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STATE OF MICHIGAN
IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant

—v—

F&E OIL, INC,

Defendant-Appellee

Supreme Court No. 162907

Court of Appeals No. 350220

Trial Court No. 18-003569-NO

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Brief of *Amici Curiae* Auto Club Group Insurance Company, Auto Club Insurance Association, Fremont Insurance Company, MemberSelect Insurance Company, and Meemic Insurance Company

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Interest of *Amici Curiae*[1]

Auto Club Insurance Association is a Michigan domiciled reciprocal insurance exchange, which is authorized to transact insurance business in Michigan. Auto Club Group Insurance Company, Fremont Insurance Company, Meemic Insurance Company, and MemberSelect Insurance Company are Michigan domiciled insurance companies, which are likewise authorized to transact insurance business in Michigan.

The aforementioned insurance companies, which operate as independent entities, market and write property and casualty insurance products for businesses and consumers throughout Michigan. They have long relied on the open-and-obvious doctrine when evaluating risks, writing policies, and setting premiums. The consistent application of the open-and-obvious doctrine has facilitated efficiencies in their underwriting processes, including prediction of losses, and allowed them to pass on the efficiencies to policyholders in the form of lower premiums. As such, they have an interest in the outcome of this case, as do the businesses and consumers for whom they set premiums and provide products.

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[1] In accordance with MCR 7.312(H)(4), Auto Club Group Insurance Company, Auto Club Insurance Association, Fremont Insurance Company, Meemic Insurance Company, MemberSelect Insurance Company, and their counsel certify that counsel for the parties neither authored any part of this brief nor made a monetary contribution intended to fund the preparation or submission of this brief. The undersigned is the sole author of this brief. Auto Club Group Insurance Company, Auto Club Insurance Association, Fremont Insurance Company, Meemic Insurance Company, and MemberSelect Insurance Company are affiliates of Auto Club Group, which is the sole financial contributor to this brief.

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Question Presented

I. Is our open-and-obvious doctrine, as articulated in *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001), compatible with our comparative-negligence regime?

Trial Court didn't answer the question

Court of Appeals didn't answer the question

Plaintiff-Appellant says "no"

Defendant-Appellee says "yes"

Amici Curiae says "yes"

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Introduction

With the advent of comparative negligence came the obsolescence of common-law doctrines that excuse the negligence of one of the parties and, consequently, have no place in a system that operates to apportion damages according to the relative negligence of all of the parties.

The adoption of comparative negligence didn't sound the death knell for the open-and-obvious doctrine, under which possessors owe no duty to protect invitees from open and obvious conditions. The open-and-obvious doctrine operates not to *excuse* negligence, but to *define* negligence. The no-duty rule built into the open-and-obvious doctrine rests on the premise that open and obvious conditions don't pose unreasonable risks of harm. The failure to protect against open and obvious conditions, then, doesn't amount to negligence.

The overriding public policy of encouraging invitees to take reasonable care for their safety counsels against saddling possessors with a duty to "foolproof" their premises. As a doctrine founded on public policy, the open-and-obvious doctrine fits neatly into the duty-of-care rubric. Duty of care, after all, is an expression of social policy and responsibility.

The longstanding debate over whether the open-and-obvious doctrine involves a standard-of-care issue, rather than a duty-of-care issue, is purely academic. Regardless of whether the open-and-obvious doctrine speaks to the duty of care or the standard of care, the result is the same. If there's no duty to protect against open and obvious hazards—a question of law—there's no negligence. If failing to protect against open and obvious hazards isn't a breach of the standard of care—also a question of law, given the overriding public policy at play—there's no negligence. Either way, there's no negligence to compare. There's no question for a jury to resolve. And there's no basis for a finding that the open-and-obvious doctrine is incompatible with comparative negligence.

The notion that *any* no-duty rule is out of step with comparative negligence overlooks the critical distinction between an *objective* no-duty rule, like the open-and-obvious doctrine, and a *subjective* no-duty rule. A

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no-duty rule based on the subjective knowledge or fault of the invitee isn't on a par with a no-duty rule premised on the objective nature of the condition, which can coexist with comparative negligence.

Our fine-tuned, faithfully applied approach reflects sound social policy, provides predictability in the law, and operates in comfortable harmony with comparative fault. Our approach may not be perfect. But the answer is not to cede the law-making and policy-making role of the courts to untrained, ever-changing lay jurors without the guidance of precedent, without the guardian of *stare decisis*, and without the goal of a predictable trajectory of jurisprudence.

The answer is to stay the course. Our approach is reasonable, justifiable by public policy, and congruent with comparative negligence. So the Court, as the steward of the common law, need not consider whether the unwieldy, unworkable approach in the Restatement (Second) of Torts (1965) or the unorthodox, widely-criticized approach in the Restatement (Third) of Torts (2012) is a better approach.

The prudential concept of separation of powers militates in favor of upholding the open-and-obvious doctrine, which the Legislature embraced even after codification of comparative fault. Opponents of the open-and-obvious doctrine haven't presented the Court with sufficient information or fiscal analysis to assess the potential benefits, costs, and consequences of doing away with the open-and-obvious doctrine. If modification of the common law is necessary, the Court should defer to the Legislature to undertake the complex task of balancing the competing societal interests and, if appropriate, reallocating the societal benefits and burdens.

Last but certainly not least, the doctrine of *stare decisis* weighs in favor of retaining the open-and-obvious doctrine, which has become entrenched in the fabric of our premises-liability law over the last thirty years. Retiring the open-and-obvious doctrine, or relegating the open-and-obvious doctrine to a mere factor to consider in the comparative-fault analysis, will impact significant reliance interests and produce practical, real-world dislocations. As but one example, litigation will abound and not only drain the resources of the judicial system, but also divert resources

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from more compelling claims to less meritorious claims. There's no special or compelling justification to vitiate the deep-rooted, time-honored open-and-obvious doctrine and potentially capsize many other areas of settled law that may not even be on the Court's radar.

Today's Court should stand by yesterday's decisions.

Argument 1

Our open-and-obvious doctrine is compatible with our comparative-negligence regime. It focuses not on the *subjective* knowledge of the invitee, but on the *objective* nature of the condition. It applies not because the encounter is *unreasonable*, but because the risk of harm is *not unreasonable*. It operates not to *excuse* negligence, but to *define* negligence.

— 1.1 —

The foundation for premises liability derives from two well-recognized precepts, which balance possessors' ability to exercise control over their premises with invitees' obligation to assume personal responsibility for their safety. First, possessors are required to exercise reasonable care to protect invitees from dangerous conditions that pose unreasonable risks of harm. Second, and as a corollary, possessors are not required to foolproof their premises or otherwise guarantee the safety of their invitees. Simply put, possessors aren't insurers. *Hoffner v Lanctoe*, 492 Mich 450, 459-460 (2012).

The open-and-obvious doctrine is a deeply ingrained doctrine that has stood the test of time. *Lugo v Ameritech Corp,* 464 Mich 512, 528 (2001). The open-and-obvious doctrine is an "integral component" of, rather than "some type of exception" to, the duty of care. *Hoffner,* 492 Mich at 460. The essence of the open-and-obvious doctrine is that possessors owe no duty to protect invitees from open and obvious conditions because such conditions, by their nature, come with their own warnings. *Id.* at 460-461; *Estate of Livings v Sage's Investment Grp,* 507 Mich 328, 332 (2021). Such conditions,

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therefore, do not pose *unreasonable* risks of harm. *Bertrand v Alan Ford*, 449 Mich 606, 616-617 (1995).

The standard for determining whether a condition is open and obvious is objective. The focus is on "the objective nature of the condition," and the question is whether "an average person with ordinary intelligence" would've discovered the condition "upon casual inspection." *Hoffner*, 492 Mich at 461, 471. The standard reflects recognition that possessors are "not required to anticipate" all of the conceivable harms "that may arise as a result of the idiosyncratic characteristics" of their invitees. *Id.* at 461 n 15.

A "*narrow*" exception applies in "*limited*, extreme situations." *Id.* at 472. Possessors may owe a duty to protect invitees from an open and obvious condition if a special aspect renders the condition "unreasonably dangerous." *Id.* at 455. At bottom, a special aspect is a circumstance in which a condition gives rise to a uniquely high likelihood of harm because the condition is either (1) unreasonably dangerous in and of itself, or (2) effectively unavoidable. *Id.* at 463, 468-469, 472; *Lugo*, 464 Mich at 518-519.

The standard for determining whether a special aspect exists is also objective. The focus is not on the condition of the invitee, but on the condition of the premises. *Mann v Shusteric Ent*, 470 Mich 320, 329 (2004).

All told, the "critical question" is "whether the special aspect of the condition should prevail in imposing liability…or the openness and obviousness of the condition should prevail in barring liability. *Lugo*, 464 Mich at 517-518.

— 1.2 —

Some forty years ago, the Court repealed contributory negligence, an all-or-nothing doctrine that precludes recovery if *any* negligence on the part of the plaintiff, however slight, contributes to the injury. *Placek v Sterling Heights*, 405 Mich 638, 652 (1979); *Kirby v Larson*, 400 Mich 585, 591, 611 (1977). The Court adopted "pure" comparative negligence, a "more equitable" doctrine that distributes responsibility and apportions damages according to the relative fault of the plaintiff and the defendant. *Placek*, 405 Mich at 652-653, 660-661; *Kirby*, 400 Mich at 623.

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The shift from contributory negligence to comparative negligence was, in the Court's mind, a foregone conclusion. In the majority of jurisdictions, contributory negligence had already fallen into disfavor and been abolished for reasons "so compelling" as to make the question "not whether but when, how and in what form to follow the lead." *Placek*, 405 Mich at 653. The justification for contributory negligence—the protection of rapidly growing industries in their infancy during the Industrial Revolution—no longer existed. *Kirby*, 400 Mich at 613-614, 620. Perhaps most decidedly, the "not-so-hoary" concept of contributory negligence was "simply not fair." *Id.* at 620-621.

A few common-law doctrines failed to survive the adoption of comparative negligence. *Jennings v Southwood*, 446 Mich 125, 131 (1994). A common thread runs through the doctrines that succumbed to comparative negligence: they *excuse* the negligence of one of the parties and, consequently, have no place in a system that operates to distribute responsibility according to the relative negligence of all of the parties. See, e.g., *Conant v Bosworth*, 332 Mich 51, 55 (1952) (noting that the last-clear-chance doctrine excuses the negligence of one of the parties); *Petrove v Grand Trunk Western*, 437 Mich 31, 33 (1991) (affirming abrogation of the last-clear-chance doctrine).

The open-and-obvious doctrine isn't among the doctrines that yielded to comparative negligence. The open-and-obvious doctrine operates not to *excuse* negligence, but to *define* negligence. The gist of the open-and-obvious doctrine, as reflected in the standard outlined above, is that the failure to ameliorate an open and obvious condition is not negligence because "the risk of harm is not unreasonable." *Bertrand*, 449 Mich at 616-617. And comparative negligence doesn't "create negligence where none existed before." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 98 n 12 (1992).

— 1.3 —

For the past thirty years, there's been an ongoing debate among members of the Court about where the open-and-obvious doctrine fits in the negligence analysis. The thrust of the debate is whether the open-and-

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obvious doctrine is a legal question about the duty of care or a factual question about the standard of care and, more pointedly, whether the open-and-obvious doctrine is incompatible with comparative negligence.

