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STATE OF MICHIGAN
IN THE SUPREME COURT

LINDA MOLITORIS,

Plaintiff-Appellant,

Docket no. 166699
Court of Appeals docket no. 364820
Livingston Circuit Court
LC Case No. 22-31366-NO
Hon. L. Suzanne Geddis

vs.

SAINT MARY MAGDALEN CATHOLIC CHURCH,

Defendant-Appellee.

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PLAINTIFF-APPELLANT'S
REPLY BRIEF

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In response to defendant-appellee's brief on appeal, plaintiff respectfully directs this Court's attention to the following points:

1. **Defendant's "parade of horribles" is overblown**

Defendant goes to some length to describe what it projects as the disastrous effects of adopting the Third Restatement approach. These scenarios are, to say the least, overstated.

i. Reasonableness remains an issue of fact under either analysis.

"Premises liability" is simply a subset of the law of torts. As in any other action alleging negligence, a plaintiff must establish the existence of a duty and a breach of that duty. "Beach of duty," of course, is a fact question – whether the defendant's conduct was or was not that of a "reasonable" [fill in the blank]. See, M Civ JI 10.02 ("Ordinary care means the care a reasonably careful *person would use"). The nature of the "person" will vary with the facts of the case: was the defendant a "reasonable" operator of a motor vehicle; owner of business; manufacturer; boat captain; "keeper" of a dog; professional; general contractor; etc.?

While it can be anticipated that some sequence of appellate decisions will help establish the "reasonableness" standard under the Third Restatement approach – see, e.g., the courts' refinement of the "open and obvious" defense – it will not involve "years, if not decades" of "shap[ing] the duties owed in premises liability cases based on competing policy concerns across a vast array of cases" as defendant contends (Defendant's brief, pp 19, 26.) Nor will the courts need to "create an entirely new set of common law rules, to guide courts and juries, which will take years and may be more confusing, inconsistent and unfair." (Defendant's brief, p 21.) Indeed, defendant fails to illustrate how a revised system would be less "confusing" or

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"inconsistent" than the complex web of statuses that plaintiff described in her first supplemental brief.

ii. Nonprofit organizations and the like would not be subjected to a significant increase in liability.

Defendant maintains that eliminating the status-based classification system would devastate "charitable and humanitarian organizations, whose main purpose is to serve their local communities, charitably." (Defendant's brief, p 27.)

Leave aside that fact that there would be no liability to "patron[s] of a public library during normal business hours" or attendees at an AA meeting or listeners at a concert in a "local park (Defendant's brief, p 15, n 4; p 27) because those entities would be protected by statutory (governmental) immunity. And there is no present indication that "local food banks, unhoused shelters, and free medical clinics" now blithely ignore the safety of their patrons and clients based on the laws of premises liability. Again, the applicable standard is that of a "reasonable" food bank, shelter or clinic," not some unattainable goal of guaranteed safety.

iii. There is often a business purpose in visits to "charitable entities and humanitarian organizations."

Defendant also seems to assume that anyone on the premises of a "charitable or humanitarian" organization is there solely for his own benefit and nothing accrues to the benefit of the landowner. But many such organizations rely on purchases and entry fees for a portion of their annual income; indeed, a nonprofit's Form 990 requires reporting of "program service revenue" including "admissions, membership dues, special event admissions, rides and attractions and concessions [sales]."

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Under the *Preston* rule that the plaintiff's presence must convey a benefit to the landowner, the shopper at a Salvation Army thrift shop or potential pet owner at an animal shelter could be considered "invitees."

iv. Discovery is necessary under any approach.

Defendant suggests that adopting the Third Restatement would create "a burden-free way for thousands of cases to proceed through discovery (Defendant's brief, p 17). But discovery is almost always required *now*.

Whether the plaintiff is an invitee or a licensee, the defendant will need to find out whether the evidence supports the allegations in the complaint; explore potential affirmative defenses and comparative negligence; look for third-party defendants or nonparties at fault; and determine the extent of the plaintiff's damages.

Any trial court can testify to the frequency of motions for summary disposition under MCR 2.116(C)(10) – which almost always require a record developed via discovery – versus those that can be decided under MCR 2.116(C)(8), on duty alone.

v. The present case illustrates the point.

Defendant's conclusion that plaintiff in the present case will lose under any standard is incorrect. (Defendant's brief, p 7, n 1.) Notice of an alleged defect is a consideration, not a requirement for liability.

In the case at hand, it was undisputed that the accident happened after dark and that at least one other volunteer "warned us that the sidewalk was slippery." If plaintiff was a licensee, the defendant would have been required to "warn of known dangers," but whether that volunteer's report was a sufficient warning by the church would still be a question of fact. If the

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Restatement Third approach applied, the question would be essentially the same: whether that warning was sufficient "reasonable care" under the circumstances.

2. **Common law need not be frozen in time**

Defendant's position on the evolution of common law would all but inscribe it in stone. (Defendant's brief, pp 4-5.) This degree of restriction is unwarranted.

Just because a principle of law is old does not make it good. As plaintiff illustrated in her first supplemental brief, the three-category framework has not "served well."

