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STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED, Plaintiff-Appellant, v F & E OIL, INC., Defendant-Appellee.	MSC 162907 COA Docket 350220 LC Case No. 18-003569-NO (Wayne County Circuit Court)

UNITED STATES CHAMBER OF COMMERCE'S AMICUS CURIAE BRIEF

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QUESTIONS PRESENTED[1]

IS *LUGO V AMERITECH CORP, INC,* 445 MICH 512 (2001) CONSISTENT WITH MICHIGAN'S COMPARATIVE FAULT FRAMEWORK AND, IF NOT, WHAT APPROACH SHOULD THIS COURT ADOPT FOR PREMISES CASES?

Plaintiff-Appellant Ahlam Kandil-Sayed answers "No."

Defendant-Appellee F & E Oil, Inc, answers "Yes."

The Wayne County Circuit Court answered "Yes."

The Court of Appeals answered "Yes."

Amicus Curiae National Chamber of Commerce answers "Yes."

WHEN AN INVITEE SLIPS AFTER VOLUNTARILY WALKING ON A SNOW-COVERED GAS STATION SURFACE ON A SNOWY DAY, IS THE GAS STATION OWNER ENTITLED TO SUMMARY DISPOSITION BECAUSE THE SNOWY SURFACE WAS OPEN AND OBVIOUS AND NEITHER UNREASONABLY DANGEROUS NOR EFFECTIVELY UNAVOIDABLE?

Plaintiff-Appellant Ahlam Kandil-Sayed answers "No."

Defendant-Appellee F & E Oil, Inc, answers "Yes."

The Wayne County Circuit Court answered "Yes."

The Court of Appeals answered "Yes."

Amicus Curiae National Chamber of Commerce answers "Yes."

[1] The Court's questions have been reordered in this amicus brief to allow Amicus CuriaeChamber of Commerce of the United States of America to discuss the foundational question on the framework for premises liability under Michigan law before discussing the specific narrower question about the facts here. This ordering is intended to avoid redundancy and facilitate a deeper analysis of the concepts that undergird the rules.

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INTEREST OF AMICUS CURIAE [2]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases like this one, that raise issues of concern to the nation's business community.

The Chamber's members are concerned about tort law and the proper interpretation of tort concepts, including whether a premises owner owes a duty to guard against, or warn about, open and obvious conditions. Traditionally, duty has been a question of whether a defendant must help a particular plaintiff. And traditionally, this question has been one of law, decided by the courts after assessing the competing policy considerations for and against the specific claimed duty. In other words, the courts ask whether the social benefits of imposing the duty as a general matter outweigh the social costs of not imposing it. This analysis is not limited to the facts of a case at hand, and it is not a question of fact for the jury.

As owners and lessees of premises for their businesses, the Chamber's members

[2] Amicus Curiae Chamber of Commerce of the United States of America is not a subsidiary or affiliate of any publicly owned corporation. Amicus affirms that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

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have an interest in ensuring that tort law is predictable, reasonable, and stable. The questions presented, as stated in the order granting oral argument on the application, are as follows:

> (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*, 446 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.

Order, Michigan Supreme Court Docket No 162907, 2/4/22.

In this and other pending cases, this Court has apparently embarked on a broad look at Michigan's law of premises liability, and at the traditional formulation of the open and obvious doctrine as an aspect of duty. See *Pinksy v Kroger Co of Michigan*, Michigan Supreme Court Docket No 163430 (granting oral argument on the application to consider "whether (1) there is a question of fact concerning whether the cable used to close off the checkout lane was open and obvious; (2) there is a question of fact concerning whether the condition was unreasonably dangerous; (3) 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 (4) 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 comparative fault of the parties as set forth in the Restatement Torts, 3d"); *Becker v Enterprise Leasing Co of Detroit, LLC*, Michigan Supreme Court Docket No 163702 (granting oral argument on the application to consider "whether the evidence, when viewed in the appellant's favor, created a genuine

issue of material fact as to whether 'an average person with ordinary intelligence would have discovered [the danger] upon casual inspection'").

These questions go to the heart of tort law and implicate foundational concepts of duty, the standard of care, breach of that standard, and causation. This Court's answers will significantly affect every premises owner or lessee in Michigan, individuals and businesses alike. The answers will also affect the judiciary, which Plaintiff asks to embark on a radical new approach to tort law that conflicts with longstanding notions of duty as relational and comparative fault as a consideration only after a showing of all the elements of a tort, including duty, negligence, causation, and damages.

