore, not a "special aspect" under *Lugo*. (COA Opinion – Appendix, pp. 104-105). The Court of Appeals affirmed, declaring that the snow would be "effectively unavoidable" and a special aspect under *Lugo* only if Plaintiff was "required to confront" it because she was "effectively trapped." (*Id* – Appendix, p. 105, citing *Hoffner v Lanctoe*, 492 Mich 450, 472; 821 NW2d 88 (2012) and *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014)). Concluding that Plaintiff "could have simply left that gas station and went to another" or explored other options, the Court of Appeals held the snow was not a special aspect exempting the open and obvious rule. (*Id*).

STANDARD OF REVIEW

The *de novo* standard of review is set forth in Plaintiff's application and supplemental brief.

ARGUMENT

I. *LUGO* AND ITS PROGENY SHOULD BE OVERRULED.

Argument Summary

The overriding purpose of the law is to "promote justice." See *Anderson v Robinson*, 38 Mich 407, 408 (1878). To accomplish substantive justice, it is long past time for this Court to

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overrule *Lugo* and its progeny's "special aspects"/"effectively unavoidable" doctrine and adopt a premises liability standard-of-care approach consistent with Michigan's comparative negligence framework.

Application of the relevant factors definitively establishes that the "special aspects"/"effectively unavoidable" rule – coupled with its advisory hypothetical of a customer trapped in a building – must be overruled. *Lugo's* "special aspects" doctrine was wrongly decided, legally unsupported, and an abrupt and largely unexplained departure from prior Supreme Court precedent. The *Lugo* majority wrongly crafted the "special aspects" doctrine out of whole cloth, plucking the phrase out of context from *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). *Livings, supra*, 507 Mich at 357 (McCormack, CJ, concurring). Confirming this, no other jurisdiction in the nation has adopted *Lugo's* limitation on the open and obvious rule. Moreover, as Justice Weaver explained, instead of deciding the specific case and controversy, the *Lugo* majority, acting more like a legislature or administrative agency than an Article VI court, announced its "special aspects" rule in advisory opinion dicta.

Even more, *Lugo's* "special aspects" rule not only resuscitated but expanded the long-abolished doctrines of contributory negligence and assumption of risk underlying 2 Restatement Torts, 2d, § 343A. Adoption of comparative negligence, first by this Court and then by the Legislature, establishes that *Lugo* and its progeny are no longer justified. *Lugo* "special aspects" rule is inconsistent with Michigan's comparative negligence framework and must be overruled.

In addition, the "special aspects"/"effectively unavoidable" rule has defied practical workability. Contrary to the majority's explicit goal of reducing litigation by characterizing the open and obvious issue a question of law to be resolved at the summary disposition stage, *Lugo* has currently spawned a legion of 732 reported Michigan and federal decisions addressing "special aspects" issues. Much like the protracted, yin-yang controversy over the judicial standard for

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determining a serious impairment under MCL 500.3135, *Lugo* exemplifies the mistake of the judiciary trying to limit common law liability by creating predetermined categories of hypotheticals meeting an abstract test and transforming determination of standard-of-care fact issues into questions of law for a trial court.

Lugo and its principal offspring, *Hoffner, supra,* have further defied practical workability by undermining the goals of our tort system – primarily compensating injured victims of negligence and encouraging possessors to eliminate dangerous conditions. As Justice Michael Cavanagh correctly stated, the combined *Lugo* and *Hoffner* doctrine has immunized "premises possessors from nearly all liability arising out of their breaches of a long-established duty" to the inevitable "harm of those who chose to reside in or visit Michigan …." *Hoffner, supra,* at 483 (Cavanagh, J, dissenting). The "special aspects" rule has caused manifestly unjust results.

Overruling *Lugo* and *Hoffner* will not work an undue hardship, cause inequity, or create "practical real-world dislocations." To the contrary, rescinding the "special aspects" rule and establishing that the open and obvious nature of a hazard does not eliminate the possessor's duty but is only a factor in determining the parties' comparative fault will reaffirm the long-established principle that premises possessors owe invitees the "highest duty of care." *Stitt, supra*. Moreover, our law continues to adequately protect possessors by requiring proof that the condition constituted an unreasonable risk of harm, that possessors had notice of the dangerous condition, and that they failed to exercise reasonable care – as well as the fact that, under MCL 600.2959, possessors are not liable for noneconomic damages if the plaintiff is more than 50% at fault.

The MAJ respectfully submits that an unjust rule cannot, and should not, be perpetuated, tweaked, or clarified. Substantive justice requires that *Lugo's* "special aspects"/"effectively unavoidable" doctrine be overruled. As demonstrated in Argument II, the open and obvious rule under 2 Restatement Torts, 2d, § 343A which, like *Lugo*, derives from the long-abolished doctrines

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of contributory negligence and secondary assumption of risk, also should be replaced with a standard-of-care approach under 2 Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 51, comment k consistent with our comparative negligence regime – that the obviousness of a danger does not extinguish the possessor's duty, but is a factor for the jury to consider in determining the comparative fault of the parties.

Argument

It is long past time for this Court to overrule *Lugo*, *Hoffner*, and their progeny, along with the duty-based open and obvious rule, and adopt an approach for analyzing premises liability cases under a comparative negligence framework. "The application of stare decisis is generally the preferred course, because it 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." *People v Wilson*, 500 Mich 521, 528; 902 NW2d 378 (2017) (citation omitted). "But stare decisis is a principle of policy rather than an inexorable command." *Id* (citations and quotation marks omitted); see also *McCormick v Carrier*, 487 Mich 180, 224; 795 NW2d 517 (2010) (Weaver, J, concurring, quoting *Lawrence v Texas*, 539 US 558, 577 (2003)).[4]

[4] This Court's rulings over the past 20 years establish that the principle of stare decisis is not inviolate. From 2000 to 2006, no less than 40 Supreme Court cases overruled scores of its previous decisions. See *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 247 n 9; 731 NW2d 41 (2007) (Markman, J, concurring). Since 2006, this Court has continued to overrule, in whole or part, numerous additional Supreme Court decisions. See, *e.g.*, *In re Ferranti*, 504 Mich 1, 7-8; 934 NW2d 610 (2019) (overruling *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993)); *People v Mead*, 503 Mich 205, 214; 931 NW2d 557 (2019) (overruling *People v LaBelle*, 478 Mich 891; 732 NW2d 114 (2007)); *Wilson*, *supra* (overruling *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992)); *People v McKinley*, 496 Mich 410, 413; 852 NW2d 770 (2014) (overruling, in part, *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997)); *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 352; 792 NW2d 686 (2010) (overruling six Supreme Court cases)

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In determining whether to overrule precedent, this Court considers the following factors: "(1) 'whether the earlier decision was wrongly decided,' (2) 'whether the decision at issue defies practical workability,' (3) 'whether reliance interests would work an undue hardship,' and (4) 'whether changes in the law or facts no longer justify the questioned decision.'" *North American Brokers, LLC v Howell Pubic Schools*, 502 Mich 882; 913 NW2d 638, 641 (2018) (McCormack, CJ, concurring) (quoting *Robinson v Detroit*, 462 Mich 439, 464; 653 NW2d 307 (2000)); *Wilson, supra* at 529. In *McCormick, supra*, this Court applied these analogous factors in concluding that *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004) must be overruled: (1) "whether the rule has proven to be intolerable because it defies practical workability," (2) "whether reliance on the rule is such that overruling it would cause a special hardship and inequity," (3) "whether upholding the rule is likely to result in serious detriment prejudicial to public interests," and (4) "whether the prior decision was an abrupt and largely unexplained departure from precedent." *Id*, 487 Mich at 211, citing *Petersen v Magna Corp*, 484 Mich 300, 314-315; 773 NW2d 564 (2009) (opinion by Kelly, CJ). Assessment of these factors readily establishes that *Lugo* and the duty-based open and obvious doctrine must be overruled with adoption of a premises liability approach consistent with Michigan's current comparative negligence framework.

A. ***Lugo* was wrongly decided and constituted an abrupt and largely unexplained departure from precedent.**

The first factors for overruling *Lugo* are easily met. The *Lugo* majority wrongly manufactured the "special aspects" doctrine out of whole cloth, plucking the phrase out of context from *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). *Livings, supra*, 507 Mich at 357 (McCormack, CJ, concurring). *Lugo's* implementation of the "special aspects" exception to the open and obvious rule erroneously, abruptly and inexplicably departed from previous Supreme Court precedent unanimously adopting 2 Restatement Torts, 2d, § 343A(1) including, in particular,

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its final clause emphasizing that an possessor is not liable for a condition which is open and obvious to the invitee "*unless the possessor should anticipate the harm*." *Id* (emphasis added).

1. *Lugo* erroneously misconstrued and abruptly departed from Supreme Court precedent to create the "special aspects" doctrine which, with no supporting authority, effectively eliminated the unanimously-adopted rule under 2 Restatement Torts, 2d § 343A(1), that a possessor is liable for maintaining an open and obvious condition if it should "anticipate the harm" to the invitee.

Ninety years ago, this Court recognized that the open and obvious nature of a condition does not preclude liability if the defendant "was reasonably bound to anticipate" the plaintiff may encounter the hazard and sustain an injury. *Boylen v Berkey & Gay Furniture Co*, 260 Mich 211, 216-219; 244 NW 451 (1932). In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 93-94, 117; 485 NW2d 676 (1992) and *Bertrand, supra*, 449 Mich at 609-612, this Court unanimously adopted 2 Restatement Torts, 2d, § 343A(1).[5] Section 343A(1), which should be "read together" with 2 Restatement Torts, 2d, § 343 (articulating an invitor's highest standard of care in a premises liability claim),[6] *Bertrand* at 610, states that "[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*." *Id* (emphasis added). This Court has also followed 2 Restatement Torts, 2d, § 343A(1), comment f, providing, in pertinent part:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. *In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection.* …

[5] In *Riddle*, both the majority and dissent agreed that § 343A(1) applies in Michigan. *Id* at 94-95 (majority); *id* at 117 (Levin, J, dissenting). In *Bertrand*, Justice Weaver's and Justice Levin's partial factual dissents did not dispute Michigan follows § 343A(1).

[6] This Court unanimously adopted 2 Restatement of Torts, 2d, § 343 in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258-259; 235 NW2d 732 (1975).

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> Such reason may … arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Bertrand, supra at 611-612, quoting 2 Restatement Torts, 2d, § 343A(1), comment f (Court's original italic emphasis; underlined emphasis added); *Livings*, *supra*, 507 Mich at 340.

Six years after *Bertrand*, in *Lugo, supra*, 464 Mich 512, 516-517, 520-521 (majority), *id* at 527 (Cavanagh, J, concurring), *id* at 544 (Weaver, J, concurring), the Supreme Court unanimously held that a pothole in a parking lot was an open and obvious condition that did not otherwise constitute an unreasonable risk of harm. Although the actual case and controversy, based on established law, was resolved, the 4-3 *Lugo* majority proceeded to abruptly depart from previous Supreme Court precedent without adequate explanation, *McCormick, supra*, 487 Mich at 211, and significantly alter and narrow the open and obvious doctrine.

After quoting the applicable rules of law from *Bertrand* and *Riddle, Id*, 464 Mich at 516-317, the majority presented the following synopsis misconstruing their holdings:

> In sum, the 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 obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

Id at 517 (emphasis added). The words "special aspects" do not appear anywhere in the standards from Second Restatement § 343, § 343A(1), *Riddle*, or *Bertrand*. Notwithstanding, the *Lugo* majority claimed the following language from *Bertrand* supported engrafting a "special aspects" limitation into the open and obvious rule:

> 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 a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. [*Quinlivan, supra,* 395 Mich at 261] Consequently, because the danger of tripping and falling on 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

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to keep the premises reasonably safe.

Id at 517 (quoting *Bertrand*, 449 Mich at 614) (original emphasis). Having plucked this potential, illustrative term from *Bertrand*, the *Lugo* majority proclaimed: "Consistent with *Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id* at 517-518.

Straying farther from the actual case and controversy, in advisory dicta, the *Lugo* majority announced only two categories of open and obvious conditions that would subject the invitor to liability: when (1) "the open and obvious condition is effectively unavoidable" (presenting the hypothetical of a customer who must use "one exit for the general public" in a commercial building "where the floor is covered with standing water") or (2) "special aspects that impose an unreasonably high risk of severe harm" (stating the hypothetical of "an unguarded thirty foot deep pit in the middle of a parking lot"). *Id* at 518. Other than the phrase exported from *Bertrand*, the majority cited no Michigan or national authority supporting their modification and limitation of the final-clause exception in Restatement § 343A(1) to the two categories of "special aspects."

In concluding, the *Lugo* majority revealed that its primary purpose in adopting the "special aspects" rule was to require assessment, and potential dismissal, of virtually all premises liability claims involving an open and obvious condition at the summary disposition stage:

> [W]e believe that this 'special aspects' inquiry serves to concretely focus trial courts on the showing that must be made in evaluating motions for summary disposition in this context.

Id at 524-525. As established below, the duty-based "special aspects" rule did not have the

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litigation-reducing effect the *Lugo* majority intended. In addition to causing two decades of unjust results inconsistent with Michigan's comparative negligence framework, *Lugo's* holding has spawned over 730 reported Michigan appellate and federal decisions.

"From the moment *Lugo* was decided, commentators and justices have questioned the soundness of its logic and the wisdom of its special aspects inquiry." *Livings, supra*, 507 Mich at 350. (McCormack, CJ, concurring). In *Lugo* itself, Justice Michael Cavanagh, joined by Justice Marilyn Kelly, and Justice Weaver, filed concurring opinions opposing the majority's "special aspects" rule.

Justice Cavanagh and Kelly disagreed with the majority's analysis as not only unsupported, but an improper departure from *Bertrand* and other Supreme Court precedent. *Lugo, supra*, 464 Mich at 538-542 (Cavanagh, J, concurring). As Justice Cavanagh demonstrated, no authority supported the majority's implementation of the "special aspects" doctrine. *Lugo, supra*, at 541-542 (Cavanagh, J, concurring). Instead, the majority "plucked" the phrase "special aspect" "out of context" from *Bertrand*. *Livings, supra*, 507 Mich at 357 (McCormack, CJ, concurring). In his *Bertrand* decision, Justice Cavanagh used this term as a potentially relevant consideration for whether an open and obvious step might still constitute an unreasonable risk of harm which the possessor should anticipate under the Second Restatement rule. *Id*, 449 Mich at 614. Nothing in *Bertrand* or any other decision supported using the phrase "special aspect" to create an ironclad principle limiting the exception to the open and obvious defense to rigidly-defined contexts.[7]

Indeed, *Bertrand* used the term "special aspects" to require consideration whether the character, location, or surrounding conditions of the steps made the risk of harm presented

[7] Defendant's amici, Acuity and the Insurance Alliance of Michigan (IAM), incorrectly contend that the *Lugo* majority merely continued the special aspects rule which Justice Cavanagh previously introduced in "shorthand." (Acuity/IAM brief, pp. 3, 6).

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unreasonable – establishing that the possessor still had a duty to exercise reasonable care to protect the invitee, which is a standard of care issue for the jury. For the *Lugo* majority to exploit this portion of *Bertrand* to severely limit the exception to the open and obvious rule to two narrow, hypothetical factual contexts crystalized into a duty analysis was completely untenable.

As Justice Cavanagh further established, other than mistakenly asserting that the "special aspects" doctrine was "[c]onsistent with *Bertrand*," *Id* at 517-518, the *Lugo* majority offered absolutely no justification for departing from Michigan Supreme Court precedent adopting 2 Restatement Torts, 2d, § 343A(1) – particularly the clause rendering the possessor liable if it "should anticipate the harm despite such knowledge or obviousness." *Id* at 529, 538-543 (Cavanagh, J, concurring, quoting § 343A(1); emphasis added). The majority created the "special aspects" rule entirely out of whole cloth.

Even more, as further addressed below, Justice Cavanagh opposed the *Lugo* majority's improper departure from *Bertrand* and Michigan precedent by transforming the exception to the open and obvious defense from a "standard of care" issue, which "is for the jury to decide," into a question of the invitor's "duty." *Id* at 538-541 (Cavanagh, J, concurring; emphasis added), quoting *Bertrand*, 449 Mich at 616-617. This not only again violated the rule of stare decisis, but rendered the *Lugo* doctrine fundamentally inconsistent with Michigan's comparative negligence framework, created far more controversy and litigation than the *Lugo* majority apparently intended to prevent, and seriously undermined public safety interests.

In her concurrence, Justice Weaver similarly disapproved of the majority announcing an "unreasonabl[e]... risk of *severe* harm … standard" with "no precedent in Michigan's common law of the open and obvious doctrine." *Id* at 544-545 (Weaver, J, concurring; original emphasis). Justice Weaver saw no reason to depart from the existing rule exempting the invitor from liability "unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id* at 546-

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547, quoting *Riddle*, *supra*, 440 Mich at 96. Justice Weaver also objected to the majority not only departing from the Second Restatement rule, but launching "new legal principles in a factual vacuum" and "unnecessarily introduc(ing) – in dicta – a new standard by which open and obvious defects will be deemed unreasonably dangerous despite their open and obvious presence." *Lugo*, *supra*, 464 Mich at 544-547 (Weaver, J, concurring). By announcing "new legal principles" beyond the case and controversy presented, the *Lugo* majority issued an unconstitutional advisory opinion. (See below).

Several commentators have questioned the soundness of *Lugo's* logic and the wisdom of its "special aspects" inquiry. *Livings*, *supra*, 507 Mich at 350-351. (McCormack, CJ, concurring; citations omitted). Among these, one commentator criticized *Lugo* for abandoning the Second Restatement approach and lessening business invitors' actual duty of care. Potocsky, Note, *The Blind Plaintiff Post-Lugo v Ameritech: Falling Away From the Restatement in "Open and Obvious" Jurisprudence in Michigan*, 62 Wayne L Rev 557, 558, 561-569 (2017). Another disagreed with the *Lugo* majority that "a special-risk antecedent to duty is the 'only' imaginable construction of section 343A," justifying evaluation and resolution of premises liability claims at the summary disposition stage. Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers: Will It Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 Tex Tech L Rev 1, 44, 47 (2005) (citing *Lugo*, 464 Mich at 390-391). Marks further lamented the *Lugo* majority's "strikingly discordant" dismissal of numerous case-specific facts bearing on whether an open and obvious condition constitutes an unreasonable risk of harm – such as how long the condition existed; foreseeable pedestrian traffic patterns in the area; the likelihood the invitee would be distracted; and the utility, if any, of the condition itself. *Id* at 45. He added that, by limiting liability to when the invitor maintains uniquely hazardous special aspects on the premises, *Lugo* departed from the negligence standard, imposing

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liability only for "reckless endangerment." *Id* at 59.