Justice Levin inaugurated the debate in *Riddle*, and Justice Cavanagh resumed the debate in *Lugo.* They penned opinions in which they took the position that the open-and-obvious doctrine involves a question of the standard of care, rather than a question of the duty of care. They noted that the open-and-obvious doctrine surfaced in the era of contributory negligence when the distinction between the duty of care and the standard of care didn't really matter. In their view, the open-and-obvious doctrine serves not to define the duty of care on the part of the possessor, but to express the notion that the negligence of the invitee relieves the possessor of the duty of care. *Id.* at 541. A holding that the possessor owed no duty of care, they reasoned, amounts to a holding that the invitee negligently failed to heed the danger. In short, they viewed the duty of care as stemming from the relationship of the parties, rather than hinging on the obviousness of the danger. *Riddle,* 440 Mich at 120-125 (Levin, J, dissenting); *Lugo,* 464 Mich at 534-541 (Cavanagh, J, concurring).

The viewpoint of Justice Levin and Justice Cavanagh never became the voice of a majority of the Court.

In *Riddle,* the Court found that the open-and-obvious doctrine "clearly" involves the duty of care and "remains viable in Michigan" notwithstanding the adoption of comparative negligence. *Riddle,* 440 Mich at 97 n 11, 99-100. The Court vetoed efforts to abolish the open-and-obvious doctrine and relegate the obviousness of the condition to a mere factor to consider in the context of comparative negligence. See *Riddle v McLouth Steel Prod Corp,* 182 Mich App 259, 264-266 (1990).

The Court explained that the open-and-obvious doctrine is not an affirmative defense, but rather a defensive doctrine that attacks the duty element. *Riddle,* 440 Mich at 95-98. The adoption of comparative negligence, the Court continued, did "not abrogate the necessity of an initial finding" that the possessor owed a duty to the invitee. *Id.* at 95. The Court elaborated that "the duty element and the comparative negligence standard are

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fundamentally exclusive—two doctrines to be utilized at different junctures in the determination of liability." *Id.* at 95, 98 n 12.

The Court acknowledged that the obviousness of the condition is a proper factor to consider in the context of comparative negligence. The Court recognized, however, that the obviousness of the condition is also a necessary factor to consider in the context of duty. Comparative negligence is a non-issue in the absence of a duty, the Court reasoned, because there's no negligence to compare if there's no duty to exercise reasonable care.

In *Bertrand*, the Court described the open-and-obvious doctrine in terms of duty. Specifically, the Court observed that the open-and-obvious doctrine stands on the "overriding public policy of encouraging people to take reasonable care for their safety," which "precludes imposing a duty" on possessors to make ordinary, obvious conditions "foolproof." *Bertrand*, 449 Mich at 616-617.

In *Lugo* and *Hoffner*, the Court described the open-and-obvious doctrine as an "integral" component of the duty of care. *Lugo*, 464 Mich at 516; *Hoffner*, 492 Mich at 460, 476. The Court counseled against viewing the open-and-obvious doctrine as an exception to the duty of care or an expression of the standard of care. *Lugo*, 464 Mich at 516. The Court stressed the importance of focusing on the objective nature of the condition, rather than the subjective degree of care used by the invitee. *Hoffner*, 492 Mich at 471; *Lugo*, 464 Mich at 523-524. The invitee's knowledge or negligence, the Court recognized, is irrelevant to the possessor's duty of care. *Id.*

Most recently, in *Livings*, the Court rejected the notion that the possessor's non-liability under the open-and-obvious doctrine emanates from the invitee's negligence. Again, the Court characterized the open-and-obvious doctrine in terms of duty. Possessors "are not liable," the Court explained, "because they have no duty to protect against" open and obvious dangers. *Livings*, 507 Mich at 332.

The Legislature, too, implicitly rejected the idea that the open-and-obvious doctrine is incompatible with comparative negligence. In 1995, the Legislature enacted tort reform legislation. The Legislature was aware of

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the open-and-obvious doctrine and the decision in *Riddle,* which found that the open-and-obvious doctrine survived the adoption of comparative negligence. *Yang v Everest Nat'l Ins Co,* 507 Mich 314, 325 (2021) (the Court "must presume that the Legislature knows of the existence of the common law when it acts"). Although the Legislature codified a system of comparative fault as part of tort reform,[2] the Legislature left the open-and-obvious doctrine intact.

Additionally, and perhaps more importantly, the Legislature endorsed and statutorily extended the open-and-obvious doctrine to municipalities charged with the duty to maintain sidewalks. MCL 691.1402a. The Legislature believed that the wisdom of and justification for the open-and-obvious doctrine in the private sector applied with equal force in the public sector.[3]

The Court and the Legislature are in good company. Scoffing at the notion that the open-and-obvious doctrine is an outmoded vestige of contributory negligence, other courts and legislatures have likewise determined that the open-and-obvious doctrine is a duty-based doctrine that survives the adoption of comparative negligence. See, e.g., *Armstrong v Best Buy Co,* 99 Ohio St 3d 79, 81-82 (Ohio Ct App, 2003) and *Anderson v Ruoff,* 100 Ohio App 3d 601, 604 (Ohio Ct App, 1995); *Ward v K-Mart Corp,* 136 Ill 2d 132, 142-148 (Ill, 1990) and *Bucheleres v Chicago Park Dist,* 171 Ill App 2d 435, 446-447 (Ill Ct App, 1996); *Hale v Beckstead,* 116 P3d 263, 267-270 (Utah, 2005); *O'Sullivan v Shaw,* 431 Mass 201, 205-206 (Mass, 2000); *Harrington v Syufy,* 113 Nev 246, 249-250 (Nev, 1997); *Carrender v Fitterer,* 503 Pa 178, 189 (Pa, 1983); *Southerland v Wal-Mart,* 848 P2d 68, 69-70 (Okla, 1993); *Sessions v Nonnenmann,* 842 So2d 649, 652 (Ala, 2002); *Bufkin v Felipe's Louisiana,* 171 So3d 851, 859 n 3 (La, 2014); *Sundermann v Hy-Vee,* 306 Neb

[2] See, e.g., MCL 600.2956; MCL 600.2957; MCL 600.2958; MCL 600.2959; MCL 600.6304.

[3] See Legislative Analysis.

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749, 764 (Neb, 2020); *Eiselein v K-Mart*, 868 P2d 893, 895-897 (Wyo, 1994); see also WV Code § 55-7-28 and WV Code § 55-7-13a.[4]

Their reasoning is consistent with concepts that the Court has endorsed. They start with the understanding that while the adoption of comparative negligence altered possessors' *defenses*, the adoption of comparative negligence did not abrogate or redefine possessors' *duties of care*. *Blackwell v Franchi*, 914 NW2d 900, 903 (2018) (McCormack, J, concurring). They proceed with the recognition that the open-and-obvious doctrine relieves possessors of liability not because invitees fail to use due care, but because possessors have no duty to protect invitees from conditions that are readily apparent upon casual inspection (*i.e.*, conditions that don't pose unreasonable risks of harm). *Livings*, 507 Mich at 332; *Bertrand*, 449 Mich at 616-617. And they end with the conclusion that if there's no duty, there's no negligence—and, ergo, no issue of comparative negligence. *Romain v Frankenmuth Ins Co*, 483 Mich 18, 20-22 (2009). The view that the open-and-obvious doctrine is a remnant of the by-gone era of contributory negligence, they say, is "misdirected." *Armstrong*, 99 Ohio St 3d at 81.

The Court has never questioned the longstanding principle that if there's no duty, there's no negligence—and, as a corollary, no issue of comparative negligence. *Romain*, 483 Mich at 20-22. If the open-and-obvious doctrine is an "integral component" of the duty of care, as the Court and many other courts have held, then the open-and-obvious doctrine is compatible with comparative negligence.

— 1.4 —

The view expressed by former members of the Court and parroted by Kandil-Elsayed—that the duty of care should be tied to the relationship between the parties and the open-and-obvious doctrine should be viewed as an expression of the standard of care—is misplaced. True, the relationship between the parties is the most important factor in the duty-of-

[4] This list is illustrative, not exhaustive.

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care analysis. But the relationship between the parties is not the *only* factor in the duty-of-care analysis.

The understanding that the open-and-obvious doctrine is an integral part of the duty of care finds support in *In re Certified Question from Fourteenth District Court of Appeals of Texas*, 479 Mich 498 (2007), a case in which the Court took a deep dive into the concept of duty and provided the following synopsis.

The term "duty" is "not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Id.* at 505. Duty is a threshold question of law that the court may resolve only after considering "logic" and assessing the "competing policy considerations for and against recognizing the asserted duty." *Id.* at 504-505, 518-519. Attendant to the "responsibility" to "consider the larger social consequences of the notion of duty" is the responsibility to "limit the legal consequences of wrongs to a controllable degree." *Id.* at 519; see also *Groncki v Detroit Edison*, 453 Mich 644, 661 (1996) (recognizing that the determination of duty requires consideration of social policy, "which must intervene at some point to limit the extent of one's liability").

The "ultimate inquiry" is whether imposing a duty is "appropriate public policy"—*viz.*, whether "the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Certified Question*, 479 Mich 498 at 505, 518. The inquiry involves consideration of the relationship of the parties, the foreseeability of the harm, the burden attendant to imposition of a duty, and the nature of the risk. *Id.* at 505.

The relationship of the parties is the most important factor for an obvious reason—if no relationship exists, no duty exists. *Id.* at 505-507. But "even when there is a relationship between the parties," a "duty does not necessarily exist." *Id.* at 507. If a relationship exists, the court must consider the foreseeability of the harm. If the harm is foreseeable, the court must still consider the magnitude of the burden (relative to the imposition of the asserted duty) and the nature of the risk. *Id.* at 508-509.

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Against the backdrop of *Certified Question*, viewing the open-and-obvious doctrine as an integral part of the duty of care makes sense. Recall that in *Bertrand*, the Court made the oft-repeated declaration that the "overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty" on possessors to make ordinary, obvious conditions "foolproof." *Bertrand*, 449 Mich at 616-617. *Bertrand* leaves no room for doubt. The open-and-obvious doctrine reflects a determination that saddling possessors with a duty to protect against ordinary, obvious dangers is not appropriate public policy. The open-and-obvious doctrine reflects a determination that imposition of a duty to protect against ordinary, obvious dangers would be a substantial burden incommensurate with and unjustified by the nature of the risk. An obvious danger, after all, is "no danger to a 'reasonably' careful person." *Glittenberg v Doughboy Recreational Indus*, 441 Mich 379, 396 (1992). Correspondingly, "the risk of harm is not *unreasonable*." *Bertrand*, 449 Mich at 617.

— 1.5 —

In the end, perhaps the debate over whether the open-and-obvious doctrine speaks to the duty of care or the standard of care is purely academic. Even if the open-and-obvious doctrine speaks to the standard of care, rather than the duty of care, the open-and-obvious doctrine remains a question of law and comparative negligence remains a non-issue.

In general, the court decides the issue of duty and general standard of care, while the jury decides the issue of specific standard of care, *i.e.*, breach.[5] *Moning v Alfono*, 400 Mich 425, 438 (1977). But where there's "an overriding legislatively or judicially declared public policy" at play, the court decides the issue of breach. *Id.*; see also *Scott v Harper Recreation*, 444 Mich 441, 448 (1993); *Williams v Cunningham Drug Stores*, 429 Mich 495, 500-501 (1988); *MacDonald v PKT*, 464 Mich 322, 336 (2001).