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INTRODUCTION

Michigan law governing premises liability rests on foundational notions of tort law recognized in this state and around the country for over 100 years. This Court's past decisions embrace a common-sense approach that defines and limits the duty owed by a premises owner to those going on the owner's premises: The premises owner must protect only against hazardous conditions that pose an unreasonable risk of harm. Premises owners owe no duty to guard against injury from open and obvious conditions unless such conditions are so unreasonably dangerous that they warrant additional safety measures. This legal framework strikes an optimal societal balance—obligating premises owners to enhance safety by warning and guarding against unreasonably dangerous hazards while giving effect to societal norms requiring everyone to take due care for their own safety.

Although plaintiffs have launched a broad attack on this Court's decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), they have established no factors that would overcome stare decisis. They urge this Court to dramatically expand the concept of an actionable duty under Michigan tort law. But if accepted, their arguments threaten a torrent of litigation inevitably coupled with a spike in the costs of insurance and goods and services sold through brick-and-mortar stores. The requested changes would discourage everyone from taking care for their own safety against what are typically avoidable and minor injuries. This is particularly true of the risk from slipping on the snow and ice that we all encounter in a northern climate and can, with care, generally protect ourselves against.

Plaintiff blurs two separate changes in tort law, each of which is problematic. First, Plaintiff urges a reversal of *Lugo*'s formulation of "special aspects," language that is

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consistent with the *Restatement (Second) of Torts* and longstanding Michigan precedent. The term "special aspects" is a shorthand method of giving content to the scope and limits of actionable duties as to open and obvious hazards. What *Lugo* tried to do, and its progeny have further delineated, is identify when an open and obvious hazard is so unreasonably dangerous that the premises owner owes a duty to guard against it. *Lugo*'s formulation was no dramatic break in the law but merely an effort to provide more defined parameters for whether an actionable duty exists. It also provided guidance to bench and bar – so that lawyers could advise their clients on their obligations about premises. Replacing *Lugo* and its progeny with a new formulation or reference to the Second Restatement would unsettle the law and lead to standardless jury verdicts. Bench and bar would lose the decades of common-law decisions that have established the boundaries of a premises owner's actionable duty.

Second, Plaintiff seeks to alter the fabric of Michigan tort law even more dramatically by dispensing with the duty inquiry as a threshold legal matter. Under Plaintiff's proposed approach, duty would no longer be a question of law for the court. Instead, duty, the standard of care based on that duty, and the other elements establishing an actionable tort would all be subsumed into a jury's comparative-fault consideration. If this second change were adopted, it would do great violence to Michigan tort law, not just in the area of premises liability but in multiple other areas in which duty is a threshold inquiry determined by the relationship between the parties.

This second argument is loosely based on the contention that Michigan law's duty analysis conflicts with the State's comparative-fault regime. But comparative-fault analysis has been accepted in Michigan for decades as part of premises law and of all negligence

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actions. *Placek v City of Sterling Heights*, 405 Mich 638, 660; 275 NW2d 511 (1979). This Court has recognized that nothing in the doctrine of comparative fault abrogates the plaintiff's burden to establish that the premises owner owes a duty to invitees. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

The stare decisis factors weigh strongly in favor of rejecting any change to Michigan's open-and-obvious doctrine. Plaintiff has not shown (and indeed cannot show) that Michigan's adoption of comparative fault requires other changes to the law, nor that the weight of authority around the country has been to essentially eliminate duty as a threshold legal question when comparative fault is adopted. Plaintiff offers no empirical evidence that the current framework is unworkable. Nor has Plaintiff made any showing that societal customs and norms have changed warranting a corresponding change in the law. Thus, stare decisis should apply, and this Court should reaffirm Michigan's traditional open and obvious doctrine.

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ARGUMENT I

LUGO V AMERITECH CORP, INC, 445 MICH 512 (2001) ALIGNS WITH MICHIGAN'S COMPARATIVE-FAULT FRAMEWORK AND CORRECTLY REQUIRES THE PLAINTIFF TO ESTABLISH AN ACTIONABLE DUTY AT THE OUTSET

A. Michigan's framework for deciding tort liability rests on foundational concepts including duty, breach of the standard of care, causation, and injury

1. Under Michigan law, duty is a threshold legal determination for the court and depends on the relationship between the plaintiff and the defendant

Under Michigan law, the existence of a duty depends on whether the relationship between the plaintiff and the defendant gives rise to any obligation by the defendant to act to benefit the later injured person. Duty is not an after-the-fact consideration when awarding damages; rather, it is a threshold question of law about whether the plaintiff has a right of action at all. Indeed, this Court has held that fairness requires that a defendant "should be able to ascertain in advance the extent of his duty and whether he has fulfilled it." *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 503 n 18; 418 NW2d 381 (1988). This Court has quoted with approval Oliver Wendell Holmes's view that an actionable duty must be knowable in advance:

> Any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

Holmes, *The Common Law*, pp 63-103 (Boston: Little, Brown & Co, 1963), quoted in *Williams*, 429 Mich at 503 n 18. Thus, under Michigan's current framework, the court decides the existence of an actionable duty and the general standard of care derived from that duty at the threshold while the jury determines what constitutes reasonable care under the circumstances. *Id.* at 500-501.