Even more, before *Lugo* was issued and in the 21 years since, not one court from another jurisdiction (state and federal courts not applying Michigan law) has ever adopted the "special aspects" rule. *Livings, supra*, 507 Mich at 359 (McCormack, CJ, concurring). To the contrary, in *Makeef v City of Bismarck*, 693 NW2d 639, 644 (ND 2005), the North Dakota Supreme Court cited, and rejected *Lugo's* "special aspects" rule.[8] The court held that "a reasonableness test more closely follows our previous holdings and makes for better public policy." *Id.*

Whether "sister states" follow an analogous rule is a relevant factor in determining if a decision was wrongly decided and must be overruled. *North American Brokers, supra*, 502 Mich 882; 913 NW2d at 641 (McCormack, CJ, concurring). The fact that not even one other state has adopted *Lugo* further establishes that it should be overruled.

Lugo's "special aspects" rule was wrongly decided. *Robinson, supra*, 462 Mich at 464. It misconstrued and abruptly departed from Supreme Court precedent, *McCormick, supra*, 487 Mich at 211, was bereft of any actual authoritative support, and lacked any proffered justification for significantly limiting the exception to the open and obvious rule to two narrow, judicially-predetermined factual categories. *Lugo's* "special aspects" doctrine must be overruled.

2. The *Lugo* majority announced its "special aspects" doctrine as dicta and an unconstitutional advisory opinion.

Lugo's "special aspects" doctrine also constituted dicta and an unconstitutional advisory opinion. A statement in a judicial opinion is dicta, and not binding precedent, if "unnecessary to determine the case at hand." *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). In her concurrence, Justice Weaver rightly objected to the majority "unnecessarily introduc(ing) – in

[8] *Makeef* cited the rule from the post-*Lugo* decision *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002).

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dicta – a new standard by which open and obvious defects will be deemed unreasonably dangerous despite their open and obvious presence." *Lugo, supra*, 464 Mich at 544 (Weaver, J, concurring).

The unanimous holding of the Court was that, as a matter of law under the Second Restatement rule, an unobscured pothole in the middle of a parking lot was an open and obvious condition which the possessor should not reasonably anticipate would foreseeably harm its invitee. Accordingly, it was "unnecessary to determine the case at hand" for the *Lugo* majority to modify the established rule and implement the "special aspects" doctrine. *Peltola, supra*. It was not necessary for the majority to offer the two categorical limitations on the exception ("effectively unavoidable" conditions and hazards imposing "an unreasonably high risk of severe harm). *Lugo,* 464 Mich at 518. In particular, it was unnecessary to pronounce that only two hypothetical fact patterns (a customer who must use "one exit for the general public" in a commercial building "where the floor is covered with standing water" and "an unguarded thirty foot deep pit in the middle of a parking lot") may satisfy the exception. *Id*. Announcement of the "special aspects" rule, its component parts, and the two categorical limitations all constituted non-precedential dicta.

Even assuming creation of the "effectively unavoidable" subcomponent of the "special aspects" pronouncement was necessary to resolution of the case, the remainder of the majority's declaration was unrelated to the case and clear dicta. Unquestionably, it was not necessary to resolution of the case to limit the "effectively unavoidable" exception to "the customer in the building" hypothetical. *Lugo* did not involve an invitee in a commercial building. The majority improvidently interjected that hypothetical into the case. Further, since the case had nothing to do with an alleged hazard creating an "unreasonably high risk of severe harm" or an "unguarded thirty

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foot deep pit in the middle of a parking lot," the majority's discussion of these matters constituted non-binding dicta.[9]

In addition, the *Lugo* majority's promulgation of the "special aspects" doctrine did not result from an actual case and controversy and therefore amounted to an unconstitutional advisory opinion. The Michigan Constitution authorizes this Court to issue advisory opinions exclusively concerning the constitutionality of legislation, only upon the request of either house of the Legislature or the Governor, and only after it has been enacted into law but not yet taken effect. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 12; 740 NW2d 444 (2007) (citing Const 1963, art 3, § 8). Otherwise, "judicial power" has been traditionally based, in pertinent part, on the existence of a real dispute, or case or controversy, and "the avoidance of deciding hypothetical questions …." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2014).

By announcing the "special aspects" doctrine not to resolve the specific case and controversy before the Court, but to "provide guidance to the bench and bar" regarding "hypothetical examples" which may meet the new standard, the Court issued an unconstitutional advisory opinion. *Lugo*, 464 Mich at 545 (Weaver, J, concurring). *Lugo* is much more analogous to a legislative enactment or administrative agency's rule promulgation rather than a judicial holding under Const 1963, art 6 resolving the specific issue presented in the case. This is not how our judicial system works.

As discussed below, instead of viewing the *Lugo* majority's "customer in the commercial building" and "unguarded 30-foot deep pit" as mere suggestions, until the *Livings* decision, our courts have construed them as strict, categorical limitations on the "special aspects" exception to

[9] The majority incorrectly asserted that its analysis was necessary to "holding that defendant was entitled to a grant of summary disposition in its favor" and not dicta. *Id* at 519 n 3.

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the open and obvious rule. *Deas v Hartman and Tyner, Inc*, unpublished Court of Appeals per curiam opinion, issued April 25, 2019 (No. 345882) (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, p. 5 – Exhibit A) (explaining that cases meeting *Lugo's* two "special aspect" categories have been "virtually non-existent"). This is why dicta and advisory opinions, even if well intended, are not binding precedent. For this additional reason, *Lugo's* "special aspects" doctrine was wrongly decided and must be overruled.

B. ***Lugo's* "special aspects" rule has perpetuated the long-abolished doctrines of contributory negligence and assumption of risk and, accordingly, is inconsistent with Michigan's comparative negligence framework.**

Lugo's holding that a possessor owes no duty to protect an invitee from a hazardous open and obvious condition that does not fall into the narrow, "special aspect" categories rests on the crumbled pillars of two ancient, long-abolished doctrines: contributory negligence and assumption of risk. Michigan's judicial and legislative abolition of contributory negligence, and rescission of the assumption of risk rule, renders *Lugo* and its progeny inconsistent with our ubiquitous comparative negligence regime. These "changes in the law … no longer justify the questioned decision(s).'" *Robinson, supra*, 462 Mich at 464. *Lugo* and its progeny must be overruled and replaced with a premises liability approach consistent with Michigan's modern comparative negligence framework.

1. The duty-based open and obvious defense and "special aspects" rule derived from the long-abolished doctrines of contributory negligence and assumption of risk.

"The 'no duty' rule inherent with Michigan's open and obvious jurisprudence is a relic from foregone era." *Dorsey v Taubman Auburn Hills Associates*, unpublished Court of Appeals per curiam opinion, issued April 13, 2017 (No. 330690) (Gleicher, J, concurring) (Slip opinion, p. 6 – Exhibit B) (citing James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and*

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Invitees, 63 Yale L J 605, 628 (1954); Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U Pa L Rev 629, 642 (1952)). Feudal landowners, who "reigned supreme" in Medieval England, possessed "vast estates" difficult to safely maintain for the many entrants upon their property. James P. End, *"The Open and Obvious Danger Doctrine: Where Does it Belong in Our Comparative Negligence Regime?"*, Marquette Law Review, Vol 84, pp. 457-58 (2000). Courts believed it would be unfair to place upon feudal landowners the heavy "burden of inspecting and improving [their] primitive land." *Id*. The absolute open and obvious defense continued into the twentieth century as a reflection of "the political power landowners enjoyed." *Michalski v Home Depot, Inc*, 225 F3d 113, 118 (2d Cir 2000) (citation omitted).

a. The First Restatement of Torts rule sprung from the absolute defenses of contributory negligence and assumption of risk.

In 1934, the American Law Institute (ALI) promulgated the First Restatement of Torts. See Restatement of the Law, Torts, Introduction (1934). Restatement (First) of Torts § 343 set forth a premises possessor's standard of care and specified that a possessor would not be liable for maintaining a natural or artificial condition on land if the possessor believes that business invitees "will discover the condition or realize the risk involved therein." *Id*, § 343(b). Section 343(b) "created a bright-line rule: If the entrant on the land recognized the risk posed by a dangerous condition of the land, the land possessor was absolved from any liability for resulting harm." *Livings, supra*, 507 Mich at 351 (McCormack, CJ, concurring). Michigan adopted Restatement (First) of Torts § 343 in *Goodman v Theatre Parking*, 286 Mich 80, 82; 281 NW 54 (1938). See *Lugo, supra*, 464 Mich at 528 (Cavanagh, J, concurring). The First Restatement rule reaffirmed previous Michigan law that a defendant may not be liable for maintaining a condition that was open and obvious to the plaintiff. *Batterson v Chicago & GT Ry Co*, 53 Mich 125, 127; 18 NW 584 (1884); *Storrs v Michigan Starch Co*, 126 Mich 666, 670; 86 NW 134 (1901) (reversing a

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judgment and holding that a directed verdict should have entered because risks "were as open to (the plaintiff's) observation as to anybody.").

The open and obvious rule derived from or was justified by the now discredited and rescinded doctrines of contributory negligence and assumption of risk. *Livings, supra*, 507 Mich at 351-352 (McCormack, CJ, concurring) (illustratively citing *Shorkey v Great Atlantic & Pacific Tea Co*, 259 Mich 450, 453-454; 243 NW 257 (1932) (the plaintiff was contributory negligent and barred from recovery when she was injured after the heel of her shoe got stuck in a hole in a hot air register in the defendant's store; a reasonably prudent person would have known the size of her heels and avoided the danger); and *Curtis v Traders Nat'l Bank*, 237 SW2d 76 (Ky 1951) (a 60-year-old customer who slipped and fell on defendant's bank's wet marble floor assumed the risk "with full knowledge of its condition" and was barred from recovery)).

Under contributory negligence, absent exceptions (where the defendant committed wanton, willful, or reckless conduct; where the plaintiff's negligence was not a substantial factor in causing his harm; or under the "last clear chance" rule), a plaintiff who was partially at fault for causing his injuries could not receive any recovery in a tort claim. *Kirby v Larson*, 400 Mich 585, 615, 616; 256 NW2d 400 (1977) (citations omitted).

The assumption of risk doctrine, while originally limited to the master-servant context or where the plaintiff expressly and contractually agreed to undertake a risk, was gradually expanded to include "every conceivable kind of negligence action," relieving "a defendant of the legal consequences of his own negligent acts on the theory that the plaintiff assumed the risk of injuries from such negligent acts." *Felgner v Anderson*, 375 Mich 23, 39-40, 43-44, 46-51, 55-56; 133 NW2d 136 (1965). This expanded rule became the "secondary assumption of risk" doctrine. *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 362-63; 415 NW2d 178 (1987), recognized as superseded on other grounds in *Lego v Liss*, 498 Mich 599, 563 n 4; 874 NW2d 684

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(2016). Michigan courts used secondary assumption of risk "either as a substitute for, or an equivalent of, or in addition to, contributory negligence." *Felgner* at 46; see also *Kreski, supra* ("Secondary assumption of risk had been employed as an affirmative defense analogous to contributory negligence. It involved a situation in which the plaintiff voluntarily encountered a known risk without manifesting an assent to relieve the defendant of any duty of care owed the plaintiff."). "[T]he gist of the defense is that the plaintiff took his chances." *Branch v D & D Property Mgt, LLC*, unpublished Court of Appeals per curiam opinion, issued December 26, 2019 (No. 345882) (Slip Opinion, p. 9 – Exhibit C) (Gleicher, J, concurring in part and dissenting in part) (quoting *Felgner* at 42).

b. The Second Restatement rule improved the open and obvious doctrine, but continued to effectuate contributory negligence and assumption of risk.

Starting in the 1950's, "[t]he availability of the open and obvious doctrine as a complete and total defense to premises liability began to be widely criticized." *Michalski, supra* (citing James, *supra*, 63 Yale L J at 628 (1954); Keeton, *supra*, 100 U Pa L Rev at 642). "[S]everal prominent critics called for it to be modified or abrogated altogether." *Livings, supra*, 507 Mich at 352 (McCormack, CJ, concurring) (citing Marks, 38 Tex Tech L Rev at 28-29).

In 1965, the ALI promulgated the Second Restatement of Torts, including 2 Restatement Torts, 2d, §§ 343 and 343A(1). Restatement of Torts, 2d, Introduction (1965). Section 343A(1) provided that "[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*." *Id* (emphasis added). This italicized clause, coupled with the comments and illustrations to § 343A, notably comment f, recognizes numerous contexts where the possessor should anticipate the harm despite such knowledge or obviousness and be liable – including, such as in this case, "where the possessor

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has reason to expect that the invitee," in order to purchase the needed product the invitor offers, "will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Id*.

While a significant improvement over the original Draconian rule, the Second Restatement was not without problems. Rather than specifying whether it addresses "duty" or sets forth the standard of care which constitutes a question of fact, § 343A(1) uses the ambiguous term "is liable." That has sparked considerable debate and inconsistent interpretations. See *Livings*, *supra*, 507 Mich at 381 (Clement, J, dissenting) (citing Marks, *supra*, 38 Texas Tech Law Review at 39, see also 5, 29-39); *Hersh v E-T Enterprises, Ltd Partnership*, 752 SE2d 336, 345, 347 (W Va 2013) (superseded, in part, by statute in West Virginia Code § 55–7–27) ("Section 343A(1) speaks in terms of one being "liable," without clarifying if this involves considerations of duty, breach of a duty, or causation.").

Even worse, section 343A(1) – indeed the entire Second Restatement – was promulgated to include and be consistent with the doctrines of contributory negligence and secondary assumption of risk. The Second Restatement maintained contributory negligence as a complete bar to any recovery by the plaintiff:

> Except where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.

2 Restatement Torts, 2d, § 467. The Second Restatement also incorporated the secondary assumption of risk doctrine, see 2 Restatement Torts, 2d, § 496A ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."), including the implied assumption of risk rule barring liability in premises liability claims, see 2 Restatement Torts, 2d, § 496C ("[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the

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defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recovery for harm within that risk.").

The comments to § 343A redundantly specify that the open and obvious rule is consistent with and subject to both contributory negligence and assumption of risk. See, *e.g.*, 2 Restatement Torts, 2d, § 343A, comment e ("The possessor of land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so."), and comment f ("In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk."). See *Woolston v Wells*, 687 P2d 144, 148 (Or 1984) (Sections 343 and 343A "describe occupier liability in terms which took into consideration the invitee's negligence or voluntary assumption of risk ….").

c. Michigan has followed the Second Restatement rule.

This Court unanimously adopted § 343 in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258-259; 235 NW2d 732 (1975). In doing so, the Court overruled previous cases ruling that a premises possessor owed no duty to an invitee regarding obvious hazards arising from natural accumulations of ice and snow. *Id* at 261. This Court held that, "[w]hile the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation," requiring that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Id.*[10] Since its holding predated Michigan's adoption of comparative negligence in *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), *Quinlivan* noted

[10] *Quinlivan* remains binding Supreme Court precedent. See *Hoffner, supra*, 492 Mich at 468.

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that the invitee's knowledge of the premises conditions should be considered in the context of contributory negligence. *Id*, 395 Mich at 261.

In *Riddle*, *supra*, the Court unanimously adopted 2 Restatement Torts, 2d, § 343A(1). *Id* at 94-95 (majority); *id* at 117 (Levin, J, dissenting). The majority held that an invitor owes "no absolute duty to warn invitees of known or obvious dangers" "unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id* at 96-97. Then, agreeing with *Ward v Kmart Corp*, 554 NE2d 223 (Ill 1990), the majority concluded that its duty analysis was not inconsistent with comparative negligence, characterizing the open and obvious rule as a threshold "defensive doctrine" separate to and unaffected by adoption of comparative negligence. *Id* at 95-99.

Justice Levin, joined by Justice Michael Cavanagh, dissented. Justice Levin explained that the majority's decision disregarded 2 Restatement Torts, 2d, § 343A comment f, which states:

> There are, however, cases in which the possessor of land can and should anticipate the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. *This duty may require him to warn the invitee, or to take other reasonable steps* to protect him against the known of obvious conditions or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Riddle, 440 Mich at 119 (Levin, J, dissenting) (quoting 2 2 Restatement Torts, 2d, § 343A comment f) (original emphasis). Justice Levin additionally disagreed with the majority's "no-duty" rule, which was a likely "vestige of common-law contributory negligence and obsolete status definitions." *Id* at 118. He explained that the majority's holding was inconsistent with comparative negligence:

> Because an invitor undeniably owes an invitee a duty to keep premises reasonably safe, the 'no *duty* to warn' rule cannot be unconditionally true. …
>
> Whether an invitor is negligent because he fails to warn an invitee of an open and obvious danger is a question of the standard of care required in a given set of circumstances, rather than a question of duty. The confusions concerning this aspect of the matter stems from the tendency to analyze virtually every aspect of negligence in terms of 'duty.'

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> Duty refers, strictly speaking, to a legally recognized obligation to observe or conform to some particular standard of conduct toward another. Courts developed the concept of 'duty' as comprehending a specific relationship between a plaintiff and defendant, absent which no liability to observe any standard of conduct arises. …
>
> If 'duty' is understood to refer, as in the traditional sense, to the relationship necessary to give rise to an obligation to observe some standard of care, then it follows analytically that the adoption of comparative negligence could not supersede the need to determine, as a matter of law, that a particular defendant did or did not owe a particular plaintiff a 'duty,' because the application of principles of 'comparative negligence' assumes the breach of a duty. Plaintiff's comparative negligence could not relieve the defendant of his duty because plaintiff's comparative negligence merely shifts to the plaintiff the burden of sharing with the defendant the loss or damages resulting both from defendant's breach of duty in violation of the standard of care and plaintiff's contributory negligence.
>
> Thus, where it is said that 'no duty' is owed by a particular defendant, in the sense that negligence or fault of the plaintiff contributed to the harm in a particular instance, or that a danger is open and obvious because of the plaintiff's subjective knowledge of the danger, comparative negligence would indeed abrogate the 'no duty' rule because a plaintiff's contributory negligence does not bar recovery and a decision to encounter a dangerous condition despite subjective knowledge of the peril is relevant in deciding the extent of the plaintiff's negligence. Application of comparative negligence principles would then call for the jury to apportion fault between the parties.
>
> It is evident that standard of care, not duty, lies at the heart of the present dispute.

Id at 121 (original italicized emphasis; underlined emphasis added; footnotes omitted).

In *Bertrand*, this Court addressed "the scope of the duty owed by an owner or occupier of land to its business invitees regarding steps on its premises." *Id*, 449 Mich at 609. After reiterating *Riddle's* holding that there is "no obligation to warn of a fully obvious condition," the Court emphasized that:

> the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions. Thus, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care.

Id at 610-611 (emphasis added). The Court then adopted a hybrid duty/standard of care framework under 2 Restatement Torts, 2d, §§ 343 and 343A:

> 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

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

Id at 610-611 (original emphasis; footnotes omitted).