[5] See *Blackwell v Franchi*, 940 NW2d 58, 59 (2020) (McCormack, CJ, concurring) (observing that in *Moning*, the Court used "specific standard of care" to refer to breach of the duty of care).

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In *Williams*, for example, the Court confronted the issue whether a merchant, or business possessor, is obligated to provide security guards for the protection of invitees. The Court observed that a merchant has a duty to exercise reasonable care to protect his invitees from a dangerous condition that poses an unreasonable risk of harm. *Williams*, 429 Mich at 499. The Court framed the issue not as whether a merchant owes a duty to provide security guards, but as whether a merchant breaches the duty of reasonable care by failing to provide security guards. Given the presence of "overriding public policy concerns," the Court regarded the issue of breach as a question for the Court to "determine as a matter of law." *Id.* at 501.

And so the Court determined, "as a matter of law," that a merchant's duty of reasonable care "does not extend to providing…security guards" for the protection of invitees. *Id.* at 504. The Court declined to extend a merchant's duty of reasonable care "that far" in light of the degree of control, the nature of the harm involved, and the public interest against imposition of a duty. *Id.* at 501. A "merchant is not an insurer of the safety of his invitees," the Court explained, "and for reasons of public policy he does not have the responsibility for providing police protection on his premises." *Id.* at 504.

As noted, the Court has held and reaffirmed that premises-liability actions involving ordinary, obvious dangers implicate "overriding public policy" concerns. *Id.* at 501. Possessors are not "insurers of the safety of their invitees," the Court has declared, and the "overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty" on possessors to make ordinary, obvious conditions "foolproof." *Bertrand*, 449 Mich at 614, 616-617; see also *Lugo*, 464 Mich at 522; *Hoffner*, 492 Mich at 460; *Perkoviq v Delcor Homes*, 466 Mich 11, 17 (2002).

Whether framed as a question about the duty of care or a question about the standard of care, the result is the same. If there's no duty to protect against obvious dangers—a question of law—there's no negligence. If failing to protect against obvious dangers isn't a breach of the duty to exercise reasonable care—also a question of law, given the overriding

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public policy at play—there's no negligence.[6] Either way, there's no negligence for a jury to compare. There's no question for a jury to resolve. And there's no basis for a finding that the open-and-obvious doctrine is incompatible with comparative negligence, which doesn't "create negligence where none existed before." *Riddle*, 440 Mich at 98 n 12; see also *Blackwell*, 914 NW2d at 903 (McCormack, J, concurring).

— 1.6 —

Perhaps now is a good time to discuss the elephant in the room—the approach catalogued by the American Law Institute in the Restatement (Second) of Torts (1965).

Under § 343, a possessor is subject to liability for a condition that causes harm to an invitee 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." Restatement, § 343. Under 343A, a possessor is not subject to a liability for a condition that causes harm to an invitee if the danger is known or obvious, "unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement, § 343A(1). Per the commentary, §§ 343 and 343A "should be read together" because § 343A "limits the liability" outlined in § 343. Restatement, § 343, comment *a*.

The role of the Restatement approach in our open-and-obvious framework is open to debate. At times, the Court has described the Restatement approach as the governing law or the source underlying our open-and-obvious framework. *Riddle*, 440 Mich at 92-95; *Livings*, 507 Mich at 343-344, 344 n 10. At other times, the Court has remarked that our open-and-obvious framework, though perhaps not identical to the Restatement

[6] Other courts that have construed the open-and-obvious doctrine as a standard-of-care issue have decided the standard-of-care issue as a matter of law. See *Harris v Niehaus (En Banc)*, 857 SW2d 222 (Mo, 1993).

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approach, is "informed by" or "consistent with" with the Restatement approach. *Id.* at 343, 344; *Lugo,* 464 Mich at 524-525. The notion in our jurisprudence that the possessor isn't liable unless there's something "out of the ordinary" or "special" about the condition, the Court has explained, is an elaboration of the notion in § 343A that the possessor isn't liable unless there's reason to "anticipate the harm" despite the obviousness of the condition. *Id.*; *Bertrand,* 449 Mich at 617.

On the other hand, some members of the Court have observed an undeniable tension between the Restatement approach and our open-and-obvious framework. *Livings,* 507 Mich at 357 (McCormack, CJ, concurring) and 369 (Zahra, J, dissenting). Indeed, on a few occasions, the Court has taken aim at the core concept embodied in § 343A—the concept that foreseeability or anticipation of harm is an exception to the no-duty rule in the open-and-obvious doctrine. In *Singerman v Mun Serv Bureau*, 455 Mich 135 (1997), the Court acknowledged § 343A but held that foreseeability of harm is not an exception to the no-duty rule in the open-and-obvious doctrine:

> The Court of Appeals incorrectly held that [the possessor] owed a duty to [the invitee] because the harm was *foreseeable*, despite the open and obvious nature of the hazard. The question is not the foreseeability of harm. Rather the question…is whether the risk of harm remains unreasonable, despite its obviousness.

Id. at 141-143. Later, in *Hoffner,* the Court squarely rejected the view that "*mere anticipation* of an injury creates, per se, a duty of care and a jury-submissible question of fact regarding liability for an open and obvious danger." *Hoffner,* 492 Mich at 474-475. To subscribe to such a view, the Court said, "would be to render the open and obvious doctrine a legal nullity." *Id.*

When the language and commentary to §§ 343 and 343A are analyzed with a fine-tooth comb and compared with the history and evolution of our open-and-obvious doctrine, *Hoffner* appears to provide the

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most accurate description of the role of the Restatement approach in our open-and-obvious framework:

> This Court has never adopted wholesale the Restatement approach. While this Court has looked to the Restatement for guidance, it is our caselaw, as developed through the years, that provides the rule of law for this State.

Hoffner, 492 Mich at 478-479.

Kandil-Elsayed, along with other proponents of the view that the Court should revisit and revamp our framework to ensure compatibility with comparative negligence, condemn the open-and-obvious doctrine as the problem and laud the Restatement approach as the solution. But is that the reality?

No.

The reality is that our open-and-obvious doctrine is compatible with comparative negligence *because* the Court declined to adopt wholesale the Restatement approach. The Restatement approach is not the solution. The Restatement approach—in particular, § 343A—is the problem.

True, some courts have questioned whether the principles espoused by § 343A are more compatible with comparative negligence. *Ward*, 136 Ill 2d at 150. Many courts, however, have questioned "whether the principles espoused by § 343A survive the adoption of comparative negligence." *Koutoufaris v Dick*, 604 A2d 390, 396 (Del, 1992).

Under § 343A, the duty for a *known* danger is the same as the duty for an *obvious* danger—the possessor owes no duty to the invitee unless he has reason to "anticipate the harm despite such knowledge or obviousness." Restatement, § 343A. However, the basis for the no-duty rule regarding a known danger differs from the basis for the no-duty rule regarding an obvious danger.

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According to the Restatement, a "known" danger is viewed through a *subjective* lens. The possessor owes no duty if the invitee possesses knowledge of the existence of the condition and appreciates the probability and gravity of the risk of harm. An "obvious" danger, by contrast, is viewed through an *objective* lens. The possessor owes no duty if a reasonable person in the position of the invitee, exercising ordinary perception and judgment, would have recognized the existence of the condition and the attendant risk of harm. Restatement, § 343A, comment *b*.

Courts that have adopted § 343A *in toto* have thus adhered to the rule that the possessor owes no duty to the invitee if the existence and risk of the condition are objectively obvious *or subjectively known*. See, e.g., *Dick's Sporting Goods v Webb,* 413 SW2d 891, 895 (Ky, 2013). The subjective "knowledge element in § 343A," likened to secondary assumption of the risk, is the reason that courts have questioned whether a no-duty rule rooted in § 343A survives the adoption of comparative negligence. *Koutoufaris,* 604 A2d at 396-397; see also *O'Sullivan,* 431 Mass at 205-206.

Perhaps a no-duty rule based on the subjective knowledge of the invitee cannot co-exist with a comparative-negligence regime. But that isn't an issue that the Court must, or should, decide. To begin, the case before the Court involves an obvious danger, not a known danger. See *Griebler v Doughboy Recreational,* 160 Wis 2d 547, 556 (Wis, 1991) (noting that "the development of a known danger test is better left for another day when a case involving a subjectively known danger is before the court").

More pointedly, the Court has never adopted a subjective standard for a known danger. The Court has made clear that the open-and-obvious doctrine is "not dependent" on the "subjective knowledge" of the invitee, *Glittenberg v Doughboy Recreational Indus,* 436 Mich 673, 696 (1990), or the "subjective degree of care" used by the invitee. *Clahassey v CAMI,* 468 Mich 919, 919 (2003). The subjective knowledge of the invitee is "relevant" to causation, the Court has explained, but "immaterial to the antecedent determination of an open and obvious danger," *i.e.*, the "existence of a duty." *Glittenberg,* 441 Mich at 393. The Court has stressed that the focus is on the "objective nature of the condition," even when the invitee "*actually* (subjectively) recognized the hazard." *Hoffner,* 492 Mich at 461, 473 n 40.

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So our open-and-obvious doctrine is not, to use the words of Justice Levin, a way to express that the "negligence or fault of the [invitee] contributed to the harm." *Riddle,* 440 Mich at 121 (Levin, J, dissenting). Whether the invitee failed to use due care or contributed to the harm isn't part of the duty-of-care equation. *Clahassey*, 468 Mich at 919; *O'Sullivan*, 431 Mass at 205-206.

Kandil-Elsayed disagrees. In her view, courts have "repeatedly analyzed" the open-and-obvious doctrine in the context of the subjective knowledge and negligence of the invitee. Putting aside her failure to cite any illustrative cases, her argument speaks to the misapplication or misunderstanding of the standard, not the propriety of the standard.

True, a determination that the possessor owes no duty based on the open-and-obvious doctrine might imply some degree of carelessness on the part of the invitee—such determination, after all, means that the condition and the risk would've been apparent to any reasonable person in the same position. But the determination doesn't require or depend upon a finding that the *invitee* was *subjectively careless* in encountering the condition. The determination, rather, depends on a finding that the *possessor* was *objectively reasonable* in concluding that the obviousness of the condition rendered warnings or precautionary measures unnecessary. *O'Sullivan,* 431 Mass at 206.

In light of the foregoing, amicus respectfully disagrees with the view that *any* no-duty rule is out of step with comparative negligence[7]—a view that, if subscribed to, would seemingly upend a lot more than the open-and-obvious doctrine.[8] A no-duty rule based on the subjective knowledge or fault of the invitee (like the Restatement approach) is not cut from the same cloth as a no-duty rule premised on the objective nature of the condition and indifferent to the subjective knowledge or fault of the invitee (like our open-and-obvious doctrine). The latter can comfortably coexist

[7] See *Livings*, 507 Mich at 354.

[8] See *Eiselein*, 868 P2d at 897; see also p. 64, *infra*.

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with comparative negligence. See, e.g., *Pitre v Louisiana Tech Univ*, 673 So2d 585, 590-591 (La, 1996) (observing that while a no-duty rule based on the subjective knowledge of the invitee resurrects contributory negligence, a no-duty rule based on the objective "obviousness and apparentness of a potentially dangerous condition" remains alive and well after the adoption of comparative negligence).[9]

An illustrative example is California's treatment of two premises-liability rules: the open-and-obvious-danger rule and the trivial-defect rule.