This threshold legal determination of duty determines whether there is a

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relationship that could give rise to legal liability. As one recent treatise explained, "Tort law's substantive directives are all relational – they always enjoin certain actors from doing certain things to certain others, or to do certain things for certain others." John C. P. Goldberg & Benjamin C Zipursky, *Recognizing Wrongs*, p 93 (Cambridge: Harvard University Press, *2020).* Duties recognized by the law may be "simple" or "relational." *Id.* at p 92. Simple duties apply universally – and are more typically, but not exclusively, the basis for criminal liability. For example, criminal law specifies that all persons must do or not do certain acts, such as "to purchase liability insurance for their cars or register for the military draft." *Id.* at p 92. By contrast, relational duties do not apply generally from everyone to everyone; they "enjoin certain actors from doing certain things *to* certain others, or to do certain things *for* certain others." *Id*. at p 93 (emphasis in original). Duty is "the anchoring element of the tort of negligence, and the law requires the plaintiff to prove that the defendant breached a duty of care that he or she owed to the plaintiff in order to obtain relief." *Id.* at p 107.

Defining duties in terms of relationships helps ensure that liability is based on recognizable wrongs:

> We all need to know what to expect of persons, businesses, offices, and organizations around us, and we all need to know what is expected of us.

Recognizing Wrongs, supra, p 364. This framework provides constructive ways of thinking about when to recognize a tort and when not to do so:

> [T]ort law recognizes each of us as a person: as someone who "counts" and who thus cannot fairly be made to sublimate her individual interests entirely in the name of some larger good. Yet this same body of law simultaneously invites us each to recognize our responsibilities to others – that, as we go about our lives interacting with others, we owe it to them to take various measures against injuring them.

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Id. at p 364. The concept of duty as a wrong based on the tortfeasor's breach of a duty owed to the plaintiff is foundational. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U Pa L Rev 1733 (1998). It helps foster societal norms and provides compensation for those injured by someone's breach of a duty to them. It also helps avoid limitless liability.

Michigan courts have issued countless decisions recognizing that duty is relational. For example, this Court held in the context of medical malpractice and independent medical examinations that "a duty arises out of the existence of a relationship 'between the parties of such a character that social policy justifies' its imposition." *Dyer v Trachtman, DO*, 470 Mich 45, 49; 679 NW2d 311 (2004), quoting Prosser & Keeton, Torts, § 56, p 374 (5th ed 1984). This Court, too, held that a merchant owed no duty to protect the public from injury caused by buyers of the merchant's shotgun ammunition, explaining that "[t]he duty to protect others against harm from third persons . . . is based on a relationship between the parties" and the relationship was not sufficient to require the merchant to protect a third-party bystander from the unforeseeable criminal acts of its customer. *Buczkowski v McKay,* 441 Mich 96, 103; 490 NW2d 330 (1992), citing Prosser & Keeton, *Torts*, § 56, p 385 (5th ed 1984). Declining to adopt the fiction that everything is foreseeable, the Court held that the relationship between the retailer and a third party was not sufficient to require the merchant to protect the third-party bystander from the criminal acts of its customer. *Id.*

This Court rejected an attorney's duty of care to an adversary to conduct a reasonable investigation before bringing suit, holding that "[o]nly if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the

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defendant to liability for negligent conduct." *Friedman v Dozorc,* 412 Mich 1, 22; 312 NW2d 585 (1981).

In sum, duty depends on a relation between individuals which obligates one to benefit the other. *Friedman, supra* at 22, quoting Prosser, Torts (4th ed 1978), § 53, p 324. See also *Buczkowski, supra* at 100 (referring to "duty" as "the relational obligation between the plaintiff and the defendant"). See also *In re Certified Question from Fourteenth Dist Ct of Appeals of Texas*, 479 Mich 498, 505–506; 740 NW2d 206, 211 (2007) (rejecting duty of property owner to persons who have never been on their property to protect against unknown third parties who touch property owner's employees' asbestos-tainted work clothing at locations off premises).

These and other decisions reveal this Court's consistent definition of the scope of a duty in terms that define and limit the duty based on the relationship between the defendant and the plaintiff.