In the consolidated case of *Maurer v Oakland Co. Parks & Recreation Dep't*, the Court affirmed summary disposition, holding that "the plaintiff has not presented any facts that the step posed an *unreasonable* risk of harm …." *Id* at 620 (original emphasis). In *Bertrand*, the Court first concluded, under *Riddle*, that "the plaintiff did not allege a jury submissible claim for liability based on a failure to warn theory because no reasonable juror would disagree that the danger of falling was open and obvious." *Id* at 623. Then, relying, in part, on 2 Restatement Torts, 2d, § 343A, comment f, illustration 3, the Court held that there was "a genuine issue regarding whether the construction of the step, when considered with the placement of the vending machines and the cashier's window, along with the hinging of the door, created an unreasonable risk of harm, despite the obviousness or the invitee's knowledge of the danger of falling off the step." *Id* at 624.

d. *Lugo* and *Hoffner* departed from the Second Restatement and resurrected the open and obvious doctrine as a virtually absolute, duty-based defense.

This brings us to *Lugo*, where the Court dramatically expanded *Riddle's* open and obvious "no duty" rule far beyond the failure to warn context. As demonstrated above, while claiming to follow *Bertrand*, the majority effectively abolished both the final clause of the 2 Restatement Torts, 2d, § 343A and the principles of comment f.[11] In their place, the majority eliminated a possessor's duty to protect an invitee from **any** foreseeably dangerous open and obvious condition

[11] The attempt of Defendant's amici Acuity and the IAM to sell *Lugo* as "a sensible application of the principles expounded in the 2nd Restatement" is totally misplaced. (Acuity/IAM brief, p. 1).

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outside the two narrow "special aspect" categories.

In his concurrence, Justice Cavanagh stated that, among other mistakes (addressed above), the *Lugo* majority erroneously mischaracterized a "standard of care" issue, which "is for the jury to decide," into a question of the invitor's "duty." *Id* at 538-541 (Cavanagh, J, concurring; emphasis added) (citations omitted). Justice Cavanagh reiterated his agreement with Justice Levin's *Riddle* dissent, which he joined, that:

> [T]he 'no-duty' rule actually came about as a one way of expressing that a plaintiff was contributorily negligent. The defendant's duty should be tied to the relationship between the parties,[12] and that duty would be owed regardless of whether a comparative negligence or contributory negligence system was in place. A finding of comparative negligence would assume that the defendant was in fact negligent, because comparative negligence is used only as a tool for apportioning damages after a breach of duty on the part of the defendant was found. The primary questions for the jury to resolve in premises liability cases are, first, whether the defendant has breached his duty of care, and, second, whether his liability is somehow limited by the plaintiff's comparative negligence. It is within this framework that the Restatement approach to the open and obvious danger doctrine must be viewed.

Id at 541. He noted that, "in an attempt to be faithful to prior precedent, some of this Court's decisions that attempted to apply the open and obvious danger doctrine in a post-contributory era," including language from his own opinions in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988) and *Bertrand*, "confused the issue inadvertently." *Lugo*, 464 Mich at 538-540. Justice Cavanagh explained that, rather than concluding no duty exists, the "better" and "more precise" approach is to say that "the duty to exercise reasonable care is not breached" and that "liability would be suspended" in circumstances like *Williams* and *Maurer*. *Id* at 540-541.

[12] Defendant's amici, Acuity and the IAM, agree that "duty" is based on the parties' relationship, but nonetheless assert that the obviousness of a hazard is relevant to determining the possessor's duty. (Acuity/IAM brief, p. 10). Whether a hazard is open and obvious does not alter, in any way, the parties' relationship. As in this case, Plaintiff and Defendant remained an invitee and invitor notwithstanding whether the snow existed or was open and obvious. Accordingly, as Justice Cavanagh correctly explained, the obviousness of the hazard is irrelevant to the invitor's duty. It is solely relevant to determining the parties' comparative fault.

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The *Lugo* majority failed to rebut Justice Cavanagh's opposition to perpetuating the contributory negligence doctrine by transforming a standard of care issue into a duty issue. Instead, the majority freely admitted its intent to take the issue of "breach" away from the factfinder and render it an issue of law for resolution at the summary disposition stage:

> As we understand it, Justice Cavanagh's basic position is that the inquiry into whether an open and obvious condition is unreasonably dangerous should not be focused on whether that condition involves special aspects that distinguish it from ordinary open and obvious conditions. We disagree because we believe that this "special aspects" inquiry serves to concretely focus trial courts on the showing that must be made in evaluating motions for summary disposition in this context. …
>
> Because of the great variety of circumstances in which premises liability claims may be raised, it may be practically impossible to demarcate the extent of a premises possessor's duties with great precision. Nevertheless, we believe that our approach, focusing on the existence or absence of special aspects of an open and obvious danger, will guide the trial courts in considering whether particular open and obvious conditions posed an unreasonable risk of harm better than would be the case without this further exposition of the open and obvious doctrine.

Id at 524-526 (emphasis added).

Defendant's amici argue that *Lugo* properly established a trial court "gatekeeping job" to not only determine the question of "duty," but decide the issue of "breach." (Acuity/IAM Brief, pp. 15, 16, 17). According to these amici, under *Lugo*, a jury may apportion the comparative fault of the parties only after the trial court determines the defendant owed and breached a duty. (Id, pp. 14, 16, 22). This is fundamentally wrong. While "duty" is a question of law for the court, *Hill v Sears Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012), unless reasonable minds cannot differ differ, the issue of "breach" (as well as proximate cause) is a question of fact for jury. *Riddle, supra*, 440 Mich at 96 ("The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent."). Defendant's amici's attempt to justify *Lugo's* recasting of trial judges into "gatekeeping" factfinders illustrates how antithetical this approach is to Michigan jurisprudence.

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In *Hoffner, supra,* 492 Mich at 468, 472, the Court further distanced "our premises liability law from the Restatement." *Deas, supra,* (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, p. 5 – Exhibit A). The *Hoffner* majority narrowed *Lugo's* "effectively unavoidable" standard, now requiring that the hazard be absolutely unavoidable to constitute a "special aspect":

> Unavoidability is characterized by an *inability* to be *avoided*, an *inescapable* result, or the *inevitability* of a given outcome. …
>
> [The hazard] must truly be, for all practical purposes, one that a person is required to confront under the circumstances. …
>
> [The plaintiff must have been] compelled by extenuating circumstances with no choice but to traverse a previously unknown risk. …
>
> As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.

Id at 468, 472, 473 (original emphasis). Concluding that the hazard at issue, snow and ice blocking the entrance to a fitness center the plaintiff contractually paid for the right to enter, *id* at 456-457, did not meet the revised definition of "effectively unavoidable" – because the plaintiff "was not "trapped" in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk" but could have left without entering the building – the majority held that "plaintiff is precluded from recovering in tort as a matter of law."[13]

> Justice Michael Cavanagh, joined by Justice Kelly, dissented, stating:
>
> This ill-wrought departure from our precedent immunizes premises possessors from nearly all liability arising out of their breaches of a long-established duty. … [T]he majority's relentless redefining and narrowing of the exceptions to the open and obvious doctrine will inevitably work to the harm of those who chose to reside in or visit Michigan ….
>
> Today, the majority continues to dismantle the Restatement approach by holding that 'effectively unavoidable' means that the injured person must have been 'compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.' In other words, 'effectively unavoidable' means *absolutely* unavoidable: the individual must have *no alternative* but to hazard the

[13] In doing so, the majority overruled *Robertson v Blue Water Oil Co,* 268 Mich App 588; 708 NW2d 749 (2005). *Id* at 472.

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> danger. Thus, there is essentially nothing left of the premises possessor's historical duty to clear ice and snow or the exceptions to the open-and-obvious doctrine because it will be incredibly rare that an injured person will be able to show that they were 'absolutely compelled' to encounter an open and obvious danger. I find today's holding to be repugnant to the traditional jurisprudence of this Court and a grave disserve to Michigan's citizens and visitors.

Id at 483, 487 (Cavanagh, J, dissenting; original italicized emphasis; underlined emphasis added). Justice Hathaway also dissented from the majority's departure from *Quinlivan* and the Restatement rule and erroneous requirement that fact-based premises cases be resolved "as a matter of law," diminishing "the rule of juries, in favor of judicial fact-fining, in direct contravention of the specific mandates of the Michigan Constitution." *Id* at 495-499, 501 (Hathaway, J, dissenting).

The "special aspects" duty-based rule of *Lugo* and *Hoffner* derived from the long-abolished contributory negligence and assumption of risk doctrines. Even as drafted, Second Restatement sections 343 and 343A arose from and were promulgated to be compatible with contributory negligence and assumption of risk. *Lugo* and *Hoffner* only expanded these ancient absolute defenses, immunizing "premises possessors from nearly all liability arising out of their breaches of a long-established duty." *Hoffner*, *supra*, at 483 (Cavanagh, J, dissenting).

As Justice Levin correctly stated, the Court's framing of the Restatement provisions as a duty-based rule mischaracterizes what should be a "standard of care" issue, perpetuating the "vestige of common-law contributory negligence …." *Riddle*, *supra*, 440 Mich at 118, 121 (Levin, J, dissenting). As Justice Cavanagh demonstrated, *Lugo's* expansion of the "no-duty" rule is just another way of expressing "that a plaintiff was contributorily negligent," *Lugo, supra*, 464 Mich at 541 (Cavanagh, J, concurring).

Moreover, along with *Lugo* itself, in relying on the plaintiff's "choice" to confront the hazard as a basis for limiting the invitor's duty, the *Hoffner* majority decision, "[a]t its core," constituted "nothing more than a surreptitious resurrection of a long-dead tort precept: assumption

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or the risk" – abolished in *Felgner, supra*, 375 Mich at 55-57. *Branch, supra* (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, p. 9 – Exhibit C). For this and other reasons, the "special aspects" doctrine "should be jettisoned." (*Id*, p. 8).

2. *Lugo* and *Hoffner's* "special aspects" rule is inconsistent with Michigan's comparative negligence framework and must be overruled.

The "special aspects" rule ignores abolition of the contributory negligence and assumption of risk doctrines and is incompatible with our current comparative negligence regime. For this additional reason, *Lugo* and its progeny, including *Hoffner*, are no longer justified and must be overruled. *Robinson, supra*, 462 Mich at 464.[14]

Over 40 years ago, in *Placek, supra*, 405 Mich at 654, this Court abolished "the doctrine of contributory negligence (which) … caused substantial injustice since it was first invoked in England in 1809." Previously, in *Kirby, supra*, this Court explained:

> [Contributory negligence] was designed to protect infant industries from oversympathetic juries who regarded these corporation defendants as intruders, as well as immensely rich. … [T]he industrial complex is now well established, … most claims against individual defendants are covered by workmen's compensation statutes where negligence is not at issue, and …, in any event, all industrial enterprises, new or old, are generally protected from burdensome liability by insurance. …
>
> [Contributory negligence] is inequitable in its operation because it fails to distribute responsibility in proportion to fault. …
>
> The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will.

[14] Defendant's amici mistakenly claim that "nothing has changed" to warrant overruling the "special aspects" doctrine. (Acuity/IAM Brief, p. 9). Implementation of our comparative negligence framework and abolition of the assumption of risk doctrine not only "changed," but eliminated the conceptional justifications for the open and obvious. Indeed, the fact that Defendant's amici essentially avoid this Court's MOAA order issue whether *Lugo* "is consistent with Michigan's comparative negligence framework" demonstrates that they have no meritorious counter-response to Plaintiff's position.

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Id, 400 Mich at 620-622 (citations and internal quotation marks omitted). Therefore, in *Placek*, the Court adopted the "more just and equitable doctrine of comparative negligence …" *Id* at 679. This "banished the notion that under the common law, an injured person's contributory fault should eliminate a fair allocation of tort liability." *Dorsey, supra* (Gleicher, J, concurring) (Slip opinion, p. 5 – Exhibit B).

When this Court decided *Riddle*, and concluded that an invitor owes "no absolute duty to warn invitees of known or obvious dangers," *id*, 440 Mich at 96, "comparative fault was solely a creature of the common law that had been embraced in *Placek*." *Dorsey, supra* (Gleicher, J, concurring) (Slip opinion, p. 5 – Exhibit B). "[T]hat changed in 1995 when our Legislature adopted MCL 600.2958, explicitly enshrining the doctrine of comparative negligence in *all* tort actions." *Id* (original emphasis). MCL 600.2958 states:

> Subject to [MCL 600.2959], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages.

"The Legislature carved out no exception for premises liability claims despite its awareness of *Riddle*." *Dorsey, supra* (Gleicher, J, concurring) (Slip opinion, p. 5 – Exhibit B).

"The clear and express language of MCL 600.2958 prohibits a court from barring a plaintiff's recovery based on her comparative fault." *Id*. In adopting and expanding the "special aspects" "no-duty" rule, the *Lugo* and *Hoffner* majorities ignored not only *Placek*, but the Legislature's previous abolition of contributory negligence. The "special aspects" doctrine perpetuates contributory negligence by focusing

> … only on the *plaintiff's* failure to conform to an objective standard of care and bars recovery even when the defendant could and should have eliminated a hazard. Our common law transforms even unreasonable dangers created or tolerated by a landowner into risks that must be born only by the plaintiff. In other words, the plaintiff's failure to exercise reasonable care negates the defendant's duty of care. …

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> Michigan's approach to premises liability law reinvigorates contributory negligence and ignores both the common law and the statutory comparative negligence frameworks. An open-and-obvious danger not only eliminates the duty to warn, but sweeps away any duty to protect an invitee from dangerous conditions on the premises. Except in the rarest of circumstances, only the injured plaintiff bears any responsibility to avoid the consequences of an obvious hazard.

Deas, supra (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, pp. 3-4 – Exhibit A) (original emphasis).

Lugo and *Hoffner* also disregarded *Felgner, supra*, 375 Mich at 55-57, where this Court's abolished the secondary assumption of risk doctrine (*i.e.*, outside the context of the employment relationship or express contracts). "The open and obvious danger doctrine is recognized as a corollary rule to assumption of risk." *Harrison v Taylor*, 768 P2d 1321, 1325 (Idaho 1989). As Judge Gleicher correctly observed, "[a]t its core," *Hoffner's* extension of *Lugo* constituted "nothing more than a surreptitious resurrection of a long-dead tort precept: assumption or the risk." *Branch, supra* (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, p. 9 – Exhibit C). The abrogation of implied or secondary assumption of risk as a defense also mandated abrogation of the open and obvious danger doctrine as a complete bar to recovery. *Harrison, supra*.

For these reasons, courts in most jurisdictions have agreed the duty-based open and obvious defense "is irreconcilable with comparative negligence" and abolition of the secondary assumption of risk rule. *Steigman v Outrigger Enterprises, Inc*, 267 P3d 1238, 1249 (Haw 2011). Of these, some maintain 2 Restatement Torts, 2d, § 343A, either expressly or implicitly, as addressing the standard of care – not the possessor's duty.[15]

[15] See *Parker v Highland Park, Inc*, 565 SW2d 512, 518 (Tex 1978) and *Del Lago Partners, Inc v Smith*, 307 SW3d 762, 772-773 (Tex 2010) (citations and internal footnotes omitted) (Where Texas courts reaffirmed: "[W]e have expressly abolished a "no-duty" doctrine previously applicable to open and obvious dangers known to the invitee. Instead, a plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence … it should not affect the defendant's duty."); *Calkins v Cox Estates*, 792 P2d 36, 43 n 7 (NM 1990) ("[A]lthough the open and obvious nature of the danger is one factor to be considered in determining whether the landlord

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Other courts have revised or eliminated the section 343A rule entirely.[16] As *Hersh, supra,*

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was negligent, it is not determinative of the issue, and does not, without more, remove responsibility from the landlord. … This would present a situation of comparative negligence, which is an issue of fact for the jury."); *Tharp v Bunge Corp,* 641 So2d 20, 25 (Miss 1994) ("We now abolish the so-called 'open and obvious' defense and apply our true comparative negligence doctrine. … [T]he open and obvious defense … is only a mitigation of damages on a comparative negligence basis under [the state's comparative negligence statute]."); *Rockweit v Senecal*, 541 NW2d 742, 748-749 (Wis 1995) ("In the ordinary negligence case, if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery."); *Smith v The Callaway Bank*, 359 SW3d 545, 548 (Mo App 2012) (citation omitted) ("An invitee's knowledge of an obvious danger is considered in determining the invitee's comparative negligence rather than in determining the duty of the owner."); and *Shelton v Ky Easter Seals Society, Inc*, 413 SW3d 901, 911-913 (Ky 2013) (previous recognition of § 343A as a statement of duty was a "vestige of contributory negligence"; Restatement actually sets forth the possessor's "standard of care").

[16] See *Johnson v A/S Ivarans Rederi*, 613 F2d 334, 347 (1st Cir 1980) ("[S]ections 343 and 343A are too heavily laden with the prohibited defenses of assumption of the risk and contributory negligence to be followed rigidly as the standard of care owed longshoremen …."); *Woolston v Wells*, 687 P2d 144, 149 (Ore 1984) (*en banc*) ("Instructing the jury that defendant has no liability because of actions of the plaintiff, or that defendant is liable only if a reasonable person entering the land would not realize a danger or would not protect himself against it, frustrates the purpose of instituting a system of comparative fault."); *Harrison, supra*, 768 P2d at 1325, 1328 (Abrogation of secondary assumption of risk and contributory negligence mandates "abrogation of the open and obvious danger doctrine as a complete bar to recovery. … Accordingly, we join the numerous state and federal courts noted above and hereby retire the open and obvious danger doctrine. Henceforward, owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises."); *Koutoufaris v Dick*, 604 A2d 390, 396 (Del 1992) (citations and internal quotation marks omitted) ("[A]n overwhelming majority of courts" have recognized that sections 343 and 343A "are too heavily laden with the prohibited defenses of assumption of the risk and contributory negligence to be followed rigidly.... Of those state courts which have addressed the issue of whether the principles espoused by § 343A survive the adoption of comparative negligence, only one (see below) appears to have answered in the affirmative."); *Steigman, supra*, 267 P3d at 1251 ("We hold that the known or obvious danger defense is inconsistent with the … comparative negligence statute. … We reject the Restatement's retention of the doctrine as a factor in determining the landowner's duty, and instead hold that courts of this state may consider any known or obvious characteristics of the danger as factors in the larger comparative negligence analysis."); and *Hersh, supra*, 752 SE2d at 345, 348-349. The one outlier case cited in *Koutoufaris* was *Carrender v Fitterer*, 469 A2d 120, 125 (Pa 1983) ("When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of risk operates merely as a counterpart to the possessor's lack of duty to protect the invitee from those risks."). A few other jurisdictions have subsequently maintained a bright-line, duty-based open and obvious rule. See *Armstrong v Best Buy Co, Inc*, 788 NE2d 1088, 1090-1091 (Ohio 2003) (maintaining a strict duty framework); *O'Sullivan v Shaw*, 726 NE2d 951, 955-956

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explained:

> [T]he 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. … [A]n entrant's decision to encounter an open and obvious danger does not necessarily mean that the land possessor was not also negligent for failing to fix an unreasonable danger in the first place. Under our rule of comparative fault, the defendant should be held responsible for his own negligence, if any. … we now hold that the open and obvious doctrine in premises liability negligence actions is abolished. … The plaintiff's confrontation of an open and obvious hazard is merely an element to be considered by the jury in apportioning the relative fault of the parties.").