California's open-and-obvious-danger rule, which mirrors the Restatement approach and differs from our approach, provides that a possessor owes no duty to protect against "defects or dangers which are obvious and known to the injured person, and which may be avoided by the exercise of reasonable prudence on his part." *Welsh v Mercy Hosp*, 65 Cal App 2d 473, 478 (Cal Ct App, 1944). After the adoption of comparative negligence, California courts held that the open-and-obvious-danger rule—triggered where the invitee encountered a hazardous condition "despite full appreciation of the risk"—sounded in secondary assumption of the risk and "merged into comparative negligence." *Donohue v San Francisco Housing Auth*, 16 Cal App 4th 658, 665 (Cal Ct App, 1993).

California's trivial-defect rule provides that a possessor owes no duty to repair or otherwise protect against "a minor, trivial, or insignificant defect in property." *Caloroso v Hathaway*, 122 Cal App 4th 922, 927 (Cal Ct App, 2004). The trivial-defect rule, which is "not an affirmative defense but rather an aspect of duty," involves consideration of objective criteria (*e.g.*, the size of the defect). *Kasparian v AvalonBay Cmty*, 156 Cal App 4th 11, 26-27 (Cal Ct App, 2007). The trivial-defect rule permits California courts to

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[9] Some courts believed that the Louisiana Supreme Court held otherwise in *Broussard v State*, 113 So3d 175 (La, 2013). But following *Broussard*, the Louisiana Supreme Court confirmed the continued vitality of the rule that "no legal duty is owed [when] the condition encountered is obvious and apparent to all," *i.e.*, "not unreasonably dangerous." *Bufkin*, 171 So3d at 859 n 3; see also *Allen v Lockwood*, 156 So3d 650, 652-653 (La, 2015).

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"determine 'triviality' as a matter of law" and, in turn, provides "a check valve for the elimination from the court system of unwarranted litigation." *Id.* After the adoption of comparative negligence, California courts continued to apply and grant summary disposition based on the trivial-defect rule. *Caloroso,* 122 Cal App 4th at 926-929; *Cadam v Somerset Gardens*, 200 Cal App 4th 383, 388-389 (Cal Ct App, 2011).

Also consider Iowa courts' treatment of two premises-liability rules: the open-and-obvious-danger rule and the continuing-storm doctrine.

Iowa's open-and-obvious danger rule, which likewise mirrors the Restatement approach and differs from our approach, provides that the possessor owes no duty to protect against "known or obvious" risks of harm. *Carr v San-Tan,* 543 NW2d 303, 306 (Iowa, 1995). The "rationale for this no-duty rule," according to Iowa courts, "is that actual knowledge of a danger is equivalent, and perhaps even superior, to a warning." *Id.* After the adoption of comparative negligence, Iowa courts found that the open-and-obvious-danger rule—triggered where the invitee had "knowledge of an open and obvious risk"—presented an issue of comparative fault rather than an issue of duty. *Ludman v Davenport Sch*, 895 NW2d 902, 914 (Iowa, 2017).

Iowa's continuing-storm doctrine provides that the possessor "has no duty to remove the natural accumulation of snow or ice during an ongoing storm and for a reasonable time after the cessation of the storm." *Gries v Ames Housing,* 944 NW2d 626, 631 (Iowa, 2020). The continuing-storm doctrine involves consideration of objective criteria (*e.g.*, inclement weather). The continuing-storm doctrine permits Iowa courts "to determine, as a matter of law, that the land possessor owed no duty," consistent with the "widespread policy consensus" that abatement of snow and ice hazards in the midst of ongoing storms is impracticable. *Id.* at 631, 634. After adoption of comparative negligence, Iowa courts continued to apply and grant summary disposition based on the continuing-storm doctrine. *Rochford v GK Dev*, 845 NW2d 715, 718 (Iowa Ct App, 2014).

Assumption of the risk provides a useful analogy, too. Courts have recognized two types of assumption of the risk: primary and secondary.

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Estate of Foronda v Hawaii Boxing Club, 96 Hawai'i 51, 61 (Haw Ct App, 2001). Primary assumption of the risk is "an alternate expression of the proposition that a defendant owes no duty to a plaintiff." *Id.* at 59. Primary assumption of the risk involves a situation in which a party voluntarily participates in an event or activity involving an inherent risk (*e.g.*, a spectator enters a baseball park). *Id.* Like our open-and-obvious doctrine, the standard is objective. The focus is on the objective nature of the activity rather than the subjective knowledge, awareness, or perception of the party. *Id.* at 67-68.

Secondary assumption of the risk is, at bottom, a "form of contributory negligence." *Id.* at 61. Secondary assumption of the risk involves a situation in which a party knows about and voluntarily encounters a risk created by breach of a duty. *Id.* Like the Restatement approach, the standard is subjective. The focus is on the subjective knowledge or fault of the party. *Id.*

Many courts hold that secondary assumption of the risk is now an issue of comparative negligence rather than a bar to recovery. But courts "almost unanimously agree"[10] that primary assumption of the risk survives the adoption of comparative negligence and continues to operate as a bar to recovery. *Id.*; see also *Kreski v Modern Wholesale Elec Supply Co*, 429 Mich 347, 363-365 (1987); *Nixon v Clay*, 449 P3d 11, 16 n 6 (Utah, 2019); *Knight v Jewett,* 3 Cal 4th 296, 314-315 (Cal, 1992); *Springrose v Willmore*, 292 Minn 23, 24-25 (Minn, 1971); *Turner v Mandalay Sports*, 124 Nev 213, 220-221 (Nev, 2008); *Sunday v Stratton Corp,* 136 Vt 293, 301 (Vt, 1978); *Helm v 206 Mass Ave,* 107 A2d 1074, 1080 (Del, 2014); *Pickel v Springfield Stallions*, 398 Ill App 2d 1063, 1076-1077 (Ill, 2010); *Goldfuss v Davidson,* 79 Ohio St 3d 116, 127 (Ohio, 1997); *Yount v Johnson,* 121 NM 585, 590-591 (NM, 1996); *Halpern v Wheeldon,* 890 P2d 562, 565 (Wyo, 1995). "There being no legal duty to breach, there can be no talk of negligence, and thus, primary assumption of risk remains a discrete and complete defense quite apart from comparative negligence." *Foronda,* 96 Hawai'i at 61.

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[10] *Perez v McConkey*, 872 SW2d 897, 904 (Tenn, 1994).

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Conceptually, our open-and-obvious doctrine is parallel to primary assumption of the risk. Just as primary assumption of the risk looks at *objective* criteria and "involves a policy determination…that there is no basis for the imposition of a duty in tort," *Nixon,* 449 P3d at 16 n 6, so too does our open-and-obvious doctrine. *Bertrand,* 449 Mich at 614, 616-617; *Lugo,* 464 Mich at 522; *Hoffner,* 492 Mich at 460; *Perkoviq,* 466 Mich at 17. If primary assumption of the risk remains "alive and well" in the wake of comparative negligence, *Nixon,* 449 P3d at 16 n 6, then by parity of reasoning, our open-and-obvious doctrine remains alive and well in the wake of comparative negligence. See *O'Sullivan,* 431 Mass at 206 n 2, citing Prosser & Keeton, *Torts,* § 68, pp 481, 496-497 (5th ed 1984) (observing that Prosser and Keeton, prominent and distinguished tort scholars, "conclude that the duty-negating principle which we recognize under the open and obvious danger doctrine and which is denoted in other jurisdictions as 'primary assumption of risk' should survive the advent of a comparative negligence regime and note that the majority of courts that have considered the issue have so held").

In sum, our open-and-obvious doctrine and comparative-negligence scheme are capable of coexistence. And for reasons discussed later, the prudential principle of separation of powers and the doctrine of *stare decisis* counsel against abrogation of our open-and-obvious doctrine.

Argument 2

The approach in §§ 343 and 343A of the Restatement (Second) of Torts (1965) is not a model of clarity or a practical, workable solution. Adoption of the approach would produce inconsistent results and lead to undesirable consequences.

Some members of the Court have queried whether the Restatement approach discussed above would provide more stability, predictability, and consistency with the comparative-negligence system in Michigan. *Livings,* 507 Mich at 360-361 (McCormack, CJ, concurring).

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Amicus has already provided the Court with ample reason to reject the Restatement approach. Amicus submits that adopting a modified version of the Restatement approach, sans the subjective component in § 343A, is not advisable either.

— 2.1 —

To begin, courts and legal analysts have criticized and grappled with the proper interpretation of § 343A. Some have referred to the language as "unwieldy." *Hersh v E-T Enter,* 232 W Va 305, 316 (W Va, 2013). Some have described the commentary as "schizophrenic." *Koutoufaris,* 604 A2d at 395. And some have observed that both the language and commentary are rife with "ambiguity" and "contradictory in nature." *Livings,* 507 Mich at 381, 383, 385 (Clement, J, dissenting); see also Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious" Dangers,* 38 Tex Tech L Rev 1, 5, 39 (2005).

Because of the "deep-seated" and "aggravating" ambiguity of § 343A, courts and legal scholars "interpret § 343A very differently." *Id.* at 5, 39. The primary disagreement among courts and legal scholars is where, in the negligence analysis, § 343A comes into play.

Many (including the Court) have said that § 343A speaks to the duty of care. *Id.* at 40 n 242 (collecting cases); *Riddle,* 440 Mich at 97 n 11; *Hale,* 116 P3d at 268; *Clemons v Mitsui OSK Lines*, 596 F2d 746, 750 n 17 (CA 7, 1979); *Napoli v Hellenic Lines*, 536 F2d 505, 508-509 (CA 2, 1976); *Coburn v Whitaker Constr Co,* 445 P3d 446, 450 (Utah, 2019).[11] Some have said that § 343A speaks to something other than the duty of care—perhaps breach, causation, or comparative fault. *Shelton v Ky Easter Seals,* 413 SW3d 901, 907 (Ky, 2013). Some have said that § 343A speaks to the standard of care. *Johnson v A/S Ivarans Rederi,* 613 F2d 334, 347 (CA 1, 1980). Some have said that § 343A speaks to breach of the standard of care. Marks, *supra,* at 5, 30, 32, 39-40. Some have said that § 343A speaks "to the more general question

[11] Kandil-Elsayed's contention that "only Michigan jurisprudence" interprets § 343A as a duty-defining concept is inaccurate.

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of liability." *Ward,* 136 Ill 2d at 151. Some have said that § 343A speaks to assumption of the risk and contributory negligence. *De Los Santos v Scindia Steam,* 598 F2d 480, 490-491 (CA 9, 1979), aff'd, 451 US 156 (1981). And some have observed that neither the language nor the commentary specifies whether the principles relate to duty, breach, causation, comparative or contributory negligence, or assumption of the risk. *Hersh,* 232 W Va at 316; Marks, *supra,* at 30, 39.

Although the language is susceptible of different interpretations, the commentary implies that § 343A embodies duty-defining principles. Restatement, § 343, comment *b* (describing § 343A as a provision that outlines the "situations in which there is a *duty* to protect an invitee against even known dangers") and comment *f* (describing § 343A as a provision that imposes a "*duty* of reasonable care" to protect invitees from obvious or known dangers when physical harm is foreseeable).