2. An actionable duty obligates the defendant to conform to a particular standard of care toward the plaintiff

Duty, once legally recognized, obligates a defendant to conform to a particular standard of care toward another. *Restatement (Second) of Torts*, § 4 (1965). The Restatement makes clear that duty describes the "requirement that action shall be taken for the protection of the interests of others." *Id.* § 4 comment b. Tort law traditionally hinges on a system of legal rights and wrongs that the common law recognizes based on custom and sound public policy.

The tort system does more than provide for compensation for injury. It provides norms based on policy assessments that guide conduct, creating or reinforcing a "sense of legal obligation to treat others in certain ways, and a sense of legal entitlement in the

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security of certain interests." Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand L Rev 1 (1998). See also, John C.P. Goldberg, *Community, and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 NYU L Rev 1324, 1334-1336 (1990). These aspects of tort law are bound up in a proper conception of duty and the related standard of care – which would be lost if this Court embarks on a dramatic break with the past to convert duty considerations into an aspect of comparative fault. These legal concepts, duty and the general standard of care, are for the court, not the jury. If it were otherwise, Michiganders would be adrift as to their legal obligations and unable to guide their conduct with any sense of predictability.

3. The duty of a premises owner depends on whether a hazard is hidden or creates an unreasonable risk of harm

As it currently stands, Michigan law places a duty onto the premises owner or lessee to take reasonably prudent actions based on the societal norm that everyone will take due care for their own safety. This public-policy choice balances risks and benefits to the parties and society at large. For decades, this Court has recognized that a premises possessor 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. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609; 537 NW2d 185 (1995). And for decades, this Court has likewise recognized that the duty owed by those in possession of premises does not generally encompass the removal of open and obvious dangers:

> [W]here 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. [*Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992).]

Accordingly, the open and obvious doctrine should not be viewed as some

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> type of "exception" to the duty generally owed invitees, but rather as an integral part of the definition of that duty.

Lugo v Ameritech Corp, 464 Mich 512, 516; 629 NW2d 384, 386 (2001). The open and obvious doctrine is not part of the standard of care or fault; it is key to the duty analysis, limiting the scope of any duty when the defect is open and obvious. See *Buhl v City of Oak Park*, 507 Mich 236, 246; 968 NW2d 348 (2021).

The open and obvious doctrine is not, as some have argued, an arbitrary rule for avoiding liability for fault. Nor is it a doctrine of comparative negligence - an argument that runs aground on the longstanding history of tort law in Michigan. The open and obvious doctrine is a legal question of duty, which is for the court to decide. *Hill v Sears Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). See also, *Williams*, supra.

Multiple decisions from this Court explain that the open and obvious doctrine reflects the "the overriding public policy of encouraging people to take reasonable care for their own safety [which] precludes imposing a duty on the possessor of land to make ordinary steps foolproof." *Lugo*, 464 Mich at 522 (quotation marks omitted), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). This public policy is in place "because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. This common-law policy has existed in Michigan for over a century. See *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887), and *Lugo*, 464 Mich at 528 (CAVANAGH, J., concurring)(citing *Caniff* and recognizing that "recovery has been barred in premises liability cases involving open and obvious dangers for at least a century"). It stems from the societal norm requiring everyone to watch where they are going and take care for their own safety. As this Court has explained, landowners are not

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insurers charged with guaranteeing the safety of all who come on their land. *Hoffner v Lanctoe*, 492 Mich 450, 459-460; 821 NW2d 88 (2012).

According to this Court, "both possessors of land and those who come onto it [are required to exercise] common sense and prudent judgment when confronting hazards on the land." *Id.* "The rules balance a possessor's ability to exercise control of the premises with an invitees' obligation to assume personal responsibility to protect themselves from apparent dangers." *Id.* As this Court has made clear, "the duty a possessor of land owes his invitees is not absolute." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). "It does not extend to dangers so obvious and apparent that an invitee may be expected to discover them himself." *Id.*

Michigan courts, like those around the country, have long defined duty in this way. Premises owners must warn or take precautions as to unreasonably dangerous hazards. But persons going onto the premises of another are expected to protect themselves by remaining observant, walking safely, avoiding visible hazards, and taking precautions based on the general weather conditions and terrain.

Recognizing that this social expectation shapes the scope of premises owners' duty is not a judicial usurpation of the jury's factfinding role. Rather, the open and obvious doctrine is a common-sense rule that places the burden of safety precautions on those best able to carry them out—the least cost avoiders. Individuals walking on the street or across someone's parking lot or through a store can watch for curbs or obstacles in the store aisles or slippery places on the floor as they are going about their activities. Such individuals also best know their own personal needs to ensure proper traction and stability. The scope of the duty rests on these societal norms and customs, which also reflect sound public policy.