Id, 752 SE2d at 345, 348-349.

Even more, as further addressed below, a growing number of jurisdictions have either expressly or implicitly adopted Restatement, 3d, Torts: Liability for Physical and Emotional Harm § 51, including comment k.[17] Finally, analogous to *Riddle, supra*, some courts still adhere to the Second Restatement as a threshold duty-based rule, while holding that, if there is a material fact question regarding the defendant's breach, the parties' comparative fault will be apportioned.[18]

(Mass 2003) (maintaining open and obvious duty rule despite rescission of assumption of risk); *Jones Food Co, Inc v Shipman*, 981 So2d 355, 361-363 (Ala 2006).

[17] See *Foster v Costco Wholesale Corp*, 291 P3d 150, 152-153 (Nev 2012) (adopting Third Restatement § 51 and comment k, the court held that a landowner owes a duty of reasonable care to land entrants even if a dangerous condition is open and obvious; adding that apportionment of liability depends on the landowner's breach of that duty and comparative fault); *Carroll v Carnival Corp*, 955 F3d 1260, 1268-69 (11th Cir 2020) (adopting § 51 in maritime law); *Lopez v Devon Energy Production Co, LP*, 468 P3d 887, 896 (NM App 2020) (applying § 51); *Ludman v Davenport Assumption High Sch*, 895 NW2d 902, 910 (Iowa 2017) (adopting § 51); *Longwell v Giordano*, 257 A3d 163, 169 n 2 (Pa Super 2012) (quoting Third Restatement, § 51, comment k) (Applying the Second Restatement, but signaling that "we would reach the same result under" [the Third Restatement, § 51, comment k]; agreeing with comment k that "the fact that a dangerous conditions is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability."); *Steigman, supra*, 267 P3d at 1250-1251 (Rejecting Second Restatement § 343A as incompatible with comparative negligence and holding, implicitly consistent with the Third Restatement, that "any known or obvious characteristics of the danger as factors" may be considered "in the larger comparative negligence analysis.).

[18] See *Cox v JC Penney Co, Inc*, 741 SW2d 28, 29-30 (Mo 1987) (*en banc*); *Ward*, supra, *554* NE2d at 228, 231-232 (1990); *Coln v City of Savannah*, 966 SW2d 34, 36, 43 (Tenn 1998), overruled on other grounds in *Cross v City of Memphis*, 20 SW3d 642, 644 (Tenn 2000); *Hale v*

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As the *Koutoufaris* decision wisely reasoned, continuation of a duty-based open and obvious rule is irreconcilable with the modern adoption of comparative negligence and elimination of the secondary assumption of risk defense:

> In our view, adoption of a comparative negligence standard in 1984 manifests a legislative intention from that date to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case-by-case basis. If § 343A is interpreted as a duty limiting provision, it retains its character as an inflexible legal rule the sole focus of which is upon whether the plaintiff was in any way culpable in not appreciating the hazard created or permitted by the defendant. Thus, if the plaintiff was aware of the danger, no liability arises on the part of the landowner even though on a comparative basis the plaintiff's error in judgment in not appreciating the risk might be far less blameworthy than defendant's conduct in creating the risk or failing to eliminate it. Such a result is clearly at variance with the legislative intent that, where negligence is reflected in the conduct of both parties, liability, and consequent recovery, be determined proportionately.

Id, 604 A2d at 398 (citations omitted). For these compelling reasons, the duty-based open and obvious rule and "special aspects" doctrine are incompatible with our current comparative negligence regime. *Lugo, Hoffner*, and their progeny are no longer justified. *Robinson, supra*, 462 Mich at 464. They must be overruled.

C. ***Lugo* has defied "practical workability" and resulted in serious detriment prejudicial to public safety interests.**

Lugo's duty-based "special aspects" doctrine has defied "practical workability." *Robinson, supra*. "[A] rule of decision defies practical workability if it has proved difficult to apply or implement." *In re Ferranti*, 504 Mich 1, 26; 934 NW2d 610 (2019). A decision particularly defies practical workability if it triggers a significant increase in appellate litigation. *McCormick, supra*, 487 Mich at 213.

"The open and obvious doctrine is one of the most litigated areas of Michigan premises

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Beckstead, 116 P3d 263, 267-271 (Utah 2005) (open and obvious rule "continues to operate in its duty-defining capacity," addressed before reaching the issue of comparative negligence).

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liability law." *Livings, supra*, 507 Mich at 360 (McCormack, CJ, concurring) (quoting *Woodard v ERP Operating Ltd Partnership*, 351 F Supp 2d 708, 713 (ED Mich 2005)). "[I]nconsistent applications of the doctrine have resulted in a confusing jurisprudence." *Id.*

The *Lugo* majority's goal of reducing premises liability litigation involving open and obvious conditions has not been unrealized. A Westlaw search reveals that, since *Lugo* was issued in July 2001, 613 Michigan appellate cases have addressed "special aspects" issues. Compounding this, 119 reported federal district and circuit court decisions applying Michigan law have considered the "special aspects" rule.[19] In sharp contrast, during the 117 years preceding *Lugo's* release, 1884[20] to July 2001, only 254 Michigan and federal court decisions in premises liability claims addressed open and obvious issues.[21] *Lugo's* purpose of creating an ironclad rule and reducing litigation has been a colossal failure.

The controversy and increased litigation over the "special aspects" rule mirrors the protracted appellate court battles over the injuries necessary to constitute a serious impairment of body function under MCL 500.3135. Seemingly trying to effectuate the same goals as the *Lugo* majority, in *Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004), this Court modified (or effectively overruled) *DiFranco v Pickard*, 427 Mich 32, 50–58; 398 NW2d 896 (1986)[22] and created a procedural regime rendering most serious impairment issues a question of law for the trial court. Instead of clarifying the law and reducing litigation, however, *Kreiner*, like *Lugo*, spawned a legion of appellate decisions. This is a central reason why, in *McCormick*, *supra*, this

[19] Word search: "*Lugo* /p special /1 aspects"

[20] When *Batterson v Chicago & GT Ry Co*, 53 Mich 125; 18 NW 584 (1884), discussed above, was released.

[21] Word search: "premises and open /2 obvious"

[22] Which had overruled *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).

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Court overruled *Kreiner*. *Id*, 487 Mich at 211-216. The Court explained:

> The serious impairment analysis is inherently fact- and circumstance- specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, '[t]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect.' [*Kreiner*, 471 Mich at 145 (Cavanagh, J, dissenting)]. As such, the analysis does not 'lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors,' particularly where there is no basis in the statute for such factors. *Id.*

McCormick, supra, 487 Mich at 215-216. Accordingly, this Court held that the trial court should not decide a serious impairment issue as a matter of law if "there is a material factual dispute regarding the nature and extent of the person's injuries...." *Id at* 193–194. In such cases, determination of a serious impairment is a question of fact for the jury conducted "on a case-by-case basis." *Id* at 215. Confirming the wisdom of leaving resolution of case-specific fact questions to the jury, in PA 2019, No. 21 and No. 22, the Legislature amended MCL 500.3135 to incorporate *McCormick's* holding. See MCL 500.3135(2) and (5).

Like the serious impairment issue, *Lugo's* "special aspects" rule exemplifies the mistake of transforming what this Court previously held are jury questions regarding the possessor's "standard of care" which must be determined on a case-by-case basis, see *Bertrand, supra*, 449 Mich at 611, into questions of law regarding the defendant's duty for the trial court at the summary disposition stage based on judicially pre-determined factual categories meeting the "special aspects" test.[23] Trial courts' opinions on what constitutes a "special aspect" may not only differ, but will usually propagate appeals.[24] By far, the wisest choice is to overrule *Lugo's* "special

[23] One reason why courts have abandoned the duty-based open and obvious rule is to prevent judges from deciding "fact-intensive issue(s)" that actually address standard of care. *Steigman, supra*, 267 P3d at 1250.

[24] This is especially true because summary disposition rulings and decisions resolving questions of law are reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019) (summary disposition); *Riddle, supra*, 440 Mich at 95 (duty).

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aspects" no-duty doctrine and adopt a premises liability approach consistent with Michigan's current comparative negligence framework.

Lugo and *Hoffner* are additionally unworkable because they created several incongruities: that the "special aspects" rule derived from *Bertrand*, when it clearly did not; revival of the contributory negligence and secondary assumption of risk doctrines, although they were long abolished; ruling that the obviousness of the hazard determines the possessor's duty, when it actually goes to the issue of comparative fault; and the incongruity of declaring, on the one hand, that a premises possessor owes invitees "the highest level of protection under premises liability law," *Stitt, supra*, 462 Mich at 597, and yet, on the other hand, immunizing "premises possessors from nearly all liability arising out of their breaches of a long-established duty." *Hoffner, supra*, 492 Mich at 483 (Cavanagh, J, dissenting). As the court in *Tharp, supra*, so aptly explained:

> It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.

Id, 641 So2d at 25. The "special aspects" rule has rendered Michigan premises liability law a mockery.

Even worse, *Lugo*, *Hoffner*, and their progeny have "resulted in serious detriment to public safety interests." *McCormick, supra*, 487 Mich at 211. The primary purpose of the tort system is to "protect safety interests and … society as a whole from physical harm to a person or property." 74 Am Jur 2d Torts § 2. Specific goals include compensating injured victims injured due to negligence; shifting or distributing the loss amount to appropriate entities; deterring "conduct that creates an unreasonable risk of injury to others"; and "providing an incentive to prevent future harm through the payment of damages." *Id*.

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Through its comments and illustrations, Restatement § 343A(1) offered numerous specific examples of situations where a possessor should anticipate its invitee may be foreseeably injured by an open and obvious condition. One such situation, which this Court addressed in *Livings*, is when a plaintiff must confront a hazard "to enter his or her place of employment for work purposes." *Id*, 507 Mich at 333, 340 (citing 2 Restatement Torts, 2d, § 343A, comment f, illustration 5). Another intuitively-obvious situation, contemplated in comment f, is where "the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Id*. Such an eventuality occurred in this case when Defendant, who held open its premises to sell invitees gasoline, unquestionably should have anticipated that Plaintiff would chose to encounter snow blocking the building entrance she needed to access in order to purchase this very product.

Notwithstanding the many situations where a possessor should anticipate the harm to an invitee due to an open and obvious hazard, circumstances held to satisfy the "special aspects" doctrine "are virtually nonexistent." *Deas, supra*, (Gleicher, J, concurring in part and dissenting in part) (Slip opinion, p. 5 – Exhibit A). As such, in both intent and effect, the "special aspects" rule "immunizes premises possessors from nearly all liability arising out of their breaches of a long-established duty … (and) will inevitably work to the harm of those who chose to reside in or visit Michigan." *Hoffner, supra*, 492 Mich at 483 (Cavanagh, J, dissenting).[25] This not only has rendered our premises liability law an intellectual dichotomy, but has repeatedly caused harm to real human beings.

Accordingly, the no-duty and "special aspects' rules have undermined each of the tort

[25] Defendant's contention that the "special aspects" doctrine "increases the protections afforded to Michigan invitees who encounter premises dangers that are so open and obvious that no duty exists," (Defendant's Supplemental Brief, p. 3), is patently incorrect.

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system's goals. Invitees are not protected or compensated for the unreasonable conduct of premises possessors. *Steigman, supra*, 267 P3d at 1246-1247 (citations omitted). Possessors, who are "in the best position to eliminate a dangerous condition," are not encouraged to do so or deterred from unsafe conduct. *Kentucky River Medical Ctr v McIntosh*, 319 SW3d 385, 390-391 (Ky 2010); see also *Tharp, supra*, 641 So2d at 25 ("This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms."); *Steigman* at 1247. To the contrary, under *Lugo*, while injured invitees are deprived of a remedy for choosing to encounter an open and obvious condition, the invitor is immunized and allowed to profit for choosing to hold open its premises to customers while ignoring the existence of a hazardous condition.

The duty-based open and obvious defense and "special aspects" doctrine have defied practically workability and resulted in serious detriment to public safety interests. Unquestionably, by depriving a remedy to invitees whom possessors should have foreseen would sustain injury despite the open and obvious nature of the condition, these rules have caused, and will continue to cause, "special hardship and inequity." *McCormick, supra*, 487 Mich at 211. They must be overruled.

D. Reliance interests on the open and obvious defense or "special aspects" rule will not work an undue hardship or cause inequity.

Overruling the open and obvious no-duty rule and "special aspects" doctrine will not work an "undue hardship," *Robinson, supra*, 462 Mich at 464, or cause tangible inequity, *McCormick, supra*. In considering this factor, "[t]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 173; 895 NW2d 154 (2017) (quoting *Robinson* at 466). Overruling *Lugo, Hoffner*, and their progeny will not have significant "practical real-world

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dislocations." *Id*.

Since *Lugo* was issued, a premises possessor, like Defendant, has continued to owe "a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra*, 464 Mich at 516, citing *Bertrand, supra*, 449 Mich at 609. This duty includes the obligation "not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Hoffner, supra*, 492 Mich at 457.

Because possessors owe invitees "the highest level of protection under premises liability law," *Stitt, supra*, 462 Mich at 597, overruling the "special aspects" rule will not work any undue hardship or inequity on business invitors. It will, instead, reaffirm a possessor's standard of care and render Michigan premises liability law compatible with comparative negligence. Indeed, as demonstrated above, the failure to overrule *Lugo* and its progeny will continue to perpetrate manifestly unjust results on Michigan citizens and visitors. *Hoffner, supra*, 492 Mich at 483, 487 (Cavanagh, J, dissenting).[26]

The fact that *Lugo* has remained constantly litigated over the past 21 years further establishes that no embedded reliance interest weighs against overruling the "special aspects" doctrine. With 732 Michigan appellate and federal court decisions addressing *Lugo* – coupled with this Court's *Livings* decision, as well as the MOA orders in this case and *Pinsky* – possessors have not justifiably relied on the "special aspects" doctrine, let alone altered their behavior in the wake of their "highest legal duty" owed to invitees.

[26] Defendant's amici's allege that, if *Lugo* is overruled, insurance "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." (Acuity/IAM Brief, p. 26). This vague allegation is totally unsupported.

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Even more, Michigan maintains ample safeguards to prevent business invitors from being subjected to undue liability. It is universally established that invitors are not the absolute insurers of their invitees' safety. See *Quinlivan, supra*, 395 Mich at 261; *Bertrand, supra*, 449 Mich at 614. A possessor will not be liable unless it fails to exercise reasonable care. Further, a plaintiff in a premises liability claim must prove that the possessor "had actual or constructive notice of the dangerous condition at issue." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2016). Moreover, under MCL 600.2959, a possessor is not liable for noneconomic damages if the plaintiff is more at fault and pays economic damages only in proportion to its share of fault. Overruling the "special aspects" doctrine will not work an undue hardship or cause inequity.

II. THIS COURT SHOULD ABOLISH THE OPEN AND OBVIOUS DOCTRINE UNDER SECOND RESTATEMENT § 343A AND HOLD, CONSISTENT WITH RESTATEMENT TORTS, 3d, § 51, COMMENT K, THAT THE OBVIOUSNESS OF A DANGER DOES NOT EXTINGUISH THE POSSESSOR'S DUTY, BUT IS A FACTOR FOR THE JURY TO CONSIDER IN DETERMINING THE COMPARATIVE FAULT OF THE PARTIES.

Several alternative approaches are significantly preferable to *Lugo's* and *Hoffner's* "special aspects" rule. This Court could return to *Riddle's* duty-based application of 2 Restatement Torts, 2d, § 343A; maintain § 343A as a standard of care framework, as Justice Levin and Michael Cavanagh advocated; or reject § 343A and adopt the portion of 2 Restatement Torts, 3d, Liability for Physical and Emotional Harm, § 51, comment k, establishing that the obviousness of a danger does not extinguish the possessor's duty, but is a factor for the jury to consider in determining the parties' comparative fault. The MAJ recommends this Court adopt this final approach, which is entirely consistent with our "comparative negligence framework." (2/4/22 MOAA Order).[27]

[27] Since the Plaintiff undisputedly was Defendant's business invitee and was owed the same duty under current Michigan law and the Third Restatement, see *Foster, supra*, 291 P3d at 155, it is unnecessary for this Court to consider whether to adopt the approach in Third Restatement § 51 eliminating the possessor's duty distinctions based on traditional entrant classifications [invitee,

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Riddle's **duty-based rule**

A return to *Riddle's* duty-based application of 2 Restatement Torts, 2d, § 343A is certainly preferrable to the Draconian "special aspects" rule – which eliminated the crucial exception in § 343A reserving the possessor's liability if it "should anticipate the harm despite such knowledge or obviousness." Notwithstanding, the MAJ agrees with Judge Gleicher that a "reexamination of *Riddle* is long overdue." *Dorsey, supra* (Gleicher, J, concurring) (Slip opinion, p. 6 – Exhibit B). As established above, § 343A and *Riddle* rest on the long-abolished doctrines of contributory negligence and secondary assumption of risk. By transforming a standard-of-care rule into a duty doctrine, *Riddle* not only usurped the factfinder's role of determining the parties' comparative fault, but conceptionally summoned *Lugo* and its progeny's transformation of virtually all open and obvious cases into questions of law at the summary disposition stage. Like the ensuing, "special aspects" rule, *Riddle's* duty-based application is inconsistent with Michigan's comparative negligence framework. The prevailing majority of national decisions addressing this issue, cited above, concur that the advent of comparative negligence necessitates rescission of the duty-based open and obvious rule. This portion of *Riddle* should not be maintained.[28]

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licensee, or trespasser]. The Court also could accept the Third Restatement's comparative fault approach and maintain the traditional premises entrant's classifications.

[28] At best, retention of *Riddle* must be limited to its actual holding that a possessor owes "no absolute duty to warn invitees of known or obvious dangers" "unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*, 440 Mich at 96-97. Continuation of this holding must include the proviso that the possessor owes no duty to warn only if the invitee has "knowledge of the existence of the condition or activity itself" and "appreciation of the danger it involves." 2 Restatement Torts, 2d, § 343A, comment b. A few jurisdictions generally rejecting the open and obvious defense continue to hold that "the obvious danger rule only obviates a duty to warn … [i]t is inapplicable where liability is predicated upon acts other than a failure to provide adequate warning of a dangerous condition." *Harrington v Syufy Enterprises*, 931 P2d 1378, 1381 (Nev 1997); see also *Osborn v Mission Ready Mix*, 273 Cal Rptr 457, 466-468 (Cal App 1990); *Zambito v Southland Rec Enterprises*, 383 So2d 989, 990-91 (Fla App 1980). Since this case primarily addresses the possessor's failure to exercise reasonable care to remove the snow hazard (by shoveling or salting), the failure to warn issue is not directly implicated.