The American Law Institute seemingly resolves the debate in the Restatement (Third) of Torts (2012). Per the commentary, § 343A delineates the "duty owed to invitees" or "the duty applicable to invitees." Restatement, § 51, comment *a.*

— 2.2 —

Clarification that § 343A sets forth the duty owed to invitees, however, doesn't resolve the bigger problem with the Restatement approach: the exception to the no-duty rule for open and obvious dangers, triggered any time the possessor "should anticipate the harm" despite the obviousness of the condition. Restatement, § 343A(1).

The factors that inform the determination of whether imposition of a duty is appropriate public policy also demonstrate why the Court should resist the urge and decline the invitation to formally adopt § 343A. The anticipation-of-harm exception would saddle possessors with "an extraordinarily onerous and unworkable burden" that would stretch "traditional tort concepts beyond manageable bounds." *Certified Question,* 479 Mich at 516, 526. And such a substantial burden isn't commensurate with or justified by the nature of the risk, which is "not unreasonable."

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Bertrand, 449 Mich at 616-617; see also *Glittenberg*, 441 Mich at 396 (an ordinary and obvious danger is "no danger to a 'reasonably' careful person").

Unsurprisingly, courts have declined to adopt § 343A on the basis that the anticipation-of-harm exception in § 343A swallows the open-and-obvious rule. *Anderson*, 100 Ohio App 3d at 605. An open and obvious hazard is just that—a *hazard*. A hazard, by definition, is a source of danger. A possessor can always anticipate a risk of harm from a hazard. The Court said as much in *Hoffner*:

> To [hold] that *mere anticipation* of an injury creates, per se, a duty of care and a jury-submissible question of fact regarding liability for an open and obvious danger would be to render the open and obvious doctrine a legal nullity. Indeed, when could it *ever* be said that harm could not be reasonably anticipated from an open and obvious condition? Ordinary open and obvious conditions are categorically conditions from which harm may be anticipated—that is the characteristic that gives them their special designation in the law that has historically curtailed liability for injuries resulting from them.

Hoffner, 492 Mich at 474-475; see also *Singerman*, 455 Mich at 141-143; *Hersh*, 232 W Va at 323 (Loughry, J, dissenting). The Court observed that the approach proposed in the dissent—under which the open-and-obvious doctrine would become a jury question any time harm could be anticipated (essentially the approach in § 343A)—would "require a landowner either to keep his property in perfect condition at all times and for all people to ensure against *any* injury, or subject himself to protracted and expensive litigation as a result of injury arising from any common condition." *Hoffner*, 492 Mich at 481 n 56. The Court condemned the approach as impractical, unworkable, and unamenable to predictability in the law. *Id.* at 480, 481 n 56. The Court refused to place possessors in the impossible position of

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trying to "anticipate what harms must be remedied in advance in order to *avoid* liability." *Id.* at 480-481.

> The goal of the law is not to create uncertainty whereby only a jury determines, after the fact, the scope of a [possessor's] duty. Rather, the goal of the law is to establish clear standards that allow citizens to ascertain the extent of their duties, liabilities, and responsibilities before an accident occurs.

Id. at 481.

Even if courts and scholars could debate whether § 343A espouses a virtually limitless duty year-round, they'd be hard pressed to disagree that § 343A imposes a virtually limitless (and certainly unmanageable) duty in winter. The decision whether to adopt § 343A must take into account that "Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces." *Id.* at 454.

Possessors can always anticipate that snow and ice carry the potential for harm. Possessors can always anticipate that invitees may fail to protect themselves against the harm, no matter how obvious. Even invitees who exercise "the utmost care" for their safety "get injured because snow and ice in inclement weather is a natural condition that defies human control." *Carter v Bullitt Host,* 471 SW3d 288, 302 (Ky, 2015) (Venters, J, dissenting). The burden of eliminating the risk of danger in inclement weather is "a practical impossibility." *Id.* at 305. "No social benefit is achieved by imposing a duty that cannot be performed." *Id.*

And with appropriate social policy in mind, who, really, is in "a better position" to prevent the harm? *Bertrand,* 449 Mich at 609. As "everyone knows," even "best efforts" with "state-of-the-art means" do not eliminate the hazard created by snow and ice. *Carter,* 471 SW3d at 304, 305 (Venters, J, dissenting). "Sometimes, they even make the hazard worse." *Id.* at 304. There's a reason why "Michigan courts have generally held that the

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hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter v Blarney Castle Oil*, 281 Mich App 474, 479 (2008). As one justice aptly explained, invitees are in a better position to prevent the harm:

> The landholder generally has no better ability to protect invitees from the hazards of snow and ice on a parking lot than he does to protect them from the hazards of a parking lot inundated with flood water or from the danger of strong winds that might cross his lands…
>
> In contrast with the landholder's inability to control where the snow falls and where the ice remains, the invitee has absolute and total control of where and when he places his foot on the snow-covered ground…
>
> There is great wisdom in placing the burden of the reducing the risk upon the one who has the best ability to control the risk… If our social policy is based upon the goal of reducing harmful injury, shifting the duty to the landholder…does not advance us to that goal because we would be placing the duty on one who cannot prevent the harm…

Carter, 471 SW3d at 304, 305 (Venters, J, dissenting). Winter, a season to which Michigan is not immune, warrants rejection of the Restatement approach in general and § 343A in particular.

— 2.3 —

Buried in the commentary to § 343A are examples of circumstances in which the possessor "should anticipate the harm" despite the obvious character of the condition: (1) where the invitee's attention may be distracted such that he'll fail to discover, remember, or protect himself from

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the harm, and (2) where the invitee may believe that the advantage of encountering the danger outweighs the apparent risk of encountering the danger. Restatement, § 343A, comment *f*. Some courts have construed the commentary as providing "illustrative, not exhaustive," examples of exceptions to the open-and-obvious-danger rule. *Dos Santos v Coleta*, 465 Mass 148, 156 (Mass, 2013). Other courts have construed the commentary as setting forth two exceptions to the open-and-obvious-danger rule: (1) the distraction exception, and (2) the deliberate-encounter exception. *Kleiber v Freeport Farm and Fleet*, 406 Ill App 3d 249, 257-258 (Ill Ct App, 2010).

The focus in § 343A and the commentary is "misdirected." *Armstrong*, 99 Ohio St 3d at 81. Even for an obvious condition, which is purportedly subject to an objective standard, the focus is not on the objective nature of the condition. The focus, instead, is largely on the subjective state of mind of the invitee. Jurisdictions that adhere to an objective standard, like Michigan, have rejected § 343A. See *Jones Food v Shipman*, 981 So2d 355, 362-363 (Ala, 2006), citing *Ex parte Gold Kist*, 686 So 2d 260, 261 (Ala, 1996). Their pragmatic rationale is that the possessor's "duty *before* a mishap" cannot depend on the invitee's "subjective state of mind *at the moment of* the mishap." *Sessions*, 842 So2d at 653-654.

The logic of their rationale isn't lost on the Court. Citing reasons of "fairness," the Court has recognized that possessors must "be able to anticipate in advance" the extent of their duty and the action, if any, needed to fulfill their duty. *Williams*, 429 Mich at 502-503, 503 n 18.

Adoption of § 343A (or any similar foreseeability exception) will place on possessors a contingent, uncertain, and impractical duty. Possessors will be in the impossible position of trying to anticipate when invitees might encounter obvious dangers—whether because of distractedness, forgetfulness, carelessness, or some other unarticulated circumstance—and whether the duty of care requires mitigation, elimination, or some other measure when warning is futile and neither mitigation nor elimination is possible or reasonable.[12] *Hersh*, 232 W Va at

[12] See Doll, *The Demise of the Open and Obvious Rule in Illinois*, 16 S Ill U L J 179, 191 (1991) (observing that "progress and material benefit can only be

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323 (Loughry, J, dissenting) (retiring the open-and-obvious-danger rule and adopting a "new limitless rule of law," which essentially requires that "property owners 'parade the horribles' to determine precisely what degree of carelessness or stupidity is cost effective to guard against," is "irresponsible").[13]

The distraction exception is problematic in its own right. Every public and private setting is rife with foreseeable distractions, many of which are beyond the control of the possessor. Doll, *supra*, at 191-193. Anticipating all the ways in which invitees might be distracted is, quite literally, an impossible feat. *Id.* And requiring the possessor to anticipate all the ways in which invitees might be distracted "would be, in effect, to make him an insurer." *Id.* at 191.

The nature and scope of the distraction exception, moreover, is anyone's guess. The commentary leaves unanswered questions and breeds inconsistent results.

Does the distraction have to be a circumstance created by the possessor? Is a self-created distraction, or some other distraction beyond the control of the possessor, sufficient to create a duty? Is the possessor required to anticipate, for example, when the invitee might be glued to his cell phone or mesmerized by the calling of a bird in the distance? *Id.* at 192-193.

The illustrations offered in the Restatement don't provide a clear answer to the question. On the one hand, a possessor is "not liable" if an

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achieved by allowing some dangerous conditions to exist"); *Hersh,* 232 W Va at 323 (Loughry, J, dissenting) (observing that some hazards "cannot be eliminated, some hazards "cannot be eliminated without unreasonable effort and expense," and some hazards "are quite simply required to be there").

[13] The state legislature agreed with the dissent and passed legislation to override the judicial abrogation of the open-and-obvious doctrine. See WV Code § 55-7-28.

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invitee encounters an obvious danger because he's "preoccupied with his own thoughts"—a situation over which the possessor obviously has no control. Restatement, § 343A, Illustration 1. On the other hand, a possessor is "subject to liability" if an invitee encounters an obvious danger because she loads her "arms full" of items that "obstruct her vision"—also a situation over which the possessor has no control. Restatement, § 343A, Illustration 4.

Decisions aren't consistent, either. Even decisions rendered by the same court are difficult to reconcile. Consider the following decisions of the Illinois Supreme Court.

In *Bruns v City of Centralia*, 21 NE3d 684 (Ill, 2014), a pedestrian tripped on an uneven sidewalk because she was looking at a door to a clinic at which she had an appointment, rather than down at the sidewalk. The Court found no circumstance that "required her to divert her attention" from the sidewalk defect or "otherwise prevented her from avoiding" the sidewalk defect. *Id.* at 693. The Court distinguished a *conceivable* distraction from a *foreseeable* distraction. *Id.* at 694.

In short, the Court declined to apply the distraction exception and determined that the city owed no duty of care because the pedestrian relied on a "self-made distraction." *Id.* at 693.

In *Ward*, a customer passed and successfully avoided a five-foot-tall post on his way into a store. On his way out of the store, though, he "blocked his view" with merchandise and collided with the post. *Ward,* 136 Ill 2d at 138. The Court acknowledged that the post was readily apparent and neither hidden nor inherently dangerous. But in the Court's view, the store should've anticipated that a customer would "collide with the post while exiting [the] store carrying merchandise which could obscure view of the post." *Id.* at 153-154.

In short, the Court applied the distraction exception and determined that the store owed a duty to protect the customer from the danger of the post even though the customer "created his own distraction." *Waters v City of Chicago,* 966 NE2d 560, 567 (Ill Ct App, 2012) (discussing *Ward*).

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What if the invitee wasn't actually (subjectively) distracted? Should the theoretical possibility of a distraction expose the possessor to liability if the distraction didn't actually cause or contribute to the injury? Courts, again, have reached inconsistent results.

In *Bruns*, the Illinois Supreme Court noted that the distraction exception doesn't apply unless the invitee "was actually distracted." *Bruns*, 21 NE3d at 691.