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B. Arguments for a wholesale change in Michigan law are misplaced

1. Lugo and the Second Restatement do not conflict with comparative negligence

Contrary to the arguments presented for a dramatic change in the law, Michigan law governing premises claims aligns with the current framework for comparative negligence. By adopting that framework, this Court and the Restatement (Second) rejected assumption of risk and contributory negligence as bars to recovery. 507 Mich at 351-355. It did not eliminate duty as a threshold legal inquiry or incorporating duty into the jury's comparative-fault analysis, as plaintiff proposes. Rather, the framework for establishing a duty looks to two aspects of the hazard involved: whether it is effectively unavoidable and whether it is unreasonably dangerous. In other words, a hazard or dangerous condition does not give rise to a duty unless it is unreasonably dangerous and effectively unavoidable. *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328, 337-338; 968 NW2d 397 (2021). This Court has traditionally determined whether a condition is so unreasonably dangerous as to give rise to an actionable duty by considering whether an otherwise open and obvious condition has particular aspects that make it especially dangerous. *Id*. at pp 337-338.

Although members of this Court have questioned *Lugo*'s articulation of this test for an actionable duty, *Lugo* provides helpful guidance to bench and bar about the nature of an unreasonable risk of harm. 464 Mich at 518. That guidance ensures that judicial decisions on what constitutes an unreasonable risk of harm remain consistent. As is typical in common-law jurisprudence, the Court used a series of factual illustrations to show trip hazards and other conditions that do not pose an unreasonable risk of harm. This Court and the Court of Appeals have applied *Lugo*'s hypotheticals to guide the duty analysis and

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predictably differentiate between routine low-risk, low-injury hazards and hazards that threaten catastrophic injury or death. That legal distinction allows premises owners advanced notice of their legal duties. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). *Lugo* and its progeny employ common-law reasoning based on concrete examples to provide a consistent answer to whether a premises owner has a duty to those entering on the premises. See e.g., *Hoffner v Lanctoe,* 429 Mich 450, 470; 821 NW2d 88 (2012). Moreover, altering the analysis to consider based on individual subjective facts would expand the duty exponentially to almost impossible standards such as safeguarding unsupervised infants. It would create a duty that would be impossible to satisfy.

Michigan precedents, both before and after contributory negligence was abolished, recognize that the open and obvious doctrine is integral to the scope of a premises owner's duty. *Lugo*, supra; *Riddle v McLouth Steel Prod Corp*, 440 Mich 85; 485 NW2d 676 (1992); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). And this determination about duty has always been and remains a question of law for the court.

This Court's decision discussion of the fact-law distinction in *Bertrand* is not to the contrary. *Bertrand*'s discussion of the fact-law distinction, as Justice Clement points out in her dissent in *Estate of Livings v Sage's Investment Group, supra*, admittedly created some confusion about whether the open and obvious doctrine was a question for the jury or for the court. *Bertrand*, 449 Mich at 625. But *Lugo* clarified that aspect of *Bertrand* by holding that the open and obvious doctrine was integral to duty analysis and properly decided by the court. 464 Mich at 516-525. *Estate of Livings v Sage's Investment Group*, Clement, J, dissenting, 507 Mich at 374-385. Throwing these questions to a jury would conflict with

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this Court's longstanding framework for negligence cases, including those in the context of premises claims. Altering this framework by looking to the Second Restatement's illustrations would not clarify Michigan law conceptually or practically. *Lugo* provides a framework that has led to consistency and clarity in the law, and this Court should not stray from it. To reverse course now—and transform the duty analysis into an unpredictable jury determination based on case-specific facts—would make it impossible for Michiganders to know their legal duties in advance. It would also invite potentially infinite liability and uncertainty in the law:

> It is still inconceivable that any defendant should be held liable to infinity for all of the consequences which flow from his act, and some boundary must be set. If nothing more than 'common sense' or a 'rough sense of justice' is to be relied on, the law becomes to that extent unpredictable, and at the mercy of whatever the court, or even the jury, may decide to do with it."

W. Prosser, *Law of Torts* § 43, at 263 (4th ed 1971) (quoting *Palsgraf v Long Island R Co,* 248 NY 339, 352 and 354; 162 NE 99, 103 and 104 (1928) (Andrews, J, dissenting)).

2. The Restatement (Third) conflicts with well-established Michigan law and, if adopted, would threaten the foundational principles of Michigan tort law

Despite the need for predictable limits on a premises owner's or possessor's duty to visitors, Plaintiff urges this Court to adopt the expansive approach of the *Restatement of Torts (Third) Liability for Physical Harm*, which would impose on premises owners and possessors a broad, generalized duty to take reasonable care of everyone in all circumstances. Adopting this approach would be a serious mistake. It conflicts with longstanding Michigan law, and its adoption would either render premises liability a notable outlier among Michigan tort law or, even worse, threaten broad and unpredictable changes to Michigan's entire tort-law regime. Even if Plaintiff had presented a strong

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showing of need for such a dramatic change in the law (and she has not), prudence would dictate a more cautious approach.