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Section 343A as a standard of care framework

Clarifying § 343A as a standard-of-care framework, as *Bertrand* foreshadowed and as Justices Levin and Cavanagh advocated, improves on *Riddle's* duty-based approach. Application of § 343A as stating the possessor's standard of care arguably would be more compatible with comparative negligence. See, in addition to the above-cited cases, *Bill's Dollar Store v Bean*, 77 SW3d 367, 372-373 (Tex App 2002) (establishment of comparative negligence necessitates rejection of § 343A as a duty-limiting provision). A plaintiff's decision to encounter a dangerous condition would no longer eliminate the possessor's duty but, instead, would be "relevant in deciding the extent of the plaintiff's" comparative negligence and the parties' comparative fault. *Riddle*, *supra*, 440 Mich at 119 (Levin, J, dissenting). Optimally, this would not only serve the goals of the tort system but substantially reduce the frequency of appeals emblematic of the *Lugo* era.

Despite these advantages, retaining § 343A as a statement of the possessor's standard of care is unadvisable. Even as a standard-of-care provision, § 343A retains the underlying principles of contributory negligence and secondary assumption of risk. The MAJ concurs with Justice Clement that, ultimately, § 343A is "a square peg" that cannot fit "into the round hole of comparative negligence." *Livings*, *supra*, 507 Mich at 379 (Clement, J, dissenting). Section 343A continues to perpetuate the long-rejected bias that, by encountering an open and obvious risk, "the plaintiff took his chances" and should not recover. *Branch*, *supra*, (Slip Opinion, p. 9 – Exhibit C) (Gleicher, J, concurring in part and dissenting in part) (quoting *Felgner* at 42).

Even more, as Justice Cavanagh's *Lugo* dissent reveals, the distinction between characterizing § 343A as a "duty" versus a "standard of care" is essentially semantical. Making the duty rule "better" and "more precise" by calling it a standard of care does not change the substantive principles and intrinsic deficiencies of § 343A. *Lugo*, *supra*, 464 Mich at 540-541

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(Cavanagh, J, concurring). Instead, rebranding the same outdated doctrine invites the same judicial factfinding, inequities and litigation propagation we've endured for over two decades. Accordingly, the MAJ does not recommend maintaining § 343A as a standard of care approach.

Adopting Restatement Torts, 3d, § 51, comment k

Restatement Torts, 3d, Physical and Emotional Harm, § 51, p. 251 (2012) states:

> [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.

Comment k to § 51 provides, in relevant part:

> 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. This treatment of land possessors is consistent with that of other actors who create risks.
>
> 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.

Id, comment *k*, pp. 251–52 (citation omitted).

Like the entire Third Restatement, § 51 is wholly consistent with comparative negligence. Under Third Restatement § 51, "the open and obvious nature of the conditions does not automatically preclude liability …." *Foster*, *supra*, 291 P3d at 156. "[I]t instead is part of assessing whether reasonable care was employed" and a factor to be considered "in apportioning

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comparative negligence ….” *Id* (citing § 51, comment k; other citations omitted).

While, as demonstrated above, most courts continue to follow Restatement Torts, 2d, § 343A either as a duty-based rule or standard of care approach, a growing number have either expressly or implicitly adopted Third Restatement § 51 and its comment k. See *Foster, supra*, at 152; *Carroll, supra*, 955 F3d at 1268-69; *Lopez, supra*, 468 P3d at 896; *Ludman, supra*, 895 NW2d at 910; *Longwell, supra*, 257 A3d at 169 n 2 (quoting Third Restatement, § 51, comment k) (signaling that “we would reach the same result under” Third Restatement, § 51, comment k, and agreeing with comment k that “the fact that a dangerous conditions is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor’s liability.”); *Steigman, supra*, 267 P3d at 1250-1251 (Rejecting Second Restatement § 343A as incompatible with comparative negligence and holding, implicitly consistent with the Third Restatement, that “any known or obvious characteristics of the danger as factors” may be considered “in the larger comparative negligence analysis.”).

By establishing that an open and obvious condition does not “pretermit the land possessor's liability” but is a factor in assessing the parties’ comparative fault, Third Restatement § 51 and comment k is the only approach totally consistent with our comparative negligence framework. It is the only round peg that fits “into the round hole of comparative negligence.” *Livings, supra*, 507 Mich at 379 (Clement, J, dissenting).

For the reasons presented, the MAJ recommends that this Court abolish 2 Restatement Torts, 2d, § 343A and adopt the standard in Restatement (Third) Torts, § 51, comment k that the open and obvious nature of a hazard does not extinguish the possessor’s duty, but is a factor for the jury to consider in determining the parties’ comparative fault.[29] None of the arguments of

[29] Once again, because Plaintiff was Defendant’s business invitee and was owed the same duty under current law (Second Restatement § 343) and Third Restatement § 51, *Foster, supra*, 291

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Defendant or its amici alter the fact that this is only standard consistent with our comparative negligence framework.

As noted above, Defendant's contention that the "special aspects" doctrine "increases the protections afforded to Michigan invitees who encounter premises dangers that are so open and obvious that no duty exists" is stunningly false. (Defendant's Supplemental Brief, p. 3). *Lugo* and its progeny have undermined each of the principal goals of our tort system. Instead of "protecting" invitees, compensating injured victims of negligence, and encouraging possessors to maintain safe premises, the "special aspects" rule has "immunize(d) premises possessors from nearly all liability arising out of their breaches of a long-established duty … (and) harm(ed) … those who chose to reside in or visit Michigan." *Hoffner, supra*, 492 Mich at 483 (Cavanagh, J, dissenting).

The contention of Defendant and its amici that the Legislature's enactment of comparative fault under MCL 600.2956, MCL 600.2957 and MCL 600.6304 somehow prevents this Court from addressing and revising the common law issues presented in the MOAA order is untenable. Defendant itself acknowledges that "[t]his Court is the principal steward of Michigan's common law …." (Defendant's Supplemental Brief, p. 21, quoting *Price v High Pointe Oil Co, Inc,* 493 Mich 238, 258; 828 NW2d 660 (2013) (citation and quotation marks omitted)).[30]

P3d at 155, it is unnecessary in this appeal to consider whether to adopt the portion of § 51 rejecting the possessor's duty distinctions based on the traditional entrant classifications of invitee, licensee, and trespasser, Third Restatement § 51, comment a. National cases are divided on the issue. See *Foster, supra*, 291 P3d at 156 n 1 (citation omitted) (abolishing entrant status distinctions); *Shelton, supra*, 413 SW3d at 909 (adhering "to the traditional notion that duty is associated with the status of the injured party as an invitee, licensee, or trespasser.").

[30] Aside from the fact that the Legislature's comparative fault statutes did not divest this Court of its plenary jurisdiction over the common law, Defendant's amici's reliance on the "legislative acquiescence" rule is unfounded. "[T]he doctrine of legislative acquiescence is not recognized in this state." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 209 n 8; 731 NW2d 41 (2007).

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Next, Defendant spuriously suggests this Court should consider adopting the "continuing storm doctrine." At the outset, this issue is not before the Court. It was not preserved for review in the lower courts. See *Hess v West Bloomfield Twp*, 439 Mich 550, 557 n 6; 486 NW2d 628 (1992) (holding that an "issue was not preserved for review by this Court because it was not raised in the trial court"). The Court also did not include this issue in this case's MOAA order. In addition, our courts have rejected the continuing storm doctrine as contrary to the natural accumulation rule in *Quinlivan*, *supra* and the overriding principle that determination whether the possessor exercised reasonable care under the circumstances is a question of fact for the jury. See *Lundy v Groty*, 141 Mich App 757, 759-761; 367 NW2d 448 (1985); *Clink v Steiner*, 162 Mich App 551, 556-557; 413 NW2d 45 (1987).[31]

Defendant mistakenly argues that adoption of a standard-of-care approach under the Third Restatement would destroy "predictability and stability" and unleash a torrent of litigation. These are the same arguments that led this Court, in *Kreiner*, *supra*, and *Lugo* to unwisely transform fact-based issues regarding a serious impairment under MCL 500.3135 or the parties' comparative fault into duty-based questions of law for the courts. Boot-strapping fact questions into judge-made predetermined categories does not work. It does not reduce litigation. It certainly does not effectuate sound public policy. It does not protect Michigan citizens. It does not serve substantive justice. Defendant and its amici also overlook all the existing safeguards, summarized above, protecting possessors from unwarranted liability.

[31] Further, the "continuing storm doctrine" has been sharply criticized as "archaic, unworkable, … outmoded" and "nonsensical." *Gries v Ames Ecumenical Housing, Inc*, 944 NW2d 626, 635-636 (Iowa 2020) (Appel, J, concurring in part and dissenting in part); see also Smith, *A Dereliction of Duty? The Iowa Supreme Court's Careless Treatment of No-Duty Doctrines under the Restatement (Third) of Torts*, 107 Iowa Law Review 391, 412-414 (Nov, 2021).

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Finally, Defendant's amici offer the irrelevant argument that a restatement is "not a statute" and is not "binding." (Acuity/IAM Brief, p. 23). This does not alter the fact that this Court not only has the authority to adopt a restatement provision as an accurate statement of Michigan common law, but has routinely done so. See *Quinlivan, supra*; *Riddle, supra*; *Bertrand, supra*. These amici's reliance on "2018, Public Act 520" (actually MCL 500.3032) as a statutory prohibition against adoption of Third Restatement § 51 is meritless. This statute exclusively addresses the law relating to "Liability Insurance" policies. *Id*. It does not represent legislative prohibition against adopting any other restatement provision, including Third Restatement § 51.

RELIEF REQUESTED

WHEREFORE, for the reasons presented, the Michigan Association for Justice respectfully requests that this Honorable Court overrule *Lugo* and its progeny's "special aspects" rule; abolish the open and obvious doctrine under 2 Restatement Torts, 2d, § 343A, and hold, consistent with Restatement Torts, 3d, § 51 and comment k, that the obviousness of a danger does not extinguish the possessor's duty, but is a factor for the jury to consider in determining the comparative fault of the parties; and reverse the lower court's decisions.

Respectfully submitted,

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Dated: July 1, 2022

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INDEX OF EXHIBITS TO AMICUS CURIAE BRIEF
OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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Exhibit A

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2019 WL 1879582
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Erica DEAS, Plaintiff-Appellee,
v.
HARTMAN AND TYNER, INC., Doing Business as Pointe O'Woods Apartments, Defendant-Appellant.

No. 340068
|
April 25, 2019

Oakland Circuit Court, LC No. 2016-155557-NO

Before: Jansen, P.J., and Meter and Gleicher, JJ.

Opinion

Per Curiam.

***1** In this slip-and-fall action, defendant appeals by leave granted [1] the trial court's order denying its motion for summary disposition under the open-and-obvious doctrine. We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff was a tenant at defendant's apartment complex. When plaintiff signed the lease for her apartment, she also purchased the right to use a parking spot covered by a carport near her apartment. Plaintiff moved into the apartment in October 2013 and regularly parked in the carport, accessing the carport at least twice per day during the workweek. Plaintiff alleges that she slipped and fell on a patch of snow and ice underneath this carport on two consecutive days in January 2014. Plaintiff could not remember the specific days of the incidents, only that they occurred on consecutive days.

Plaintiff testified that there had been snow and ice visible in the parking lot for at least a week before the incidents. On the morning of the first fall, plaintiff's car was backed into her spot in the carport near one of the carport's poles. Plaintiff testified that she was aware of slippery conditions by this pole and that she had previously observed snow and ice under the carport. Plaintiff walked across the parking lot to the passenger side of her car, intending to place her belongings there. As she was putting her belongings into her car, she slipped on a patch of snow covered with ice near the pole, twisting her ankle in the process. Plaintiff admitted in her deposition testimony that, had she put her belongings in the backseat of her car on the driver's side, she would have avoided the icy area near the pole. After she fell, plaintiff got into her car and drove to work. She informed the apartment complex of her fall later that day, and the apartment complex indicated that the ice could have been in a low spot of the parking lot where the pavement had sunk.

Plaintiff returned her car to the carport that night, backing into her spot. The next morning plaintiff again walked to the passenger side of her vehicle to place her belongings there. Plaintiff testified that she was "very careful" where she was walking and that she "stepped on that one particular area"—meaning the spot near the pole—and slipped on the ice, bumping her leg in the process, though she did not fall to the ground.

Plaintiff did not seek medical attention for her injuries until October 2014, at which time she was allegedly informed that she had several injuries to the ligaments in her leg. Shortly thereafter, plaintiff sued defendant pleading, *inter alia*, a count of premises liability. After discovery, defendant moved for summary disposition on plaintiff's premises-liability claim, asserting that the allegedly dangerous condition was open and obvious. The trial court concluded that a question of material fact existed as to whether the condition was open and obvious because the carport did not have any lighting. This appeal followed.

II. ANALYSIS

***2** On appeal, defendant argues that it was entitled to summary disposition on plaintiff's premises-liability claim because the allegedly dangerous condition was open and obvious. "We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc. v. Dep't of Treasury*, 325 Mich. App. 289, 293-294; —— N.W.2d —— (2018)—— N.W.2d —— (2018). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and is appropriately granted when, except as to the amount of damages, there is no genuine

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issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 294. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v. Kovich*, 273 Mich. App. 227, 230; 731 N.W.2d 112 (2006).

A plaintiff alleging a premises-liability claim must establish that (1) the defendant owed her a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Sanders v. Perfecting Church*, 303 Mich. App. 1, 4; 840 N.W.2d 401 (2013). "[A] tenant is an invitee of the landlord." *Benton v. Dart Props*, 270 Mich. App. 437, 440; 715 N.W.2d 335 (2006). A landlord owes an invitee a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516; 629 N.W.2d 384 (2001).

The landlord, however, is "not an absolute insurer of the safety of an invitee." *Buhalis v. Trinity Continuing Care Services*, 296 Mich. App. 685, 693; 822 N.W.2d 254 (2012) (internal citation and quotation marks omitted). "The possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard." *Lymon v. Freedland*, 314 Mich. App. 746, 757-758; 887 N.W.2d 456 (2016) (internal citation and quotation marks omitted). "Whether a danger is open and obvious involves an objective inquiry to determine whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection." *Id.* at 758 (internal citation, quotation marks, and brackets omitted).

The open-and-obvious doctrine is predicated on the strong public policy that "people should take reasonable care for their own safety" and precludes the imposition of a duty on the landlord to take extraordinary measures to keep people safe from reasonably-anticipated risks. *Buhalis*, 296 Mich. App. at 693-694 (internal citation and quotation marks omitted). Thus, when "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." *Id.* at 693 (internal citation and quotation marks omitted). The open-and-obvious doctrine is not an exception to the duty owed by a landlord, but an integral part of that duty, and its application is a question of law for the court to decide. *Id.*

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Estate of Trueblood v. P & G Apartments, LLC*, —— Mich. App. ——, ——*Estate of Trueblood v. P & G Apartments, LLC*, —— Mich. App. ——, ——; —— N.W.2d —— (2019)—— N.W.2d —— (2019) (Docket No. 340642); slip op. at 5 (internal citation and quotation marks omitted). We see no reason to break from this precedent in this case. Plaintiff testified that snow and ice were present in the parking lot for at least a week before her falls. See *Ragnoli v. North Oakland-North Macomb Imaging, Inc.*, 500 Mich. 967 (2017) ("[T]he presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch open and obvious such that a reasonably prudent person would foresee the danger of slipping and falling.") (internal citation and quotation marks omitted).[2] Indeed, plaintiff testified that she was aware that snow and ice had previously been present in the carport and that, *on the day of her first fall*, she was aware that there were slippery conditions in the carport. Additionally, we must point out that plaintiff fell in the same location on two consecutive days. It stands to reason that, after falling the first day, plaintiff was aware of the potential hazard in the carport. Accordingly, we conclude that the ice and snow upon which plaintiff fell was an open-and-obvious danger.

***3** That the danger was open and obvious, however, does not end our inquiry. Rather, summary disposition is appropriate only when the open-and-obvious danger does not involve any "special aspects" that create an "unreasonable risk of harm." *Lymon*, 314 Mich. App. at 758 (internal citations and quotation marks omitted). "Two instances that can constitute special aspects include when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable* because these conditions give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 758-759 (internal citation and quotation marks omitted). It is the plaintiff's burden to demonstrate that a genuine issue of material fact exists as to whether any special aspects were present. *Id.* at 759.

Plaintiff argues that special aspects exist because the carport did not have lighting and, therefore, a tenant would be

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incapable of conducting an inspection of the premises. We disagree. Again, we point out that plaintiff testified that she was actually aware of the ice in the carport. Moreover, our Supreme Court has already concluded that, when wintery conditions are present elsewhere on the property, a lack of adequate lighting is insufficient to preclude the application of the open-and-obvious doctrine. *Ragnoli*, 500 Mich. 967. Moreover, plaintiff specifically stated that she could see the snow and ice on the ground under the carport, thereby undermining her claim that inadequate lighting prevented her from conducting an inspection of the premises upon which she fell. Accordingly, we conclude that the lack of lighting does not constitute a "special aspect."

Additionally, we conclude that the ice was not effectively unavoidable. "[T]he standard for effective unavoidability is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Hoffner v. Lanctoe*, 492 Mich. 450, 468-469; 821 N.W.2d 88 (2012). Plaintiff testified that she chose to back her vehicle into the carport and chose to place her belongings in the passenger side of her car on both occasions, despite being aware of the ice near the pole. Plaintiff admitted that, had she placed her belongings in the backseat on the driver's side of her car, she would have avoided the ice upon which she fell.

Therefore, there were no special aspects which would preclude the application of the open-and-obvious doctrine. Thus, we conclude that the trial court erred by denying defendant's motion for summary disposition. [3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Gleicher, J. (concurring in part and dissenting in part).

I concur with the majority's decision to affirm the trial court's grant of summary disposition in this premises liability case because I am compelled to do so by our Supreme Court's opinion in *Hoffner v. Lanctoe*, 492 Mich. 450; 821 N.W.2d 88 (2012). I write separately to briefly describe the deficiencies in the doctrinal approach to premises liability law manifest in *Hoffner* and predecessor cases, and exemplified by this case.

Plaintiff Erica Deas slipped and fell on snow-covered ice that had accumulated under her carport. Deas knew the snow and ice were there; they were obvious. Deas claims that the defendant should have eliminated the snow and ice because the condition was dangerous, present for several days, and imperiled her ability to safely enter and exit her vehicle.

Because this theory does not hinge on defendant's failure to warn, the majority's discourse on the open-and-obvious doctrine is misplaced. Here, Deas contends that the landowner failed to exercise reasonable care to protect her from the danger, notwithstanding her awareness of it. Rather than analyzing the danger using open-and-obvious principles, the proper legal question is: should the landowner have reasonably anticipated that Deas would suffer an injury *despite* the condition's obviousness?