In *Grubb v Smith,* 523 SW3d 409 (Ky, 2017), by contrast, the Kentucky Supreme Court held that the mere possibility of distraction sufficed. *Grubb* involved a concededly obvious pothole "in plain view in a well-lit area" of a gas station. *Id.* at 418. The Court applied the distraction exception because the possessor should've anticipated that the invitee could be momentarily distracted by the passage of a car. The invitee wasn't actually distracted by the passage of a car, though. The invitee, "by her own admission,…was careless." *Id.* at 419. Specifically, the invitee "admitted that she failed to observe the hazard, not because it was obscured or because she was distracted, but simply because she was talking to her friend and not paying attention to where she was walking." *Id.* at 418-419.

The distraction exception "is bound to produce absurd results," said one scholar. Doll, *supra,* at 193. To say he hit the nail on the head would be an understatement. Under *Ward,* store owners are required to protect against the danger of running into anything on their premises, no matter how obvious, because of the possibility that customers might carelessly obstruct their vision with merchandise. *Id.* (How store owners might provide that level of protection is anyone's guess.) Under *Grubb,* convenience store owners are required to foolproof their premises because any theoretical distraction will subject them to liability, even if the distraction doesn't actually cause or contribute to the mishap.

The deliberate-encounter exception isn't seamless, either. Is the focus on the possessor or the invitee? The language of § 343A indicates that the focus is on the anticipation of the possessor, but the commentary to § 343A indicates that the focus is on the motivation of the invitee. *Hastings v Exline,* 326 Ill App 3d 172, 175-176 (Ill Ct App, 2001).

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The consequences of adopting § 343A and essentially doing away with our open-and-obvious doctrine cannot be overstated. Imposing a duty based on anticipation of harm creates premises liability that approaches strict liability, ensures that virtually every claim presents a question of fact for jury resolution, and precludes disposal of a meritless claim through summary disposition. Litigation will, no doubt, abound and drain the already limited resources of the Michigan judicial system. Reynolds, *A Question of Duty or Breach?*, 54 U Louisville L Rev 157, 180 (2016); *Hersh*, 232 W Va at 323 (Loughry, J, dissenting).

And to what end? The burden of obtaining summary disposition will be much higher—seemingly unattainable—while the value of any recovery will remain low because the condition was obvious and apparent to anyone exercising basic common sense and caution. *Shelton*, 413 SW3d at 921 (Scott, J, dissenting). Juries aren't going to change their perspective on causation just because courts have. *Id.*

Insurance underwriting involves assessment of the likelihood and magnitude of risk. Adopting § 343A and imposing an uncertain, contingent, and seemingly limitless duty on possessors will undoubtedly increase policy premiums. Increased insurance rates will be passed on to consumers and visitors in some form or another. *Id.* at 919 (Cunningham, J, dissenting) and 920 (Scott, J, dissenting); Doll, *supra*, at 194-195.

Homeowners and small business owners with finite resources will undoubtedly pay a high price, too. *Hersh*, 232 W Va at 319 (Loughry, J, dissenting); Reynolds, *supra*, at 158-160, 178-179, 181.

Perhaps the biggest concern isn't for the landowner, though. Perhaps the biggest concern is for the sick, the elderly, and the poor. *Carter*, 471 SW3d at 307 (Venters, J, dissenting); *Shelton*, 413 SW2d at 919 (Cunningham, J, dissenting). "We fool ourselves if we think that the landowner is going to carry the brunt of the financial and human cost in relaxing the open and obvious principle." *Id.*

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Other undesirable results noted by legal scholars include economic inefficiencies of compensating injured parties through the tort system—including, among others, overcompensation of injured victims, arbitrariness of jury awards, and constraints of judicial mechanisms. Doll, *supra,* at 192, 192 n 115, citing Sugarman, *Doing Away With Tort Law,* 73 Cal L Rev 555, 581-596 (1985).

Kandil-Elsayed tries to minimize the potentially sweeping consequences of adopting § 343A and effectively nullifying our open-and-obvious doctrine. In her view, MCL 600.2959 codifies the public policy that possessors aren't insurers of safety and thus provides possessors with sufficient protection. Contrary to her belief, the statute doesn't say that "plaintiffs who are more than 50% negligent may not recover damages." The statute says that plaintiffs who are more than 50% negligent may not recover *noneconomic* damages, which is cold comfort in the premises-liability context.

The Court should reject the invitation to adopt the Restatement approach in general and § 343A in particular. As "the principal steward of Michigan's common law," *Henry v Dow Chemical,* 473 Mich 63, 83 (2005), the Court has an "obligation to create common law rules" that lend themselves to "easy, common-sense application" and "predictability in the law." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 90-91 (1999). The Restatement approach doesn't fit the bill.

— 2.5 —

As is evident by the foregoing, amicus strongly opposes adoption of the Restatement approach. If the Court is inclined to adopt the Restatement approach, amicus offers a few proposals to address some of the shortcomings identified above.

To the extent the Court finds that an ordinary, obvious danger presents a duty-of-care question, the Court should continue to adhere to our open-and-obvious doctrine and clarify that our special-aspect exception informs the determination of whether the possessor "should anticipate the harm." *Lugo,* 464 Mich at 524-525. Alternatively, the Court might consider

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incorporating §§ 343 and 343A into the multi-factor duty analysis from *Certified Question*. See *Certified Question*, 479 Mich at 508-509. The "ultimate inquiry," recall, is whether "the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Id.* at 505, 518; see also *Groncki*, 453 Mich at 661 (recognizing that the determination of duty requires consideration of social policy, "which must intervene at some point to limit the extent of one's liability"). Some courts have endorsed a comparable approach. *Kleiber*, 406 Ill App 3d at 255-258, 260-261 (incorporating §§ 343 and 343A into a multi-factor test that requires consideration of foreseeability of the harm and magnitude of the burden); *Bufkin*, 171 So3d at 856 (weaving the open-and-obvious doctrine into a multi-factor test that involves consideration of likelihood and magnitude of the harm, as well as cost of prevention of the harm).

If the Court finds that an ordinary, obvious danger presents a standard-of-care question, the Court might consider the approach that the Missouri Supreme Court endorsed in *Harris v Niehaus*, 857 SW2d 222 (Mo, 1993). There, the Court found that §§ 343 and 343A address the standard of care and present two questions of law: (1) whether the condition is open and obvious and, if so, (2) whether the possessor could reasonably rely on invitees to protect themselves from the danger or whether the possessor should expect that invitees will be unable to protect themselves from the danger.

Harris involved tragic circumstances. A mother parked her car on the side of a gravel road in a subdivision, which descended in increasingly steep gradients to a cul-de-sac. A small lake, clearly visible from the area in which she parked, lay a hundred feet from the end of the road. She left her children unattended in the car, which rolled down the road and into the lake. Her children drowned. She sued the trustees of the subdivision, who bore responsibility for the road. She claimed that the trustees owed a duty to protect her and her children—either to warn of the slope or to barricade the end of the cul-de-sac—because they should've known that the condition presented an unreasonable risk of danger and should've expected that she'd be unable to appreciate or protect herself and her children from the danger.

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Analyzing § 343A(1) in conjunction with § 343(b), the Court derived the general rule that "a possessor's actions do not fall below the applicable standard of care if the possessor fails to protect invitees against conditions that are open and obvious as a matter of law." *Id.* at 226.

The Court held that even if the condition was unreasonably dangerous, the condition was open and obvious as a matter of law. *Id.* From there, the Court framed the "critical question" as "whether the trustees could *reasonably rely*" on their invitees to protect themselves from the danger or "whether the trustees *should have expected*" that their invitees would fail to appreciate or be unable to protect themselves from the danger. *Id*. The Court held, again as a matter of law, that the "evidence—and, more importantly, common sense—conclusively support as reasonable the trustees' reliance on their invitees to take the simple steps necessary to protect themselves." *Id.* The Court reasoned that while the trustees could anticipate that their invitees would drive and park on the road, the trustees could also expect that their invitees would (1) understand that their cars could roll down the hill and sink in the lake at the bottom of the hill, and (2) take simple measures at their disposal to secure their cars from operation of the laws of gravity. *Id.* at 226-227.

In short, the case "should not have been submitted to the jury." *Id.* at 227. The trustees' failure to warn of or protect against the condition did "not fall below the standard of care" because (1) the condition was "open and obvious as a matter of law," and (2) the trustees "could reasonably rely" on their invitees' "normal sensibilities to protect against such a condition." *Id.* "Quite simply, where the danger is open and obvious as a matter of law and the risk of harm exists only if the [invitee] fails to exercise due care, the case is not submissible to the jury." *Id.*

Harris represents a sensible approach. The Court refused to engage in unnecessary speculation about foreseeability or anticipation of harm, disregarded the idle guidance provided in the commentary, and properly decided the question as a matter of law.

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Argument 3

The widely criticized approach in § 51 of the Restatement (Third) of Torts (2012) is not advisable. Adoption of the approach would drastically change the existing landscape of premises-liability law in Michigan.

Some members of the Court have also queried whether § 51 of the latest Restatement would provide more stability, predictability, and consistency with the comparative-negligence system in Michigan. *Livings*, 507 Mich at 360-361 (McCormack, CJ, concurring).

— 3.1 —

The latest Restatement hasn't been welcomed with open arms. To the contrary, the latest Restatement has been widely criticized for restructuring, reshaping, and rewriting—rather than *restating*—the law of negligence. See, e.g., *Manley v Halibauer*, 308 Kan 723, 732 (Kan, 2018); *Carney v Galt*, 517 SW3d 507, 512-519 (Ky Ct App, 2017) (Acree, J, concurring) (collecting authority).

The latest Restatement is a "thinly veiled attempt…to accomplish tort reform" and an "extreme over-reaction," some critics have said. Vandall, *A Critique of the Restatement (Third)*, 49 Emory LJ 565, 565, 570 (2000). The latest Restatement is "simply wrong," other critics have argued. Twerski, *Duty and the Restatement (Third) of Torts*, 60 Hastings LJ 1, 7 (2008).

Among other things, the Restatement creates a universal duty owed to society—nullifying the first element of negligence with an "irrebuttable presumption that duty always exists." *Carney*, 517 SW3d at 515 (Acree, J, concurring). The Restatement also upends the concept of foreseeability, removing foreseeability from "the lofty work of duty and questions of law for judges" and relegating foreseeability to "the issue of breach and the work of fact finders." Weigland, *Massachusetts and the Restatement (Third) of Torts*, 96 Mass L Rev 55, 56 (2015).

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Premises liability is governed by § 51. Under § 51, a possessor owes an "entrant" (including a trespasser but perhaps not a "flagrant" trespasser)[14] a duty of reasonable care with regard to any natural or artificial condition that poses a risk of harm. Restatement, § 51.

Suffice it to say that § 51 is no exception to the view that the latest Restatement rewrites, rather than restates, the law. Sayonara to the open-and-obvious doctrine in any form. Restatement, § 51, comment *k.* Adios to the status-based distinctions among invitees, licensees, and trespassers. Restatement, § 51, comment *a.* Farewell to the notion that the duty of care extends only to conditions that pose *unreasonable* risks of harm. Restatement, § 51, comment *g.*

The Court should decline the invitation to adopt the latest Restatement. Adoption of § 51, in particular, would completely redefine the duty of reasonable care and drastically change the existing landscape of premises-liability law in Michigan. As "the principal steward of Michigan's common law," the Court has an obligation to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences." *Henry*, 473 Mich at 83.