Like several recent American Law Institute projects, the *Restatement of Torts (Third) Liability for Physical Harm*, accepted flawed recommendations of the reporters on premises liability. See generally, John C.P. Goldberg & Benjamin C Zipursky, *The Restatement and the Place of Duty in Negligence Law*, 54 Vand L Rev 657 (2001). The reporters proposed, and the ALI accepted, an approach dispensing with centuries of common law that established duty as a liability-limiting concept. Indeed, the reporters sought "to downplay, recast, or eliminate [duty's] role in negligence." *Id.* at p 661. Under their approach, a duty has no regard to the relationship between the parties but for "exceptional cases." *Restatement Third of Torts*, § 7 (2012). And the drafters' statement of the duty of land possessors could hardly be broader:

> A land possessor owes a duty of reasonable care to entrants on the land *with regard to all risks that exist on the land*. This duty of reasonable care extends to the entrant and any personal property that accompanies the entrant onto the land. Ordinarily, a possessor of land does not owe a duty of reasonable care for risks arising from the conduct of transients and independent contractors while on the possessor's land. However, the affirmative duties contained in Chapter 7 may impose a duty on the possessor for such risks. *Thus, a business that opens its premises to the public owes an affirmative duty to those lawfully on the premises*.

Restatement Third of Torts: Phys & Emot Harm, § 51 (2012) (emphasis added).

As scholarly critics have pointed out, the Restatement (Third) urges courts to depart from "standard judicial usage" as to negligence with no explanation "as to why ordinary judicial usage [regarding the elements of negligence] is irremediably defective…." Goldberg and Zipursky, *Restatement Third and the Place of Duty in Negligence Law*, supra at p 662-663. Indeed, the Restatement (Third)'s drafters have thrown out the traditional categories

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of visitors entering premises (invitees, licensees, and trespassers) with the brief and unsupported assertion that changes in the modern world have made those categories obsolete:

> *Differences between contemporary society and historical conditions in which the status-based system developed.* The status-based duties imposed on land possessors were influenced by a time when land was the predominant form of wealth and large tracts of land were held by a powerful few. Those conditions have changed in modern times.

Restatement Third of Torts: Phys & Emot Harm, § 51 (2012). The drafters offer no historical basis for their assertion that the traditional status-based duties arose just because land was purportedly a predominant form of wealth. Nor do they explain what modern changes warrant abandoning the traditional status categories. These claims are nothing more than the drafters' pure *ipse dixit*.

The drafters of the Third Restatement further assert that "[t]he 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." *Restatement Third of Torts: Phys & Emot Harm*, § 51 (2012). But the drafters reach this conclusion only by adopting an approach to negligence that virtually dispenses with the traditional four-element tort analysis, eliminating duty as a key threshold element of tort liability. Nowhere do the drafters explain why such a revolutionary approach would improve tort law or why the traditional duty framework conflicts with comparative-fault analysis.

Throwing out Michigan's over one-hundred years of premises law to replace it with this novel and untested approach is unwarranted and would lead to detrimental policy consequences. Neither this Court, nor the lower courts, nor Michigan's citizens and

businesses will be able to predict with even minimal certainty what the results of any particular case will be. The law of premises liability will become a foggy mass of uncertainty with few guideposts. And it would either make premises law an island of its own or it would destabilize tort law as a whole, requiring dozens of new decisions to recapture any semblance of clarity and predictability. Those advocating such grand and far-reaching changes have not made their case in anything approaching the showing needed to overcome stare decisis.

C. Stare decisis counsels against the effort to overturn this longstanding framework for deciding premises claims.

Principles of law deliberately examined and decided by a court of competent jurisdiction should not be overturned lightly. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 172–73; 895 NW2d 154, 161 (2017); see also *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000). The principles challenged by Plaintiff have been repeatedly examined and approved by this Court for over a century.

Michigan's current approach to tort duty goes back at least to *Caniff v Blanchard Navigation Co,* 66 Mich 638; 33 NW 744 (1887). The court rejected a claim of someone who fell through an open hatch on a ship that was out of commission and in winter quarters because such a duty would be "burdensome in the extreme and is not required by law." 66 Mich at 644-645. The court explained that the ship-owner owed no duty to the party injured since the hatchways were kept open for ventilation and the plaintiff had been sailing for fourteen years and was familiar with the boats and method of laying them out. The court rejected the claim because the occupier of premises has no duty "where a person who from his experience, through many years, in sailing a vessel, knows that it is customary to leave the hatchways of the vessel open while lying in port, and whom

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observations teaches that they are liable to be open rather than closed, and are the sources of danger which he must avoid at his one peril." Id. See *also Goodman v Theatre Parking, Inc,* 286 Mich 80; 281 NW 545 (1938); *Lugo v Ameritech Corp*, 464 Mich 512, 528–29; 629 NW2d 384, 392 (2001); *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328; 968 NW2d 397 (2021).