***4** The majority's perception that the open-and-obvious-danger doctrine bears relevance is understandable, as Michigan's common law conflates a landowner's duty with the landowner's defenses. A finding that a danger is "open and obvious" eliminates the landowner's duty to warn or otherwise protect against the danger, thereby serving to immunize the landowner for any negligence in maintaining the premises. See *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516-517; 629 N.W.2d 384 (2001). In Michigan, the open-and-obvious-danger doctrine corresponds to contributory negligence. It focuses only on the *plaintiff's* failure to conform to an objective standard of care and bars recovery even when the defendant could and should have eliminated a hazard. Our common law transforms even unreasonable dangers created or tolerated by a landowner into risks that must be born only by the plaintiff. In other words, the plaintiff's failure to exercise reasonable care entirely negates the defendant's duty of care.

In all other negligence cases, a system of comparative fault dictates that a plaintiff's negligence must be weighed against a defendant's, and fault apportioned accordingly. The Supreme Court justified replacing contributory negligence with comparative fault in *Kirby v. Larson*, 400 Mich. 585, 620-622; 256 N.W.2d 400 (1977) (cleaned up), explaining that contributory negligence had outlived its usefulness ("The policy ... was designed to protect infant industries from oversympathetic juries who regarded these corporation defendants as intruders, as well as immensely rich"), that contributory negligence worked an inequity because "it fails to distribute responsibility in proportion to fault," and that the doctrine "visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than

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the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will." The Legislature subsequently codified comparative negligence by enacting MCL 600.2957(1), which provides that in tort cases, "the liability of each person shall be allocated ... by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault."

Michigan's approach to premises liability law reinvigorates contributory negligence and ignores both the common law and the statutory comparative negligence frameworks. An open-and-obvious danger not only eliminates the duty to warn, but sweeps away any duty to protect an invitee from dangerous conditions on the premises. Except in the rarest of circumstances, only the injured plaintiff bears any responsibility to avoid the consequences of an obvious hazard.

With the landowner's duty to protect an invitee against known or obvious dangers written out of our common law, this Court has approached every premises liability case as presenting one issue: whether the danger was open and obvious. If a danger is "open and obvious," our common law instructs, the landowner has no duty, even when the theory of liability (as here) centers on the landowner's failure to diminish a hazard rather than to warn of its presence. This is not what the Restatements of Torts teach. Indeed, the Restatement Torts, 3d clarifies that a landowner has a duty of reasonable care whenever "artificial" or "natural conditions on the land ... pose risks" to those who enter the land. 2 Restatement Torts, 3d, § 51(b)-(c), p. 242. The duty does not evaporate when a danger is open and obvious:

> The duty imposed in this Section, as amplified in this Comment, is consistent with § 343A, although it is extended beyond the invitees covered in § 343A to all entrants on the land. ... 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. [2 Restatement Torts, 3d, § 51, comment *k*, p. 251.]

***5** Under the Second and Third Restatements, a landowner is not excused from remedying a known or obvious danger. Rather, the obviousness of a danger "bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability." *Id*. In other words, an obvious danger does not mean that the landowner must prevail. Rather, the legal questions become (1) whether the landowner should have remediated the danger despite its obviousness, and (2) whether the invitee failed to use reasonable care in the face of the obvious danger. Under this approach, the defendant's duty is separate and distinct from the plaintiff's. [1]

Michigan's blurring of two distinct duty analyses began with *Lugo*. Before *Lugo*, the Supreme Court expressly adopted the principles embodied in 2 Restatement, Torts, 2d, § § 343 and 343A. See *Riddle v. McLouth Steel Prods Corp.*, 440 Mich. 85, 94-95; 485 N.W.2d 676 (1992); *Bertrand v. Alan Ford*, 449 Mich. 606, 610-612; 537 N.W.2d 185 (1995). In *Lugo*, 464 Mich. at 524, the Supreme Court purported to apply the legal principles articulated in 2 Restatement Torts, 2d, §§ 343 and 343A. Unfortunately, the Court merely professed to follow the Restatement. Instead, *Lugo* forged a new path by eliminating a landowner's duty "to protect an invitee from open and obvious dangers" unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous[.]" *Lugo*, 464 Mich. at 517. This rule is inconsistent with the pertinent sections of 2 Restatement Torts, 2d, §§ 343, 343A, pp. 215-216, 218, which provide:

> § 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

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> (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.

Notably, the term for the defense to liability used by Restatement Torts, 2d was "*known* or obvious dangers," not "*open* and obvious dangers." In addition to changing the name of the doctrine, the Michigan Supreme Court fundamentally altered its character. Restatement Torts, 2d proposed that a landowner should not bear liability for injuries caused by dangerous conditions on the land that were known to an invitee "unless the possessor should anticipate the harm despite such knowledge or obviousness." 2 Restatement Torts, 2d, § 343A(1), p. 218. The Supreme Court limited this duty to situations presenting "special aspects," a term of the Court's own creation, which it defined narrowly to include only "effectively unavoidable" risks and severe dangers such as "an unguarded thirty foot deep pit in the middle of a parking lot." *Lugo*, 464 Mich. at 518. The Court further extinguished a landowner's liability with this admonition: "In sum, only those special aspects that give rise to *a uniquely high likelihood of harm or severity of harm* if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 518-519 (emphasis added). As the subsequent caselaw has proven, such circumstances are virtually nonexistent.

***6** *Hoffner* further distances our premises liability law from the Restatement. In *Hoffner*, 492 Mich. at 473, the Court held that to establish a "special aspect" and an "effectively unavoidable" danger, the plaintiff must have been "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Hoffner*'s "special aspects" and "effectively unavoidable" formulations do not derive from the Restatement. To the contrary, they cancel the duty set forth in 2 Restatement Torts, 2d, § 343A(1), and its relevant commentary. As Justice Michael Cavanaugh pointed out in his dissent, by vitalizing a new version of contributory negligence, *Hoffner*'s rule continues the progression of our premises liability law away from comparative fault and the Restatement and toward blanket immunity. Hoffner, 492 Mich. at 487-488 (CAVANAGH, J., dissenting).

Were it not for *Hoffner* I would hold that Deas has created a jury question regarding whether defendant breached its obligation to maintain the premises in a reasonably safe condition. Defendant knew or should have known that the area under the carport was icy and snowy. Defendant knew or should have known that Deas was entitled to park there. Whether Deas should have parked elsewhere depends on how the factfinder weighs each party's culpability for the accident. Under a comparative-negligence regime, as modified by Michigan's statutory law, whether Deas should have behaved differently is merely one element of a larger factual picture. Under the Restatement and MCL 600.2957(1), it should be for a jury to decide how to apportion fault for Deas's fall.

All Citations

Not Reported in N.W. Rptr., 2019 WL 1879582

Footnotes

1 See *Deas v. Hartman Tyner, Inc.*, unpublished order of the Court of Appeals, entered February 22, 2018 (Docket No. 340068).

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2 See also *Janson v. Sajewski Funeral Home, Inc.*, 486 Mich. 934, 935 (2010) (concluding that icy conditions "are open and obvious when there are indicia of a potentially hazardous condition, including the specific weather conditions present at the time of the plaintiff's fall") (internal citation and quotation marks omitted); *Estate of Trueblood*, —— Mich. App. at ——; slip op. at 5-6 (same); *Slaughter v. Blarney Castle Oil Co.*, 281 Mich. App. 474, 483; 760 N.W.2d 287 (2008) (same).

3 Given our conclusion that defendant was entitled to summary disposition under the open-and-obvious doctrine, we need not address defendant's arguments regarding notice.

1 An earlier draft of 2 Restatement Torts, 3d, § 51, comment k (2010), put it this way:

> 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 defense.

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Exhibit B

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2017 WL 1367162
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Cheryl DORSEY, Plaintiff–Appellant,
v.
TAUBMAN AUBURN HILLS ASSOCIATES, a Limited Partnership, Defendant–Appellee.

No. 330690
|
April 13, 2017

Synopsis

Background: Business invitee, who, while walking to the entrance to the shopping mall, was injured when her shoe got caught in a strip of sealant that had been placed in a seam of the concrete sidewalk and she fell, brought premises liability action against mall. The Oakland Circuit Court, Lc No. 2014–142098–NO, entered summary disposition for mall, and invitee appealed.

[Holding:] The Court of Appeals held that condition of concrete walkway was open and obvious, and thus, shopping mall was not responsible for invitee's injuries.

Affirmed.

Gleicher, J., filed concurring opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] Negligence Private walkways and paths

Condition of concrete walkway was open and obvious, and thus, shopping mall was not responsible for injuries that business invitee sustained when her shoe got caught in a strip of sealant that had been placed in a seam of the concrete sidewalk and she fell; joints and cracks in concrete sidewalks and walkways, repaired with a variety of materials, were an everyday occurrence, much like potholes in a parking lot, reasonably prudent person would be aware that joints, cracks, or other uneven areas of a sidewalk could present a tripping hazard, the repaired joint in the walkway was clearly visible and the material used to fill and repair the gap was of a noticeably different color than the surrounding concrete, and average user with ordinary intelligence could have discovered, after a casual inspection, the presence of the repaired area and the accompanying risk of tripping.

[2] Judgment Documentary evidence or official record

Judgment Torts

Conclusion in report from a proposed expert witness, who had examined the scene after the accident, stating that the hazard was not cognizable, detectable, or observable upon casual inspection by ordinary citizens, was improper because proposed expert had no specialized knowledge of the hazard that would place him in a superior position to the trial court to determine on summary judgment whether the legal criteria for openness and obviousness had been satisfied in premises liability action brought against shopping mall by business invitee, who was injured when her shoe got caught in a strip of sealant that had been placed in a seam of the concrete sidewalk and she fell.

Oakland Circuit Court, LC No. 2014–142098–NO

Before: O'Connell, P.J., and Gleicher and Boonstra, JJ.

Opinion

Per Curiam.

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***1** In this premises liability action, plaintiff appeals by right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a trip and fall outside of the entrance to the Great Lakes Crossing Mall ("the Mall") owned by defendant. On August 6, 2013, plaintiff and her friend Vanessa Clark went to the Mall to pick up carryout food, arriving at approximately 1:45 p.m. While walking to the entrance to the Mall, plaintiff's left shoe got caught in a strip of sealant that had been placed in a seam of the concrete sidewalk. She fell and was injured.

Plaintiff filed suit, alleging that defendants improperly repaired the sidewalk joint with a pliable sealant or caulk that compressed when she stepped on it and caused her fall. Plaintiff testified in her deposition that she thought, before she stepped on the repaired area, that the filler material was solid. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's claim was barred because the condition was open and obvious and there were no special aspects about the condition to prevent application of the open and obvious doctrine. In her answer, plaintiff included a report from a proposed expert witness, Steven J. Ziemba of Comprehensive Risk Analysis, Inc., who examined the scene after the accident. The report indicated that "[t]he excessive width and depth of the intersecting concrete joints created a hole or unevenness in the pavement" and that "[t]he amount of soft caulking compound used failed to fill the gap or provide sufficient support for normally imposed pedestrian traffic." Ziemba further stated in his report that there was "an intersection of joints creating a wide gaping discontinuity up to two inches in width" at the accident site and that "[t]he defendant chose to use a caulking compound suitable for repairing small sidewalk cracks" to address the issue. Ziemba opined that "[b]ecause cured caulk remains soft, spongy and easily punctured, caulk should not be used to fill wide joints or cracks" and that "[c]racks or wide sidewalk joints that exceed ¾ inches must be filled with a cement product, such as a concrete patch or mortar." Ziemba also opined that "[f]ailure to properly maintain this section of pavement created an unreasonable risk of harm for business invitees such as [plaintiff]." Defendant filed a motion in limine to preclude Ziemba from testifying as an expert witness under MRE 702, arguing that expert testimony was not necessary to resolve the issue of openness and obviousness.

After a hearing, the trial court granted defendant's motion for summary disposition in a written opinion, concluding that the condition was open and obvious and that the condition created a risk of harm only because plaintiff failed to realize its danger. The trial court did not explicitly rule on defendant's motion in limine. Plaintiff filed a motion for reconsideration, which the trial court denied. This appeal followed.

II. STANDARD OF REVIEW

***2** "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). A motion pursuant to MCR 2.116(C)(10) is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v. Barton Malow Co.*, 480 Mich. 105, 111; 746 N.W.2d 868 (2008). "The moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists." *Bronson Methodist Hosp. v. Auto–Owners Ins. Co.*, 295 Mich. App. 431, 440–441; 814 N.W.2d 670 (2012) (citations omitted). "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*, 469 Mich. at 183.

"The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law." *Riddle v. McLouth Steel Prod. Corp.*, 440 Mich. 85, 95; 485 N.W.2d 676 (1992). "Because the issue of the openness and obviousness of a hazard is an 'integral part' of the question of duty, establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue within

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the province of the court." *Hoffner v. Lanctoe*, 492 Mich. 450, 476; 821 N.W.2d 88 (2012) (footnotes omitted). "[I]t is only when an open and obvious hazard is in some manner *unreasonable* that there is a question of fact for the jury." *Id.*(footnote omitted). We review matters of law de novo. *Slaughter v. Blarney Castle Oil Co.*, 281 Mich. App. 474, 477; 760 N.W.2d 287 (2008).

III. ANALYSIS

On appeal, plaintiff argues that the trial court erred by granting summary disposition based on the open and obvious doctrine. We disagree.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee [1] from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516; 629 N.W.2d 384 (2001). However, a premises possessor generally does not have a duty to protect an invitee from open and obvious dangers. *Id.* at 516, 517. "When a potentially dangerous condition is wholly revealed by casual observation, the premises owner owes its invitees no duty to warn of the danger's existence." *Price v. Kroger Co. of Mich.*, 284 Mich. App. 496, 500; 773 N.W.2d 739 (2009) (quotation marks and citation omitted). In determining whether a danger is open and obvious, the question is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v. Burger King Corp.*, 198 Mich. App. 470, 475; 499 N.W.2d 379 (1993). This is an objective standard, calling for an examination of the objective nature of the condition of the premises at issue." *Hoffner v. Lanctoe*, 492 Mich. 450, 461; 821 N.W.2d 88 (2012) (quotation marks and citation omitted). "Because the test is objective, this Court look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Joyce v. Rubin*, 249 Mich. App. 231, 238–239; 642 N.W.2d 360 (2002) (quotation marks and citation omitted; alterations in the original).

Notwithstanding that a hazard may be discernable by a reasonable person in plaintiff's position, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich. at 517. "The special aspects that cause even open and obvious conditions to be actionable are those that make the conditions 'effectively unavoidable,' or those that 'impose an unreasonably high risk of severe harm.' " *Slaughter*, 281 Mich. App. at 478. "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard," and "situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Hoffner*, 492 Mich. at 469. "[N]either a common condition nor an avoidable condition is uniquely dangerous." *Id.* at 463.

***3** **[1]** Plaintiff tripped on a joint between adjacent slabs of a concrete walkway that had been repaired with some type of pliable caulk or sealant material. These sorts of joints and cracks in concrete sidewalks and walkways, repaired with a variety of materials, are an "everyday occurrence," much like potholes in a parking lot. *Lugo*, 464 Mich. at 523. It is common to notice unevenness and other imperfections in the walking surface, caused by various features or conditions of the land, at the joints between slabs of a concrete sidewalk or walkway. A reasonably prudent person would be aware that joints, cracks, or other uneven areas of a sidewalk can present a tripping hazard. See, e.g., *Weakley v. City of Dearborn Hts.*, 240 Mich. App. 382, 383–384, 385; 612 N.W.2d 428 (2000). Based on the photographs submitted into evidence by both parties, the repaired joint in the sidewalk at issue in this case was clearly visible, and the material used to fill and repair the gap was of a noticeably different color than the surrounding concrete. The pictures also show the unevenness of the slabs and joint area, as well as a vertical height difference between the top of the concrete slabs and the surface of the material used to fill the joint. Indeed, plaintiff admitted that she saw the repaired area as she was walking, yet proceeded to step on it. In sum, like ordinary steps and potholes, deteriorating sidewalk joints and various imperfections in a concrete walking surface are ordinary features that people frequently encounter during the course of their everyday lives and that can be easily observed by a reasonably prudent person. See *Lugo*, 464 Mich. at 523; *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 616–617; 537 N.W.2d 185 (1995). The trial court did not err by holding that the condition was open and obvious, because an average

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user with ordinary intelligence could have discovered, after a casual inspection, the presence of the repaired area and the accompanying risk of tripping. *Novotney*, 198 Mich. App. at 475.

Additionally, there were no special aspects of the type that would remove the condition from the open and obvious doctrine. The photographs submitted into evidence show that the repaired joint was in the middle of a wide-open area and could have been avoided with minimal effort. Thus, although plaintiff thought that the joint was filled with a solid non-pliable material, plaintiff was not "compelled" to step on the joint, and the repaired joint was clearly not "effectively unavoidable." *Hoffner*, 492 Mich. at 469; see also *Joyce*, 249 Mich. App. at 242–243. There was nothing about the surrounding circumstances that would have made it difficult for plaintiff to successfully navigate the small repaired area. See *Bertrand*, 449 Mich. at 623–624. Furthermore, unlike the risk of harm presented by "an unguarded thirty foot deep pit," the risk of harm presented by tripping on an ordinary sidewalk joint repair like the one at issue here is not a "substantial risk of death or severe injury." *Lugo*, 464 Mich. at 518. Common, avoidable conditions are not uniquely dangerous. *Hoffner*, 492 Mich. at 463.

Although plaintiff argues that she thought that the filler material was solid rather than pliable and did not realize that her foot would sink in, there was nothing hiding the nature of the filler material or preventing her from discovering its pliable nature. Cf. *Hughes v. PMG Bldg., Inc.*, 227 Mich. App. 1, 11–12; 574 N.W.2d 691 (1997) (where the stability of the support for an overhang was obscured from sight). There also were bumps, imperfections, and signs of unevenness in the surface that were visibly present. As previously stated, the test for whether a condition is open and obvious is an objective one, *Hoffner*, 492 Mich. at 461, and a reasonably prudent person could have seen that there was some risk of tripping at this joint and avoided it. Moreover, it is not "unusual" to repair the joints of a sidewalk with materials like pliable caulk or sealant or for repaired sidewalk joints to be somewhat uneven, and this factor therefore does not negate the applicability of the open and obvious doctrine. See *Lugo*, 464 Mich. at 522.

[2] Even after giving plaintiff the benefit of reasonable doubt, reasonable minds could not differ in concluding that an ordinary person's casual inspection would have revealed the condition of the sidewalk area and that the repair was therefore open and obvious. *West*, 469 Mich. at 183. An unreasonably dangerous hazard "must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances." *Hoffner*, 492 Mich. at 472. Moreover, even accepting the evidence in Ziemba's report as true, that the repair should have been made with a cement product rather than caulk because of the size of the crack, the report does not alter our conclusion. Plaintiff concedes that Ziemba's legal conclusion that the sealant upon which plaintiff tripped was unreasonably dangerous was improper and objectionable. See *Keywell and Rosenfeld v. Bithell*, 254 Mich. App. 300, 338; 657 N.W.2d 759 (2002). Similarly, Ziemba's conclusions that the hazard was not "cognizable, detectable, or observable upon casual inspection by ordinary citizens" also was improper because Ziemba had no "specialized knowledge" of the hazard that would place him in a superior position to the trial court to determine whether the legal criteria for openness and obviousness had been satisfied. *Id.* And nothing in Ziemba's report, even viewed in the light most favorable to the plaintiff, created a genuine issue of material fact regarding the open and obvious nature of the hazard, so as to prevent the trial court from deciding the issue as a matter of law. *Hoffner*, 492 Mich. at 476. Our conclusion to uphold the trial court's determination is therefore not altered by Ziemba's report.