— 3.2 —

If the Court is inclined to look past the widespread criticism of the latest Restatement, the Court should view § 51 not in a vacuum, but in conjunction with § 7.

Per the Restatement, § 51 is a specific application of § 7 in the premises-liability context. Restatement, § 51, comment *b.* Under § 7(a), "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement, § 7(a). But § 7(b) recognizes an exception "when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases," in which case "a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." Restatement,

[14] In certain circumstances, § 52 limits the duty to "flagrant" trespassers.

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§ 7(b). Addressing liability "as a matter of duty," the Restatement says, is appropriate. Restatement, § 7, comment *a.*

According to the Restatement, cases involving "factors…such as the overall social impact of imposing a significant precautionary obligation on a class of actors…are properly decided as duty or no-duty cases." Restatement, § 7, comment *i.* The Restatement provides that non-liability under the rubric of duty—"a purely legal question"— is appropriate "when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." Restatement, § 7, comments *a* and *j.*

In light of important principles "influenced by" or "reflected in" property law, the Restatement recognizes the existence of and contemplates the creation of "no-duty and limited-duty rules in cases involving owners and occupiers of land," at least when "overriding concerns of principle or policy exists (*sic*) such that tort liability should be withdrawn or limited." Restatement, § 7, comments *d* and *n*, and § 51, comment *b.* The Restatement instructs that no-duty rules should rest on "general social norms of responsibility," which may be "reflected in longstanding precedent" or legislative action. Restatement, § 7, comments *a*, *c*, *g*, and *j.*

The Iowa Supreme Court is one of the few courts that have embraced the latest Restatement. Recall *Gries*, the case in which the Court addressed the vitality of Iowa's continuing-storm doctrine.[15] The Court found that public-policy considerations justified the continuing-storm doctrine—the feebleness of human efforts in attempting to counteract the power of the elements, the notion that possessors aren't *de facto* insurers, the need for businesses to remain open during storms, the reduction of the prevalence of weather-related injuries, and the universal knowledge of the risks attendant to venturing out in inclement weather. *Gries,* 944 NW2d at 630-631. The Court stated that the continuing-storm doctrine, at bottom, reflects a "widespread policy consensus" that the "overall social costs of requiring people to go outside and clear during a storm exceed the overall social benefits of cleared passageways that will soon be covered over by

[15] See *supra,* p. 36.

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additional accumulation." *Id.* As such, the Court upheld the continuing-storm doctrine as an appropriate no-duty rule under § 7(b). *Id.* at 631-632.

Like the continuing-storm doctrine, the open-and-obvious doctrine is predicated on "strong" public policies and social norms of responsibility. *Jeffrey-Moise v Williamsburg Towne Houses Coop*, 971 NW2d 716, 727 (2021); see also *Bertrand*, 449 Mich at 616-617; *Lugo*, 464 Mich at 522; *Hoffner*, 492 Mich at 460; *Perkoviq*, 466 Mich at 17. The development of the open-and-obvious doctrine over the years has resulted in "relatively clear, categorical, bright-line rules of law applicable to a general class of cases." Restatement, § 7, comment *a.* If the Court adopts the latest Restatement, the Court should uphold the open-and-obvious doctrine under § 7(b).

Argument 4

The Court should stay the course out of respect for the doctrine of *stare decisis*, as well as the prudential principle of separation of powers. Overruling *Lugo* or relegating the open-and-obvious doctrine to a mere factor to consider in the comparative-fault analysis will significantly impact reliance interests and produce real-world dislocations. There's no compelling reason to depart from *Lugo*. The Legislature, moreover, is better suited to balance the competing societal interests and determine the propriety of abrogating or modifying the open-and-obvious doctrine.

— 4.1 —

The Court should approach an invitation to change the common law with caution and with consideration of social policy. *Price v High Pointe Oil Co*, 493 Mich 238, 243, 258-260 (2013). There's no doubt that the common law is adaptable to changing societal conditions and problems. *Bugbee v Fowle*, 277 Mich 485, 492 (1936); *People v Woolfolk*, 497 Mich 23, 26 (2014). But the circumstances and social policies that validated the wisdom of the open-

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and-obvious doctrine decades ago haven't changed. *Bertrand*, 449 Mich at 616-617; see also *Carter*, 471 SW3d at 300 (Venters, J, dissenting). And compelling reasons to abrogate or modify the open-and-obvious doctrine haven't emerged.

The Court has fined-tuned and faithfully applied our approach for over thirty years. Is our approach perfect? Probably not. "No approach is perfect," after all. *Hoffner*, 492 Mich at 479 n 52. "But the answer…is not for judges to stop making [legal and policy] determinations, allowing juries to do so in the name of comparative fault." *Carney*, 517 SW2d at 516 (Acree, J, concurring). The answer is not to abdicate "the law-making and policy-making role of the courts to an ever-changing group of individuals, untrained in law or policy and unaware of the importance of and need for…predictability." *Id.* at 516-517.

The answer is not to search for a perfect approach—a castle in the air, no doubt—and do away with an approach that is both "rational…and justifiable as a matter of reasonable public policy." *Price*, 493 Mich at 260.

— 4.2 —

As a prudential matter, the Court should consider whether abrogation of the open-and-obvious doctrine is more suitable for resolution by the legislative branch. True, the Court adopted and developed the open-and-obvious doctrine. But the Legislature has since embraced and subscribed to the open-and-obvious doctrine, as reflected in MCL 691.1402a and the legislative analysis. And the Court has since recognized that the judicial branch shouldn't craft public policy in the dark.

In *Henry*, the Court stressed the importance of "the judiciary's obligation…to defer to the Legislature" when "called upon to make a new and potentially societally dislocating change to the common law" but "provided no guidance on how the proposed change might affect Michigan." *Henry*, 473 Mich at 89-90, 96. The Court emphasized the need for "sufficient information to assess intelligently and fully" the potential costs, benefits, and consequences of the proposed change. *Id.* at 68, 84. The Court observed that the judiciary isn't "institutionally equipped" to gauge

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the potential costs and benefits of the proposed change, let alone satisfactorily predict the potential undesirable consequences of the proposed change. *Id.* at 83, 86-87. The Court determined that the Legislature is "better suited to undertake the complex task" of balancing competing societal interests and, where appropriate, reallocating societal benefits and burdens. *Id.* at 68-69, 89-90.

In *Price,* the Court reiterated that while the judiciary is "vested with the power to alter the common law," the judiciary is not free to "alter the common law at its unchecked discretion, much less at its whim." *Price,* 493 Mich at 260 n 20. The judiciary, the Court continued, is "bound to tradition and stability and continuity." *Id.* If a common-law rule is "reasonable" and "justifiable as a matter of reasonable public policy," change "*must* come by legislative alteration." *Id.* at 260-261, 263 (emphasis added).

In light of the important prudential principles recognized in *Henry* and *Price,* the Court should leave the question regarding the continued vitality of the open-and-obvious doctrine to the Legislature. Abrogation of the open-and-obvious doctrine may have "sweeping effects" for the citizenry and economy of Michigan. *Henry,* 473 Mich at 102. Opponents of the open-and-obvious doctrine haven't provided the Court with sufficient information and fiscal analysis to make an informed judgment, which necessarily entails weighing the societal benefits against the societal costs and burdens on courts, businesses, landowners, insurers, consumers, and others. Whether to abrogate the open-and-obvious doctrine is a matter that "should be handled by those best able to balance these competing interests: the people's representatives in the Legislature." *Id.*

In the words of the Court: "Equity is indeed an instrument of justice. But when it is exercised without due regard for the interests of those who are not before the Court, its invocation can lead to great injustice." *Id.* at 102. Separation of powers counsels in favor of staying the course and upholding the open-and-obvious doctrine.

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— 4.3 —

"In this world, with great power there must also come—great responsibility." *Kimble v Marvel Ent't*, 576 US 446, 455 (2015), quoting Lee & Ditko, *Amazing Fantasy No 15: "Spider–Man,"* p 13 (1962).

"Overruling precedent is never a small matter," as the Court knows. *Kimble*, 576 US at 455. "*Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Id.* (cleaned up). *Stare decisis* promotes evenhanded and predictable development of the law, fosters reliance on and reduces incentive to challenge settled precedent, avoids arbitrary discretion, and contributes to the integrity of the judicial process. *Id.*; see also *McCormick v Carrier*, 487 Mich 180, 210 (2010).[16] *Stare decisis* is, therefore, the "preferred course." *Robinson v City of Detroit*, 462 Mich 439, 463 (2000).

"Respecting *stare decisis* means sticking to some wrong decisions." *Kimble*, 576 US at 455. An argument—"even a good argument"—that the Court "got something wrong" doesn't justify "scrapping settled precedent." *Id.* Rebutting the presumption in favor of upholding settled precedent requires "a special or compelling justification" over and above the belief that the Court missed the mark. *McCormick*, 487 Mich at 211; *Robinson*, 462 Mich at 465; *Kimble*, 487 Mich at 455-456.

So although the Court should consider whether *Lugo* is a wrongly-decided decision that represented an abrupt and largely unexplained departure from precedent, the Court should also consider (1) whether the open-and-obvious doctrine articulated in *Lugo* has defied practical workability, and (2) whether modification or abrogation of the open-and-obvious doctrine articulated in *Lugo* would have an adverse impact due to

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[16] *Stare decisis* is not simply a theoretical concern. Perceived failure to honor *stare decisis* does, in fact, erode trust and confidence in the Court. See, e.g., Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 Wayne L Rev 1911 (2009).

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reliance interests. *McCormick,* 487 Mich at 211; *Robinson,* 462 Mich at 464-465.

Lugo isn't a wrongly-decided decision or an abrupt, largely unexplained departure from precedent. Amicus acknowledges that some members of the Court have expressed the view that *Lugo* ventured away from precedent by creating a new test (the special-aspect test) that, in their view, struck a discord with the Restatement approach and set Michigan apart from other jurisdictions. *Livings,* 507 Mich at 355-357. Amicus respectfully disagrees and submits that *Lugo* stayed true to precedent.

In *Lugo,* the Court described "special aspects" as circumstances that make open-and-obvious conditions "unreasonably dangerous." *Lugo,* 464 Mich at 517, 524. In other words, the Court described "special aspects" as circumstances "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Id.* at 517. The Court drew on *Bertrand* and § 343 to formulate the special-aspect exception to the open-and-obvious doctrine.

Under § 343, a possessor is subject to liability only for a condition that presents an "unreasonable risk of harm." In *Bertrand*, the Court determined that an ordinary, obvious condition doesn't create an unreasonable risk of harm and doesn't expose a possessor to liability. *Bertrand,* 449 Mich at 616-617. The Court described the exception to the general rule in several ways: a possessor may have an obligation to eliminate or mitigate an obvious condition (1) if there is "something unusual" about the character, location, or environment surrounding the condition, (2) if there is some "unique circumstance surrounding the area" that makes the condition "unreasonably dangerous," and (3) if there is some "special aspect" of the condition that makes "the risk of harm unreasonable." *Id.* at 614, 617.

That's the essence of the special-aspect exception that came to be in *Lugo*. See *Lugo,* 464 Mich at 517, 525.