Michigan premises law imposes a duty on premises owners to protect their invitees from unreasonable risks of harm but refuses to make them insurers of their invitees' safety. *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 261; 235 NW2d 732 (1975). This Court has adopted the possessor's duty under the *Restatement (Second) of Torts*, § 343, pp 215-216 (1965):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an *unreasonable* risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Bertrand v Alan Ford, Inc, 449 Mich at 609. And it has made clear that the hazards that may be connected to a trip and fall are open and obvious, so premises owners' duties rarely extend to warning or protecting against them. *Quinlivan*, see also *Bertrand,* 449 Mich at 614.

This Court applied these well-established principles in *Lugo* and other decisions. The judgment in *Lugo* was unanimous. Although the decision featured two separate concurring opinions, the Court explicitly noted that any differences among the majority opinion and the concurrences did not concern the current framework under Michigan law:

> There is much agreement between our opinion and the concurrence

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> authored by Justice Cavanagh. We agree "that a premises possessor is not generally required to protect an invitee from open and obvious dangers." *Post* at 400. We also agree that consistent with 2 Restatement Torts, 2d, §§ 343 and 343A, circumstances may arise in which an open and obvious condition is nevertheless unreasonably dangerous so as to give rise to a duty upon a premises possessor to in some manner remove or otherwise appropriately protect invitees against the danger. We further agree that any comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee's comparative negligence can only serve to reduce, not eliminate, the extent of liability.

Lugo v Ameritech Corp, 464 Mich 512, 524; 629 NW2d 384, 390 (2001). This Court should reaffirm these principles and reject Plaintiff's attack on the longstanding and widely accepted Michigan common law of premises liability.

In assessing a request to overturn past precedent, courts should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. *Id*. Before this Court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it. *People v Graves,* 458 Mich 476, 480–481; 581 NW2d 229 (1998).

Plaintiff has not even come close to such a showing here. The notion of duty as a foundational element of tort liability—and not merely one consideration in the comparative-fault analysis—is a longstanding, even ancient, aspect of Michigan tort law. This Court has for decades embraced the open-and-obvious doctrine as a foundational aspect of the scope of premises possessors' duty. This Court described that doctrine as "a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Bertrand,* 449 Mich at 612.

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"An ancient decision – one that has long been accepted as a correct exposition of the law or that has been repeatedly approved and followed – carries great weight as precedent and will not be overruled or departed from except for the most cogent reasons." Bryan A Garner, *The Law of Judicial Precedent,* pp 176-177 (2016). The precedents governing duty and the open and obvious doctrine are so longstanding as to be a fundamental part of Michigan common law. They have been reaffirmed in multiple decisions joined by liberal and conservative members of this Court. They have been relied on by bench and bar to anticipate their duties as premises owners and possessors.

Plaintiff has not shown that the concept of duty as a liability-limiting foundation of a tort claim is flawed. Nor has Plaintiff established that the weight of authority around the country has dispensed with duty as a threshold legal question. Nor has Plaintiff demonstrated that the current regime is unworkable, or offered any empirical evidence that the current framework requires change. Plaintiff instead merely offers a broad attack on the judiciary for dismissing claims based on the absence of an actionable duty. That is not enough.

In any event, the same policy considerations that have long sustained these well-accepted rules of law support the common-law concepts that are part of this appeal. They reflect an appropriate societal balance of responsibilities that has worked for centuries. The *Restatement (Third) of Torts*, by contrast, has been an untested and highly criticized project that proposed, over serious objections, a wholesale reworking of many foundational tort concepts. By contrast, the notion that duty is a question of law based on the relationship between the plaintiff and defendant underlies virtually all the decisions issued by this Court on negligence and tort liability. Deviating from such longstanding,

indeed ancient, tort doctrines that have been reaffirmed repeatedly for a century, including as recently as last year, would have significant unintended consequences for Michigan and its citizens.