***4** Finally, the fact and severity of plaintiff's injury is "immaterial to whether an open and obvious danger [was] ... unreasonably dangerous." *Lugo*, 464 Mich. at 518 n 2. Defendant simply did not have a duty to protect plaintiff from this open and obvious condition. *Id.* Accordingly, summary disposition was proper under MCR 2.116(C)(10) because there is no genuine issue of material fact regarding whether the condition at issue was open and obvious, and defendant is entitled to judgment as a matter of law. *Latham*, 480 Mich. at 111; *West*, 469 Mich. at 183.

Affirmed.

Gleicher, J. (concurring).

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I concur with the majority only because *Riddle v. McLouth Steel Prod. Corp.*, 440 Mich. 85, 95; 485 N.W.2d 676 (1992), and its progeny compel me to do so. This case exemplifies the juridical contradictions inherent in our state's "open and obvious" jurisprudence, precipitating this separate opinion.

Viewed in the light most favorable to Dorsey, defendant negligently created a dangerous condition by repairing a sidewalk joint with an inappropriate material that appeared solid, but gave way under the weight of a foot. On the other hand, as the majority accurately observes, "a reasonably prudent person would be aware that joints, cracks, or other uneven areas of a sidewalk can present a tripping hazard." A jury could easily find that both parties were negligent. Given that we live in a comparative negligence world, why does Dorsey's negligence bar her recovery while the negligence of defendant is excused?

Our Supreme Court long ago banished the notion that under the common law, an injured person's contributory fault should eliminate a fair allocation of tort liability. See *Placek v. Sterling Hts.*, 405 Mich. 638; 275 N.W.2d 511 (1979). Under a comparative fault regime, the trier of fact determines the relative degree of the parties' negligence. In a case like this, the calculus would certainly include the obviousness of the danger and its visibility. So why does an open and obvious danger absolve a negligent landowner from any liability by negating the landowner's duty to keep its premises in reasonable repair? And lest there be any confusion regarding a landowner's duty, the Supreme Court has repeatedly elucidated that a landowner owes to an invitee such as Dorsey an "obligation to also make the premises safe, which requires the landowner to inspect the premises and depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 597; 614 N.W.2d 88 (2000).

In *Riddle*, 440 Mich. at 99, the Supreme Court adopted a duty-based open and obvious danger defense. In reaching this result, the Court appropriated the analysis of the Illinois Supreme Court in *Ward v. K. Mart Corp.*, 136 Ill. 2d 132; 554 N.E.2d 223 (1990), rejecting that "the adoption of comparative negligence ... has affected the basic duty a landowner or occupier owes to entrant upon his land" with respect to open and obvious conditions.[1] In the 25 years that have elapsed since *Riddle* was decided, three important developments have dramatically altered the legal landscape. A re-examination of *Riddle* is long overdue.

***5** First, in countless cases involving whether a particular condition is open and obvious, Michigan courts have applied the test applicable in all negligence case—the reasonable person standard. In *Novotney v. Burger King (On Remand)*, 198 Mich. App. 470, 475; 499 N.W.2d 379 (1993), we engrafted that standard on a court's determination of whether a condition is open and obvious: "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" The *Novotney* formulation is ubiquitous in our premises liability caselaw.[2] Whether called the "average person with ordinary intelligence" test as in *Novotney*, or "a reasonably prudent person" standard as the majority does here, the pertinent inquiry in premises liability cases echoes that in *all* negligence cases: did the plaintiff behave reasonably under the circumstances?

The second post-*Riddle* development concerns comparative fault. When the Supreme Court decided *Riddle*, comparative fault was solely a creature of the common law that had been embraced in *Placek*. But that changed in 1995 when our Legislature adopted MCL 600.2958, explicitly enshrining the doctrine of comparative fault in *all* tort actions:

> Subject to [MCL 600.2959], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages.

The Legislature carved out no exception for premises liability claims despite its awareness of *Riddle*.

The clear and express language of MCL 600.2958 prohibits a court from barring a plaintiff's recovery based on her comparative fault. But as the majority's opinion in this case vividly demonstrates, applying the open and obvious danger doctrine violates this prohibition. Because her conduct fell below that of a "reasonably prudent person," Dorsey may not recover—despite that defendant was concurrently negligent, and arguably *more* negligent than Dorsey. Even if a plaintiff

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cautiously approaches a negligently created or permitted danger and attempts to avoid it, she may not recover. This result simply cannot be reconciled with MCL 600.2958. "It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty." *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss., 1994). I would hold that the open and obvious danger defense is incompatible with our Legislature's pronouncement that comparative negligence controls.

Finally, the "no duty" rule inherent with Michigan's open and obvious jurisprudence is a relic from foregone era. See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 Yale L. J. 605, 628 (1954); Keeton, *Personal Injuries Resulting From Open and Obvious Conditions,* 100 U. Pa. L. Rev. 629, 642 (1952). A number of courts have recognized that comparative negligence principles apply in premises liability disputes as well as all other tort cases. See *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky., 2015); *Steigman v. Outrigger Enterprises, Inc.*, 126 Haw. 133; 267 P.3d 1238 (2011); *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 781–782; 291 P.3d 150 (2012); *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss., 1994). But until our Supreme Court says otherwise, negligent landowners are graced with judicially created immunity and plaintiffs such as Dorsey must be denied recovery, regardless of the Legislature's clearly expressed contrary view.

All Citations

Not Reported in N.W. Rptr., 2017 WL 1367162

Footnotes

1 That plaintiff was a business invitee of the Mall is not in dispute; plaintiff went to the Mall with Clark for the purpose of purchasing carry-out food and was therefore on the premises for a business purpose. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 597; 614 N.W.2d 88 (2000).

1 The *Riddle* Court engaged in no discussion whatsoever of the body of *Michigan* caselaw holding that the obviousness of a dangerous condition, or a plaintiff's familiarity with that condition, was relevant to a plaintiff's *fault* rather than a defendant's *duty.* See *Town v. Armstrong*, 75 Mich. 580; 42 N.W. 983 (1889); *Rice v. Goodspeed Real Estate Co.*, 254 Mich. 49, 55; 235 N.W. 814 (1931) (emphasis added) ("One who knows or in the exercise of ordinary care should have known the existence of danger from which injury might reasonably be anticipated and who by his voluntary acts or omissions exposes himself to such danger *is guilty of negligence*, if under the circumstances an ordinarily prudent person would not have incurred the risk of injury which such conduct involved."); and *Cadagan v. Great Atlantic & Pacific Tea Co.*, 298 Mich. 207, 212; 298 N.W. 504 (1941) (where the plaintiff knew of the dangerous condition on the sidewalk but used it anyway, rendering her "guilty of contributory negligence").

2 The Supreme Court denied leave to appeal in *Novotney v. Burger King Corp.*, 445 Mich. 862; 519 N.W.2d 158 (1994), and has never raised any challenge to the application of the reasonable person standard in cases involving allegedly open and obvious dangers.

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Exhibit C

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2019 WL 7206105
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Pamela BRANCH, Plaintiff-Appellant,
v.
D & S PROPERTY MANAGEMENT, LLC, Defendant-Appellee.

No. 345882
|
December 26, 2019

Macomb Circuit Court, LC No. 2017-001162-NO

Before: Murray, C.J., and Sawyer and Gleicher, JJ.

Opinion

Per Curiam.

***1** Plaintiff brought suit against defendant alleging several claims including a claim of common-law premises liability and violations of MCL 554.139. The circuit court granted summary disposition in favor of defendant and dismissed plaintiff's premises liability claim and plaintiff's statutory claims under MCR 2.116(C)(10). Plaintiff now appeals as of right. We affirm in part, and reverse and remand in part for further proceedings consistent with this opinion.

This premises liability action arises out of injuries sustained by plaintiff from two slip and falls that occurred at Pine Crest Apartments, an apartment complex owned by defendant. On the date of plaintiff's injuries, she was a resident at Pine Crest Apartments. Plaintiff left her apartment through the rear entryway to the building at approximately 6:00 a.m. and returned at approximately 9:00 a.m. Upon plaintiff's return, she was unable to see the sidewalk leading to the rear entryway to the building because it was covered in snow but knew where it was from prior experience. As plaintiff used the sidewalk to approach the rear entryway of the apartment building, she slipped and fell onto her back, twisting her ankle. After plaintiff fell, she stood up, entered the apartment building through the rear entryway, and called the management office at Pine Crest Apartments. Plaintiff reported that she had fallen and requested that management arrange for the snow to be cleared from the sidewalks. Despite plaintiff's request, management did not clear the snow from the sidewalks and did not use salt to abate the conditions.

Plaintiff remained in her apartment until approximately 9:00 p.m. on that same day. As plaintiff was preparing to leave for a second time, she looked outside and noticed that the snow had not been cleared from the sidewalks. Plaintiff also noted that it was dark at that time, and the light above the stairs outside the rear entryway was broken. As plaintiff was descending the stairs to the rear entryway, she slipped and fell, injuring her back. Before plaintiff fell, she attempted to grab the handrail next to the stairs for support but was unable to do so because it was covered in ice. The ice accumulated as a result of a defective gutter above the rear entryway stairs that was leaking water. An expert meteorologist assessed the weather conditions on the date of plaintiff's injuries and opined that the ice plaintiff encountered had existed for 31 hours before her first slip and fall and for 42 hours before her second slip and fall. As a result of the two slip and falls, plaintiff sustained injuries, underwent multiple back surgeries, and incurred medical expenses.

On appeal, plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition because there was a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). Plaintiff also contends that the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries. We agree that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a) and disagree that there is a question of fact as to whether the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries.

I. MCL 554.139(1)(a)

***2** Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the circuit court considered evidence outside the pleadings. Therefore, this Court considers the motion as having been decided under MCR 2.116(C)(10). *Candler v. Farm Bureau Mut. Ins. Co. of Mich.*, 321 Mich. App. 772, 776, 910 N.W.2d 666 (2017). A trial court's decision on a motion for summary

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disposition is reviewed de novo. *Lowrey v. LMPS & LMPJ, Inc.*, 500 Mich. 1, 5-6, 890 N.W.2d 344 (2016). A motion for summary disposition under MCR 2.116(C)(10) challenges the "factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence." *Gorman v. American Honda Motor Co., Inc.*, 302 Mich. App. 113, 115, 839 N.W.2d 223 (2013). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey*, 500 Mich. at 5, 890 N.W.2d 344. "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." *Gorman*, 302 Mich. App. at 116, 839 N.W.2d 223 (citation omitted). " 'This Court is liberal in finding genuine issues of material fact.' " *Lewis v. Farmers Ins. Exch.*, 315 Mich. App. 202, 209, 888 N.W.2d 916 (2016), quoting *Jimkoski v. Shupe*, 282 Mich. App. 1, 5, 763 N.W.2d 1 (2008). [1]

Plaintiff argues that there is a genuine issue of material fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). We agree.

MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that the premises and all common areas are fit for their intended use by the parties. MCL 554.139(1)(a). "MCL 554.139 provides a specific protection to lessees and licensees of residential property *in addition to* any protection provided by the common law." *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425, 751 N.W.2d 8 (2008). The Michigan Supreme Court has addressed the analytical framework that is to be used when determining liability under MCL 554.139(1)(a). See *id.* at 428-431, 751 N.W.2d 8. First, the court is to determine whether the area in question is a common area. *Estate of Trueblood v. P&G Apartments, LLC*, 327 Mich. App. 275, 289, 933 N.W.2d 732 (2019). Next, the court is to identify the intended use of the common area. *Id.* "Lastly, the court must determine if there could be reasonable differences of opinion regarding whether the conditions made the common area unfit for its intended use." *Id.* (quotation marks omitted). MCL 554.139(1)(a) does not require a lessor to maintain a premises in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for its intended use. *Allison*, 481 Mich. at 430, 751 N.W.2d 8. Mere inconvenience of access will not render a premises unfit for its intended use. *Id.*

***3** In this case, plaintiff slipped and fell in two separate locations. Plaintiff first slipped on the sidewalk leading from her apartment building to the parking lot. Plaintiff then slipped while descending the stairs to the rear entranceway of her apartment building. This Court has held that sidewalks located within an apartment complex constitute common areas. *Benton v. Dart Props., Inc.*, 270 Mich. App. 437, 442, 715 N.W.2d 335 (2006). Furthermore, this Court has held that stairways located within an apartment complex constitute common areas. *Hadden v. McDermitt Apartments, LLC*, 287 Mich. App. 124, 130, 782 N.W.2d 800 (2010). Accordingly, both locations in which plaintiff slipped and fell are common areas within the meaning of MCL 554.139(1)(a).

The intended use of a sidewalk is for pedestrians to walk on it. *Benton*, 270 Mich. App. at 444, 715 N.W.2d 335. Moreover, the intended use of a stairway is to provide pedestrian access to different levels of a building or structure. *Hadden*, 287 Mich. App. at 130, 782 N.W.2d 800. Accordingly, it must be ascertained whether there could be reasonable differences of opinion as to whether the sidewalk and stairs to the rear entranceway of plaintiff's apartment building were fit for their intended uses on the date of plaintiff's injuries. See *id.*

A. SIDEWALK LEADING TO PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. In *Estate of Trueblood*, [2] this Court summarized the current state of Michigan law as it relates to the effect of ice accumulation on the intended use of a sidewalk in the context of MCL 554.139. "In *Benton*, this Court held that 'a sidewalk covered in ice is not fit' for its intended use." *Estate*

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of Trueblood, 327 Mich. App. at 290, 933 N.W.2d 732, quoting *Benton*, 270 Mich. App. at 444, 715 N.W.2d 335. "But in *Allison*, our Supreme Court explained that ice does not inherently render a common area unfit for its intended use if the ice is a '[m]ere inconvenience.' " *Id.*, quoting *Allison*, 481 Mich. at 430, 751 N.W.2d 8. In reconciling the holdings in *Benton* and *Allison*, this Court distinguished between sidewalks that are completely covered in ice and sidewalks that are partially covered in ice. *Id.* at 291, 933 N.W.2d 732. In doing so, this Court held that a sidewalk completely covered in ice is not fit for its intended use because it presents more than a mere inconvenience of access, but rather, forces anyone using the sidewalk to walk on ice. *Id.* Conversely, a sidewalk that is only partially covered in ice does not inherently render it unfit for its intended use because the ice is a mere inconvenience. *Id.* at 291-292, 933 N.W.2d 732. Thus, in considering a motion for summary disposition as to whether a sidewalk is fit for its intended use, the dispositive issue is whether there is a question of fact that a sidewalk is completely covered in ice, and therefore, presents more than a mere inconvenience. See *id.*

There is a question of fact as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. Plaintiff's expert stated in his affidavit that ice would have existed on untreated surfaces at the location of Pine Crest Apartments on the date that plaintiff slipped and fell. Plaintiff's expert also opined that the ice that plaintiff encountered had existed for 31 hours before her first slip and fall, and for 42 hours before her second slip and fall. Moreover, plaintiff stated in her deposition that the snow had not been cleared from the sidewalks and there was a layer of ice under the snow at the time of her first slip and fall. Notably, plaintiff indicated that the entire sidewalk was covered in snow and ice by stating that she could not see the sidewalk under the snow as she was walking toward her apartment building, but knew where the sidewalk was from prior experience. Because the snow and ice had not been cleared, and because plaintiff could not see the sidewalk under the snow as she was walking to her apartment building, the evidence presented creates a question of fact as to whether the sidewalk was completely covered in snow and ice, thereby rendering the ice more than a mere inconvenience.

***4** Defendant avers that there is no question of fact as to whether the sidewalk was fit for its intended use because plaintiff stated in her deposition that she used the sidewalk to her apartment building two times without falling on the date of her injuries. This evidence tends to suggest that the sidewalk was fit for its intended use and was not completely covered in ice because plaintiff was able to walk on it twice without slipping. However, this evidence also suggests that plaintiff walked on the sidewalk more carefully at some times than at others, or that plaintiff was simply able to keep her balance some of the time. While this evidence is contrary to plaintiff's deposition testimony, it does not invalidate plaintiff's deposition testimony that the sidewalk was completely covered in snow and ice such that there is no question of fact regarding this issue. Thus, given the conflicting evidence on this matter, a genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use.

B. STAIRS TO THE REAR ENTRANCEWAY OF PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the stairs to the rear entranceway to plaintiff's apartment building were fit for their intended use. The presence of ice in a common area does not inherently render that common area unfit for its intended use provided that the ice presents a mere inconvenience of access. *Allison*, 481 Mich. at 430, 751 N.W.2d 8. The principles set forth in *Allison* apply to all common areas, including stairways. *Hadden*, 287 Mich. App. at 130, 782 N.W.2d 800. Thus, "MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels." *Id.* (citation omitted).

In *Hadden*, this Court considered whether there was a genuine issue of material fact as to whether the stairway leading to the plaintiff's apartment unit was fit for its intended use by providing tenants with reasonable access to the premises. *Id.* The plaintiff presented evidence that she lived on the second floor of an apartment building owned by the defendant. *Id.* The plaintiff also presented evidence

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that there was fresh snow and black ice on the stairway, the stairway was unlit, the gutters above the stairway were overflowing with water, and there was no salt on the stairway at the time of her fall. *Id.* at 131, 782 N.W.2d 800. Additionally, the plaintiff presented evidence that she was able to use the stairway without incident on the day before her injury, but called the defendant to complain about the presence of snow and ice on the stairway. *Id.* at 130-131, 782 N.W.2d 800. Based upon this evidence, this Court concluded:

> Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use. [*Id.* at 132, 782 N.W.2d 800.]

Ultimately, this Court held that the evidence presented by the plaintiff was sufficient to establish a genuine issue of material fact as to whether the stairway was fit for its intended use on the date of the plaintiff's injuries. *Id.*

The facts presented by plaintiff in this case bear several similarities to the facts in *Hadden*. Thus, a genuine issue of material fact exists as to whether the rear entranceway to Pine Crest Apartments was fit for its intended use of providing tenants with reasonable access to the premises. Much like the plaintiff in *Hadden*, plaintiff presented evidence that she was aware of the wintry weather conditions and requested that management arrange for the snow to be cleared from the walkways before her second slip and fall. Additionally, plaintiff presented evidence that the stairs and the handrail leading to the rear entranceway were covered in ice, the light above the rear entranceway was broken, and the gutter above the rear entranceway was leaking water at that time, causing ice to accumulate on the handrail and the stairs. Plaintiff also presented evidence that, on the date of her injuries, she used the stairs to the rear entranceway without issue approximately 12 hours prior to her slip and fall. However, unlike the plaintiff in *Hadden*, plaintiff did not slip on black ice in this case. Thus, plaintiff was not injured by a hidden danger like the plaintiff in *Hadden*.