Even critics of *Lugo* acknowledge that the special-aspect exception, on its face, may be consistent with *Bertrand* and § 343. *Livings,* 464 Mich at

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355. They take aim at the examples of "special aspects" provided in *Lugo*—"an unguarded thirty foot deep pit in the middle of a parking lot" and "a commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo,* 464 Mich at 518-519. In their view, the examples "became the barometer for lower courts applying the special aspects doctrine" and resulted in fewer cases finding their way to juries. *Livings,* 464 Mich at 358, 359.

That some courts have viewed a thirty-foot pit or standing water trap as a yardstick is a fair point. But the blame shouldn't be placed on *Lugo,* which described the standing water trap as an "illustration" and the thirty-foot pit as an "example." *Lugo,* 464 Mich at 518. And the answer shouldn't be to overrule *Lugo*. If lower courts have "erroneously interpreted" *Lugo* as "creating a legal rule unique to Michigan tort law," the Court can "write to clarify" *Lugo*. See *Loweke v Ann Arbor Ceiling & Partition Co,* 489 Mich 157, 163 (2011) (clarifying, but not overruling, *Fultz v Union–Commerce Assoc,* 470 Mich 460 (2004), due to confusion or misinterpretation); see also *Livings,* 507 Mich at 371 (Zahra, J, dissenting) (suggesting that perhaps the Court "should clarify the instances where special aspects may be found to exist").

Whether the special-aspect exception sets Michigan apart from other jurisdictions shouldn't factor into the analysis. The interest in following a "modern trend" (a term used loosely)[17] must yield to the interest in adhering to a "'very old and well tested legal rule' of *Michigan*." *Rory v Cont'l Ins Co,* 473 Mich 457, 470 n 24 (2005).

That said, the special-aspect exception isn't really an outlier. The "unreasonably dangerous" component and the "uniquely high likelihood of harm" component of the special-aspect exception are consistent with the principle articulated in § 343 and endorsed by many, if not all, jurisdictions—liability doesn't attach unless, among other things, the condition poses an "*unreasonable* risk of harm." Others courts have held that while there's "no fixed rule for determining when a risk of harm is unreasonable," the "plain meaning of the term suggests a uniquely or

[17] As F&E Oil points out, "there is no real trend."

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unacceptably high risk of harm—something more than the usual risks commonly encountered." *Sundermann*, 306 Neb at 768. Other courts have "recognized an exception" to the open-and-obvious doctrine "where the injured person was unable to avoid the danger." *Griebler*, 160 Wis 2d at 551 n 1. Relatedly, other courts have interpreted the "deliberate encounter exception" in § 343A to apply only under circumstances in which avoiding the danger is impractical or impossible and encountering the danger "is the only real solution." *Hastings*, 326 Ill App 3d at 176.

In short, *Lugo* wasn't an abrupt, unexplained departure from precedent or an otherwise erroneous decision. Even if the Court disagrees, overruling *Lugo* shouldn't be a foregone conclusion. *McCormick*, 487 Mich at 211; *Robinson*, 462 Mich at 465; *Kimble*, 487 Mich at 455-456.

Neither Kandil-Elsayed nor any other opponent of the open-and-obvious doctrine has established impracticability or unworkability. The near universal acceptance of the open-and-obvious doctrine for decades, not only in Michigan but across the country, is strong indication that the open-and-obvious doctrine is practicable and workable.

Retiring the open-and-obvious doctrine, or relegating the open-and-obvious doctrine to a mere factor to consider in the context of comparative fault, will undoubtedly impact reliance interests. The open-and-obvious doctrine has become so ingrained in the fabric of our premises-liability law—"so embedded, so accepted, so fundamental, to everyone's expectations"—that abolition or even modification would "produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

Although the focus is on reliance interests in Michigan, consider the forceful dissents of judges and justices in jurisdictions that removed the open-and-obvious doctrine from the duty-of-care analysis. They mourned the loss of a rule of law that "served America's judges, litigants, and courtrooms aptly for many years." *Shelton*, 413 SW3d at 920 (Venters, J, dissenting); see also *Hersh*, 232 W Va at 319-324 (Loughry, J, dissenting); *Carney*, 517 SW3d at 512-519 (Acree, J, concurring); *Carter*, 471 SW3d at 300-308 (Venters, J, dissenting); *Shelton*, 413 SW3d at 919 (Cunningham, J,

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dissenting); *Hersh,* 232 W Va at 324 (Benjamin, CJ, dissenting); *Baker v Shavers,* 117 Idaho 696, 699-704 (Idaho, 1990) (Bates, CJ, dissenting in part). One even wrote a heartfelt eulogy:

> It was a doctrine that was based on personal responsibility and common sense; yet, one that was unforgiving of inattention, forgetfulness, or risky conduct. Still, it protected those whose distractions were warranted, as well as those who could not reasonably perceive the real danger around or underlying what they could see. Simply put, it was a doctrine crafted within the perceptions of the Americans of its time: a doctrine that negated the considerable time and expense of litigation in cases that otherwise generally could not have been won in front of the juries of the day, and a doctrine that kept property liability insurance premiums within its confines. It was a doctrine whose lifetime spanned the greatest opportunity and economic growth this nation has ever known. It was not the cause of this growth, personal responsibility was—but it did play its part along with many, many other factors of our social, economic, and political structures of the time.

Shelton, 413 SW3d at 920 (Venters, J, dissenting).

Returning to Michigan, the Court has taken pains to be faithful to *Lugo* over the years. Consider, for example, cases involving snow and ice hazards. Undeterred by the "unpublished" status of opinions, the Court has righted the ship on many occasions to ensure consistent and predictable application of the open-and-obvious doctrine. See, e.g., *Mann v Shusteric Enter,* 470 Mich 320 (2004); *Schultz v Henry Ford Health,* 474 Mich 948 (2005); *Morgan v Laroy*, 474 Mich 917 (2005); *D'Agostini v Clinton Grove Condo Ass'n,* 474 Mich 876 (2005); *Jackson v Lone Star Steakhouse & Saloon,* 475 Mich 882 (2006); *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010); *Ragnoli v North*

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Oakland-North Macomb Imaging, 500 Mich 967 (2017); *Cole v Henry Ford Health*, 497 Mich 881 (2014); *Kaseta v Binkowski*, 480 Mich 939 (2007); *Hoffner v Lanctoe*, 492 Mich 450 (2012); *Kenny v Kaatz Funeral Home*, 472 Mich 929 (2005).

In so doing, the Court has created substantial reliance interests among members of the bench and the bar. Judges have been able to apply lucid principles and weed out unmeritorious claims. Attorneys have been able to advise clients with confidence and clients, in turn, have been able to behave accordingly.

Perhaps needless to say, landowners have relied on the open-and-obvious doctrine when determining how to allocate their resources and whether to repair or post warnings on their premises. The insurance industry has relied on the open-and-obvious doctrine when evaluating risks, writing policies, and setting premiums.

Lugo is not "of recent vintage." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 219 (2012). The reliance interests among attorneys, courts, insurers, landowners, and citizens are over thirty years in the making.

Overruling *Lugo* or otherwise abrogating the open-and-obvious doctrine will indeed produce practical, real-world dislocations. To begin, the types of cases that will probably find their way to juries are the definition of practical, real-world dislocations. See *Shelton*, 413 SW3d at 921, citing *Johnson v Lone Star Steakhouse & Saloon*, 997 SW2d 490 (Ky Ct App, 1990) (patron sued steakhouse after she slipped on peanut shells that she watched others throw on the floor for several hours before her fall).

And we don't live in a world in which landowners have unlimited capacity to compensate invitees who are injured on their premises. *Henry*, 473 Mich at 101. Overruling *Lugo* will "lead to a stampede of litigation" that will "divert resources from more…compelling claims," such as claims involving hidden defects or special aspects, to "less meritorious claims." *Id.* at 85. The "stampede of litigation" will also overwhelm the judicial system. The "systemic harms that can accompany unlimited and unpredictable liability" are practical, real-world dislocations. *Id.* at 86.

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The tremendous burdens that landowners will face in trying to fulfill uncertain and seemingly limitless duties are practical, real-world dislocations. So, too, are the difficulties that insurers will encounter in the underwriting process and the premiums that insureds will resultantly pay.

The Court should also look beyond the premises-liability context. The open-and-obvious doctrine inhabits the product-liability context, too. *Glittenberg*, 441 Mich at 387-403. And overruling *Lugo* on the basis that a no-duty rule is out of step with a comparative-negligence scheme, *Livings*, 507 Mich at 354, will seemingly impact more than the open-and-obvious doctrine. See *Eiselein*, 868 P2d at 897.

For example, will merchants or landlords owe customers or tenants a duty to provide security personnel or quell criminal activity? *MacDonald*, 464 Mich at 325-326; *Williams*, 429 Mich at 501, 504. Will baseball stadium proprietors owe spectators a duty to warn of the danger of errant baseballs? *Benejam v Detroit Tigers*, 246 Mich App 646, 648-661 (2001). Will pharmacists owe customers a duty to monitor drug usage? *Kintigh v Abbott Pharmacy*, 200 Mich App 92, 94 (1993). Will police offers owe crime victims (with whom they have no "special" relationship) a duty to provide protection? *White v Beasley*, 453 Mich 308, 324 (1996). Will insurance agents owe potential insureds (with whom they have no "special" relationship) a duty to provide advice about coverage? *Harts v Farmers Ins Exchange*, 461 Mich 1, 11-12 (1999). Will individuals owe others in peril (with whom they have no "special" relationship) a duty to provide protection or aid? *Murdock v Higgins*, 454 Mich 46, 54 (1997). Will employers owe others a duty to investigate the competency of independent contractors? *Reeves v Kmart Corp*, 229 Mich App 466, 475-476 (1998).

A decision that has the potential to capsize so many settled areas of law is a practical, real-world dislocation.

No one disputes that the Court can undecide what the Court decides, but "*stare decisis* teaches that [the Court] should exercise that authority sparingly." *Kimble*, 576 US at 465. Given the absence of a special or compelling justification to depart from *stare decisis*, the Court should reaffirm *Lugo* and retain the open-and-obvious doctrine even if the Court

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believes that § 343A, or some other rule, "is the better rule." *Lang v Holly Hill Motel*, 122 Ohio St 3d 120, 126-127 (Ohio, 2009) ("This court…rejected the view expressed in Section 343A," and "while I believe that Section 343A is the better rule, *stare decisis* demands that our precedent to the contrary must be respected"). The Court should also reaffirm *Riddle* and find that the open-and-obvious doctrine still holds a place in our premises-liability jurisprudence notwithstanding the adoption of comparative negligence.

Today's Court should stand by yesterday's decisions.

Conclusion

The Court abolished contributory negligence because the concept was "simply not fair." That much may be true. But saddling landowners with the duty to foolproof their premises and insure the safety of their invitees, all in the name of comparative negligence, is "simply not fair," either. A line must be drawn between the competing policy considerations of providing a remedy for every injury and expanding exposure to liability, essentially without limit, to the detriment of many.

There's no doubt that the Court has the power to change the common law. But the Court is also constrained by the doctrine of *stare decisis*, the prudential principle of separation of powers, and the notion in our jurisprudence that imposition of a duty must reflect appropriate public policy—all of which counsel against departure from the status quo.

The Court can search for the perfect approach, but the Court will search in vain. Our approach has reflected sound social policy, provided predictability in the law without injustice, and operated in comfortable harmony with comparative fault for over three decades.

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Certificate of Compliance

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