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ARGUMENT II

SUMMARY DISPOSITION IN FAVOR OF A GAS STATION OWNER WAS PROPERLY GRANTED WHEN AN INVITEE VOLUNTARILY WALKS ON A SNOWY GAS STATION SURFACE WHEN IT HAS BEEN SNOWING ALL DAY BECAUSE NO OPEN AND OBVIOUS DANGER EXISTED THAT WAS UNREASONABLY DANGEROUS OR EFFECTIVELY UNAVOIDABLE

Plaintiff's claim is that an area of snow and ice at a gas station was effectively unavoidable because she had to enter the station to pay cash for the gas before pumping it. But this is surely not enough to make the snowy gas station condition unavoidable. As the Court of Appeals correctly held, Kandil-ElSayed had many options to avoid encountering the snowy surface or to guard against her fall.

Many jurisdictions have recognized that the natural accumulation of ice and snow is considered to be among the normal hazards of life. See e.g., *Clifford v Crye-Leike Commercial, Inc*, 213 SW3d 849 (2006). See also 65A CJS Negligence § 633 citing cases. Even when jurisdictions impose a duty on premises owners and possessors to protect visitors from such hazards, they limit that duty during an ongoing snowstorm until a reasonable time after the storm concludes. The Delaware Supreme Court, for example, rejected any duty in the circumstances here. *Laine v Speedway*, LLC, 177 A3d 1227, 1229-1230 (Del 2018). The *Laine* court explained that it is reasonable for a business owner to wait until a storm has ended and a reasonable time after to remove natural accumulations of ice and snow. The rationale for this limitation on the duty is that it is "inexpedient and impracticable to take earlier effective action." *Young v Saroukos*, 185 A2d 274 (Del 1962). Imposing any duty to shovel or salt the surface to eliminate ice during a storm or for a reasonable time thereafter would create unnecessary litigation and prompt businesses to close during storms or weather events to avoid liability:

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> Customers are expected to be aware themselves of the risks of falling and to take care to protect themselves. They know it could be slippery and must dress and otherwise take the steps necessary to protect themselves against a potential fall. As sad as the plaintiff's injuries were, the reality is that there is no foolproof way to avoid the risk of slipping on ice. Some injuries are not the legal fault of anyone, they just are the result of the reality that nothing in life is entirely safe, and surely not walking on ice or snow. That does not mean that these injuries are not important and unfortunate, but before opening the door to trials about falls during active storms, this court needs reliable evidence that the existing rule does not strike the optimal balance for all Delawareans affected by the reality that bad weather happens.

Laine v Speedway, LLC, 177 A3d 1227, 1233 (Del 2018).

In *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 260-262; 235 NW2d 732 (1975), this Court held that a premises owner has a duty to take reasonable measures "within a reasonable time *after* an accumulation of ice and snow to diminish the hazards of ice and snow accumulation." *Id.* at 261(italics added). Thus, it upheld a judgment against a premises owner because evidence showed the parking lot was snow-covered and icy although "[s]now had not fallen for several days." *Id*. But this Court made clear that it was not making the premises owner an insurer nor did it adopt "a flat requirement that the possessor's duty requires that he attempt to keep his land free of ice and snow." *Id*. at 260. Here, it was a snowy day and no time had passed allowing for clearing snow and ice. Thus, an alternate ground in support of the lower court decisions is that a premises owner's duty to clear snow does not arise until a reasonable time after the snow has ceased.

True, this Court has considered whether snow and ice are effectively unavoidable for those entering premises for work, *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328; 968 NW2d 397 (2021) or as here, to prepay cash for gasoline. But as the Court of Appeals held here, those entering premises with snow and ice have multiple ways to guard their own safety. In northern climates like Michigan, persons are expected to take

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appropriate care, such as by remaining indoors during bad weather if possible, watching where they step, walking carefully on slippery surfaces, wearing appropriate footgear with traction to avoid slipping on snow and ice, and using a cane or walker for added stability when appropriate.

Applying those principles here, whether using the particularized phrase "special aspects" or the Second Restatement's more general language of "an unreasonable risk of harm," the snowy gas-station pavement during and immediately after a snowfall lies outside the gas station owner's duty to guard or warn against the risk of a slip and fall. Ice and snow on a winter day of snowfall in Michigan does not satisfy the test for posing an unreasonable risk of harm, nor does it present special aspects that would alter the no-duty rule for open and obvious conditions. Kandil-Elsayed could easily have stayed at home or looked for another gas station or worn footwear with better traction to avoid injury. A risk of slipping on snow and ice and falling to the ground during a snowstorm simply does not rise to the level of unreasonable danger nor is it effectively unavoidable. Under either prong of the test, summary disposition was required.

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RELIEF

WHEREFORE, Amicus Curiae Chamber of Commerce of the United States of America respectfully requests this Court to reaffirm *Lugo* and its progeny, affirm the circuit court's summary disposition order, and grant such other relief as is proper in law and equity.

Respectfully submitted,

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