***5** Michigan law dictates that the stairs to the rear entranceway were not required to be in an ideal condition, nor were they required to be in the most accessible condition possible. *Allison*, 481 Mich. at 430, 751 N.W.2d 8. However, reasonable minds could conclude that the presence of snow and ice on the darkly lit, unsalted stairway—possibly caused by overflowing water from overhead gutters—posed a danger that denied tenants reasonable access to different levels of the Pine Crest Apartment building and rendered the stairway unfit for its intended use.

It is true that plaintiff was aware of the presence of the ice at the time of her second slip and fall. Additionally, the open and obvious doctrine provides that a landlord does not owe a tenant a duty to safeguard from open and obvious dangers. *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 516, 629 N.W.2d 384 (2001). An open and obvious danger is known to a tenant or is so obvious that a tenant might reasonably be expected to discover it. *Id.* However, whether plaintiff knew or should have known of the condition of the stairs leading to the rear entranceway does not affect the analysis at hand. Indeed, the open and obvious doctrine is not available to deny liability for a statutory violation under MCL 554.139(1). *Benton*, 270 Mich. App. at 441, 715 N.W.2d 335. Thus, plaintiff's knowledge of the ice on the stairs at the time of her second slip and fall does not negate the existence of a genuine issue of material fact as to whether the rear entranceway stairs to Pine Crest Apartments were fit for their intended use. In sum, the circuit court erred in determining that there was no genuine issue of material fact as to whether the stairs to the rear entranceway to Pine Crest Apartments were fit for their intended use.

II. PREMISES LIABILITY

Plaintiff argues that there is a question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable. We disagree.

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"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton*, 270 Mich. App. at 440, 715 N.W.2d 335. "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id.* "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee, and a tenant is an invitee of the landlord." *Id.*

A landlord "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo*, 464 Mich. at 516, 629 N.W.2d 384. "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich. App. at 285, 933 N.W.2d 732. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v. Lanctoe*, 492 Mich. 450, 461, 821 N.W.2d 88 (2012). "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis v. Trinity Continuing Care Servs.*, 296 Mich. App. 685, 694, 822 N.W.2d 254 (2012). Michigan courts "impute[ ] knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v. Blarney Castle Oil Co.*, 281 Mich. App. 474, 479, 760 N.W.2d 287 (2008). As a matter of law, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v. Hartfield Lanes*, 271 Mich. App. 61, 67, 718 N.W.2d 382 (2006).

***6** The hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious. On the date of plaintiff's injuries, plaintiff observed that there was snow on the sidewalk from a prior snowfall and it had been snowing throughout the morning. At the time of plaintiff's first slip and fall, there was approximately 2 feet of snow on the ground. Before plaintiff's second slip and fall, she observed that the snow had not been cleared from the sidewalks and salt had not been used to abate the conditions. Furthermore, plaintiff's expert opined that the ice that plaintiff encountered had existed for 31 hours before her first fall, and for 42 hours before her second fall. As a result of plaintiff's prior observations and the duration that the snow and ice were present, a reasonable person in plaintiff's position would have gleaned from the circumstances, as well as common knowledge of weather hazards that occur in Michigan during the winter months, that the sidewalk and rear entryway stairs were slippery. See *Slaughter*, 281 Mich. App. at 479, 760 N.W.2d 287. Thus, the circuit court did not err in determining that there is no question of fact that the hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious.

Although there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard, liability may still arise if the hazard was effectively unavoidable. *Hoffner*, 492 Mich. at 463, 821 N.W.2d 88. "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id.* at 469, 821 N.W.2d 88.

There is no question of fact as to whether the hazard in this case was effectively unavoidable. At the time of plaintiff's slip and falls, she had the option to enter and exit her apartment building through the front door, but chose to enter and exit through the back door because it was convenient to do so. Thus, plaintiff was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building.

"[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Detroit v. Gen. Motors Corp.*, 233 Mich. App. 132, 139, 592 N.W.2d 732 (1998). It is true that plaintiff presented evidence that snow and ice may have also been present at the front door entryway to plaintiff's apartment building. For instance, plaintiff's expert opined that ice existed on untreated surfaces at the location of Pine Crest Apartments on the date of plaintiff's slip and falls. Additionally, plaintiff opined that management did not clear the snow from the sidewalks and did not use salt to abate the conditions. However, plaintiff failed to present specific evidence that the front door entryway presented a hazard

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similar to the back door entryway. Plaintiff testified that she did not remember whether the front entryway was well-lit and she was not sure whether the railing leading to the front door entryway was icy. Thus, there is no question of fact as to whether plaintiff was required or compelled to encounter a hazard before entering or exiting her apartment building because the evidence presented by plaintiff only provides speculation that the front door entryway was hazardous and plaintiff could have used an alternate route to enter and exit her apartment building.

Based upon the record, and viewing the evidence in the light most favorable to plaintiff, we conclude that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a), and there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable.

***7** We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

GLEICHER, J. (concurring in part and dissenting in part).

Plaintiff Pamela Branch slipped and fell twice on the same day. The first fall occurred on a common-area sidewalk, and the second on the steps of her unit. The day was cold, snowy, and icy. Her testimony and that of an expert witness substantiated that the outdoor surfaces of her apartment premises (sidewalks and steps) were coated in ice and snow. Branch used her back door in and out of her apartment because it was closest to her targets (her parked car and her mother's nearby unit).

Branch sued the apartment complex, defendant D & S Property Management, under MCL 554.139(1)(a). This statute imposes a duty on landlords to maintain common areas in a condition "fit for the use intended by the parties." The majority holds that Branch's statutory claim survives summary disposition and I agree, albeit for different reasons. I respectfully dissent as to the dismissal of Branch's premises liability claim.

I. BRANCH'S STATUTORY CLAIM

Defendant contends that because Branch was able to walk on the sidewalk twice without falling, the sidewalk was fit for its intended use. The majority concludes that a question of fact exists regarding the sidewalk's fitness, reasoning that on the fall-free occasions Branch may have walked with extra care or avoided the most slippery spots. These observations are logical but irrelevant. Defendant's argument that the sidewalk was fit because there had been no previous accidents (involving Branch or anyone else) should be rejected because it conflicts with a longstanding legal principle: evidence of the absence of accidents involves unreliable negative evidence and generally is not probative of a party's negligence. *Grubaugh v. City of St. Johns*, 82 Mich. App. 282, 287, 266 N.W.2d 791 (1978). Just as another tenant's slip and fall on the sidewalk would not have definitely proved defendant's negligence, "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v. Vanderlinde*, 165 Mich. 464, 468, 131 N.W. 165 (1911). [1]

Defendant also suggests that Branch's decision to use the back door rather than the front door defeats her statutory claim. But defendant presented no evidence regarding the sidewalk conditions in the front of the apartment. MCR 2.116(G)(4) assigns to the *moving* party the task of identifying "the issues as to which the moving party believes there is no genuine issue as to any material fact." If evidence actually exists that the front-door route was safe, it does not appear in the record. Therefore, Branch had no duty to address this question.

II. "MERE INCONVENIENCE"

Citing *Estate of Trueblood v. P&G Apartments, LLC*, 327 Mich. App. 275, 933 N.W.2d 732 (2019), the majority engages in an analysis of defendant's contention that the ice and snow covering the common areas created a "mere inconvenience," thereby absolving defendant of liability. Correctly, the majority rejects this argument. To the extent *Trueblood* requires a "mere inconvenience" analysis in cases brought under MCL 554.139(1)(a), *Trueblood* misstates the law.

***8** The *Trueblood* Court found that a question of fact existed regarding whether the sidewalk at issue "was completely covered in ice, making the ice more than a mere

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inconvenience." *Trueblood*, 327 Mich. App. at 290, 933 N.W.2d 732. "[A] sidewalk completely covered in ice," the Court explained, "is not fit for its intended use, because it does not present a '[m]ere inconvenience of access'; anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it." *Id.* at 291, 933 N.W.2d 732 (citations omitted). The majority deems this case analogous.

To the extent that *Trueblood* requires a court to consider whether a sidewalk condition is merely "inconvenient" and therefore not actionable, I respectfully disagree with *Trueblood*. The "mere inconvenience" language derives from *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 430, 751 N.W.2d 8 (2008). The primary issues presented in *Allison* were whether a parking lot constituted a "common area" under MCL 554.139(1)(a), and whether a lessor had a duty under the statute "with regard to the accumulation of snow and ice in a parking lot." *Allison*, 481 Mich. at 430, 751 N.W.2d 8.

A parking lot is a common area, the Supreme Court acknowledged, but analyzed the duty to keep a parking lot "fit for the use intended by the parties" under MCL 554.139(1)(a) based strictly on the "intended use" of a parking lot. *Allison*, 481 Mich. at 428-429, 751 N.W.2d 8. The Court explained that the "intended use" of a parking lot is "parking" and "storing" vehicles. *Id.* at 429, 751 N.W.2d 8. Therefore, the Court reasoned,

> A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used. [*Allison*, 481 Mich. App. at 429.]

The evidence of parking lot unfitness presented in *Allison* consisted of one to two inches of snow, with ice underneath in the areas where the snow had been "displaced." *Id.* at 423, 751 N.W.2d 8. In the Supreme Court's view, this evidence did not suffice to restrict ingress or egress to the parking lot. In other words, a small amount of snow and ice did not deny tenants "reasonable access" to their vehicles. In this context —parking lots harboring a relatively benign amount of snow —the Court added:

> The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id.* at 430, 751 N.W.2d 8.]

Notably, the "mere inconvenience" concept was limited in *Allison* to a parking lot. Because a sidewalk serves an entirely different "intended use" than a parking lot, the duty to maintain a sidewalk differs meaningfully from that required for a parking lot. *Allison* explicitly recognized this distinction: "A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be *to ensure that the entrance to, and the exit from, the lot is clear*[.]" *Allison*, 481 Mich. at 429, 751 N.W.2d 8 (emphasis added). The means of parking lot entry and exit are sidewalks.

***9** Tenants also use sidewalks to enter and exit from their homes. Stairs and banisters function in the same way. As this Court stated in *Hadden v. McDermitt Apartments,*

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LLC, 287 Mich. App. 124, 130, 782 N.W.2d 800 (2010), the standard of care is the preservation of *reasonable* access to and from the premises.

Parties to a lease understand and intend that sidewalks and steps serve purposes different from parking lots. Lessors have a duty to keep the premises "fit" for those intended uses: walking on them. Parking lots are vehicle storage locations, but sidewalks are places for *people* to walk. While a tenant might be inconvenienced at having to maneuver around snow and ice in a parking lot, the presence of that condition does not automatically render the lot "unfit" for parking a vehicle. But the presence of snow and ice on a sidewalk (of which the lessor has reasonable notice, as here) *does* render the sidewalk potentially unfit, even if a tenant could trek through grass, bushes, or slide over a frozen lake to avoid walking on it. A sidewalk is all about "access." Therefore, "[m]ere inconvenience of access," when applied to a sidewalk, is an oxymoron.

It goes without saying that a plaintiff who chooses to walk on an icy sidewalk rather than to take an obviously safer path may be found comparatively negligent. But this legal truism does not alter the landlord's duty to maintain the sidewalk or the banister. Both parties must exercise reasonable care. The "mere inconvenience" formulation applied in *Truebolood* to a statutory claim should not be available as a complete defense to a suit involving common areas intended for access to and from one's home.

III. NEGLIGENCE CLAIM

The majority holds that Branch's premises liability claim is foreclosed based on a related doctrine: the snowy and icy sidewalk and banister were "effectively avoidable." The majority asserts that Branch "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This portion of the majority's analysis finds its genesis in *Hoffner v. Lanctoe*, 492 Mich. 450, 821 N.W.2d 88 (2012). I have previously examined the doctrinal weaknesses of *Hoffner*, and will not restate that particular analysis here. See *Deas v. Hartman & Tyner, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2019 (Docket No. 340068) (GLEICHER, J., concurring). The facts of this case provide additional grounds for a careful reexamination of *Hoffner*.

Before addressing those grounds, I respectfully suggest that the majority has misapplied the "effectively unavoidable" doctrine by holding that Branch "had the option to enter and exit her apartment building through the front door," and therefore "was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building." This is undoubtedly true, but critical facts are missing: a description of the conditions outside her front door. No evidence supports that that the front-door route offered safer passage than the path from the rear door. Rather, the evidence presented to the trial court substantiates that *every* surface in the apartment complex was covered in ice and snow, and that taking the front door would have required Branch to spend *more* time traversing the dangerous terrain. Plaintiff testified that there was snow "everywhere," and her expert submitted an affidavit, averring, in relevant part:

> ***10** 7. The meteorological facts indicate that the ice Plaintiff encountered would have existed on untreated surfaces at the location of this incident in Warren, Michigan both at 10:00 A.M. and 8:50 P.M. on 2 February 2015.
>
> 8. The meteorological facts indicate that this ice was caused by melting of residual snow and ice on 31 January 2015, which then froze into ice no later than 3:00 A.M. on 1 February 2015. This was then covered by a ten inch snowfall that began on the 1st and ended by 8:00 A.M. on the 2nd. The snow would not have changed the physical characteristics of the ice in any manner whatsoever.
>
> 9. Thus, the meteorological facts indicate clearly and unambiguously that the ice Plaintiff encountered had existed for thirty-one hours before her first fall, and for forty-two hours before her second fall.

I would hold that defendant has utterly failed to support its claim that the dangerous condition was "effectively unavoidable."

More importantly, the "effectively unavoidable" doctrine contradicts bedrock tort principles, and should be jettisoned for that reason.

Under *Hoffner*, an open-and-obvious danger precludes a premises liability claim unless the danger is "effectively unavoidable," a term interpreted in *Hoffner* to mean "an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Hoffner*,

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492 Mich. at 456, 821 N.W.2d 88.[2] As framed by *Hoffner*, the issue is one of "choice." *Id.* at 469, 821 N.W.2d 88. The Court elaborated, "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required or compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id.* (emphasis in original).

At its core, this analysis is nothing more than a surreptitious resurrection of a long-dead tort precept: assumption of the risk. The now-discredited and abandoned assumption of the risk doctrine began as a defense available only in "cases involving the master-servant relationship," but its reach gradually expanded to include "every conceivable kind of negligence action." *Felgner v. Anderson*, 375 Mich. 23, 39-40, 133 N.W.2d 136 (1965). As the Supreme Court pointed out in *Felgner*, 375 Mich. at 42, 133 N.W.2d 136, the defense was applied "as a virtual synonym of contributory negligence[.]" "[T]he gist of the defense is that the plaintiff took his chances." *Waltanen v. Wiitala*, 361 Mich. 504, 508, 105 N.W.2d 400 (1960).

In *Felgner*, 375 Mich. at 46, 133 N.W.2d 136, the Supreme Court officially eliminated the defense in most applications, characterizing its history in our state as "an indefensible misuse of a legal doctrine whose foundations in justice, even when applied properly, are tenuous at best."[3] The Court declared that assumption of the risk "should not again be used in this State as a substitute for, or as a supplement to, or as a corollary of, contributory negligence .... The traditional concepts of contributory negligence are more than ample to present that affirmative defense to established negligent acts." *Id.* at 56, 133 N.W.2d 136.

***11** Here, an orthodox application of *Hoffner* would not focus on the availability of the front steps, but instead would announce that because Branch had a choice to just stay home, the snow and ice on the sidewalk were "effectively avoidable." According to *Hoffner*, tenants must elect to be prisoners in their homes rather than risk falling; if they choose to walk, they alone must pay the price for the landlord's negligence. I suggest a return to the real world of tort. A duty of care is owed to those who may foreseeably suffer injury due to the negligence of a landowner. If the danger created by the landowner's negligence is open and obvious, a jury should decide whether a plaintiff was negligent in having confronted it. And a jury must weigh that negligence against that of the landowner who failed to ameliorate the danger. A tenant who chooses to go out into the snow and ice so she can exercise or take care of her elderly mother may have made a negligent choice. But that is for a jury to decide. "A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care." *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 824 P.2d. 293, 297 (1992, N.M. Sup. Ct.). The relevant inquiry evaluates and compares the conduct of the parties against the standards of care. Whether a danger was "effectively unavoidable" may play a role in that analysis, but should not dictate the outcome.

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Footnotes

1 In her brief on appeal plaintiff relies in part on an outdated and overruled summary disposition standard, arguing that under MCR 2.116(C)(10) the trial court cannot summarily dismiss a case if a record "could be developed that would leave open an issue upon which reasonable minds could differ." Twenty years ago the Supreme Court explicitly rejected this approach. See *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 455 n. 2, 597 N.W.2d 28 (1999). We recognized the correct standard under the 1985 Court Rules more than a decade ago in *Grand Trunk W R, Inc. v. Auto Warehousing Co.*, 262 Mich. App. 345, 350, 686 N.W.2d 756 (2004). Nevertheless, this Court continues to receive briefs advocating our application of this outdated, overruled, and

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obviously inapplicable standard. We urge appellate counsel to update their brief banks or their legal research methods to avoid citing to summary judgment standards that were set aside by the 1985 Court Rules.

2 Estate of Trueblood had not been issued prior to the trial court's decision on defendant's motion.

1 One obvious reason for this rule is that another tenant may have slipped and fallen, but not suffered injury or elected not to report the fall.

2 The "effectively unavoidable" framework is not a recognized tort doctrine outside of Michigan. A Westlaw search reveals that no other state has adopted this theory as part of its "open and obvious" jurisprudence.

3 In support of this proposition, the Supreme Court quoted from an article by Fleming James, Jr., *Assumption of Risk*, 61 Yale L J 141, 168-169 (1952), worthy of reprinting here:

> "The doctrine of assumption of risk, however it is analyzed and defined, is in most of its aspects a defendant's doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found, perhaps, in those cases where there is an actual agreement. Moreover, the expression has come to stand for two or three distinct notions which are not at all the same, though they often overlap in the sense that they are applicable to the same situation.
>
> Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion. For the most part the policy of individualism it represents in outmoded in accident laws; where it is not, that policy can find full scope and far better expression in other language. There is only one thing that can be said for assumption of risk. In the confusion it introduces, it sometimes—ironically and quite capriciously—leads to a relaxation of an overstrict rule in some other field. The aura of disfavor that has come to surround it may occasionally turn out to be the kiss of death to some other bad rule with which it has become associated. We have seen how this may happen with the burden of pleading and proving an exceptional limitation on the scope of defendant's duty. There may be other instances. But at best this sort of thing is a poor excuse indeed for continuing the confusion of an unfortunate form of words." [*Felgner*, 375 Mich. at 46 n. 7, 133 N.W.2d 136.]

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