Furthermore, the proposed change to landowners' duties would not be "undertaken lightly" or without "fullest consideration of public policy." (Defendant's brief, p 5.) Consider the history of this case:

i. In *Livings v Sage's Investment Group, LLC*, 507 Mich 328; 968 NW2d 397 (2021), (2021), Justice McCormack suggested that "perhaps it is time for this Court to consider the Third Restatement's approach." 507 Mich 360 (McCormack, J., concurring.)

ii. In *Kandil-ElSayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023), amici for the plaintiff urged this Court to adopt the Restatement Third. The court examined the Third Restatement in detail. 512 Mich 129-131. The court, however, "reserv[ed]the question of whether to adopt the Third Restatement's blanket reasonable-care standard for a later time." 512 Mich 143-144.

iii. In the present case, the court initially granted oral argument on the application, directing briefing on "whether this Court should adopt the Third Restatement of Torts' reasonable-care standard . . ." Order of November 8, 2024.

iv. After the oral argument, on February 13, 2026, the court ordered another round of briefing, to address, in part whether overruling *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000) would be "an appropriate alteration of the common law." Order of February 13, 2026.

v. Following the submission of the second supplemental briefs, the court granted the application for leave to appeal, directing briefing again on "whether this Court should adopt the Third Restatement of Torts' reasonable-care standard." Order of May 22, 2026.

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By this point, then, the court has been considering adopting Restatement Third, at least to some degree, for more than five years. Multiple amici, on both sides, have weighed in and the legal community has effectively been on notice that change in the law of premises liability may be coming. Defendant cannot now act as if it is a surprise.

3. **The Restatement Third does not apply the same standard of care to trespassers as to others on the land.**

Defendant claims that Restatement Third §51 applies to all "entrants," "known or unknown, permitted or not" (Defendant's brief, pp 16, 22.) While § 51 does refer to "entrants on land," that standard is "[s]ubject to § 52." Section 52 provides that "A land possessor owes a duty to flagrant trespassers only as stated in § 51(b) and (c)."

> Section 51 provides:
>
> (b) [A] land possessor owes a duty of reasonable care to flagrant trespassers only if the flagrant trespasser reasonably appears to be imperiled and:
>
> (1) helpless; or
>
> (2) unable to protect himself or herself.
>
> (c) [A] land possessor has a duty to refrain from intentional, willful, or wanton conduct that harms a flagrant trespasser.

Restatement Third §51(c) restates the common law rule, codified at MCL 554.593(2)(a), limiting liability to trespassers. A possessor may be liable for "injur[y to] the trespasser by willful and wanton misconduct").

Restatement Third §51(b) would apply only to events of very low frequency. It would also be possible for this Court to adopt ¶51(a) and §51(c) without adoopting §52(b), if such a limitation seemed essential.

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4. Adopting the public invitee class would not be as "tectonic" as adopting the Third Restatement.

Defendant maintains that "adopting the public-invitee doctrine . . . would, in effect, overrule . . . over a century of precedent applying the status-based classifications." (Defendant's brief, p 6.) This conflation of possibilities is incorrect.

The "public invitee" category is limited. Restatement Second of Torts §332(2) defines "public invitee" as "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." A duty to this class of persons is considerably narrower than all "entrants on land" (except trespassers).

Defendant suggests that a "public invitee" standard would primarily affect "social hosts and entities who operate principally for the welfare of broader society, often free of charge, such as charitable entities and humanitarian organizations." (Defendant's brief, pp 6-7.) "Social hosts," however, do not generally "hold open" their premises "the public" and only a subset of "entities who operate principally for the welfare of broader society" "invite members of the public for a purpose" which, as plaintiff discussed *supra*, is often one of a "business or commercial nature."

Defendant's reference to the "effect" of *Stitt* in plaintiff's brief misreads the point. (Defendant's brief, p 8.) Neither the requirement of a "business or commercial purpose" for invitee status nor the absence of the "public invitee" category has been a dispositive factor in more than a small number of premises cases, primarily because the plaintiff's status is only rarely in dispute.

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5. **When determining the plaintiff's status is an issue of fact, then maintaining the classification system does not differ from applying a single standard of reasonable care.**

In responding to plaintiff's examples (not hypotheticals) of the challenges created by the status-based classification, defendant states that determining a plaintiff's status can be an issue of fact. (Defendant's brief, p 22.) But if determining "status" is, even sometimes, an issue of fact, how different is a fact-based single standard of reasonable care?

Defendant actually undercuts its own argument by complaining that the Restatement Third's "simplistic approach radically changes the 100-plus-year common law requirement that the reasonableness of our actions must be measured only in the context of a set of circumstances supporting a conclusion that *this* Defendant owed *this* Plaintiff a duty in the first instance." (Defendant's brief, p 20; emphasis original.) A single standard of care would entail precisely the same analysis: were the defendant's actions "reasonable" under "a set of circumstances" involving "this plaintiff and this defendant"?

6. **A single standard would also benefit landowners by reducing the duty to invitees.**

Defendant argues that "the threshold public policy determination of whether the controlling analysis under Michigan law supports a finding that any duty is owed, properly is for the court, and not the jury, to decide." (Defendant's brief, p 18.) There is always *some* duty owed, however, by virtue of land ownership or occupation.

In response to any proposal to alter the present system, defendants tend to react with an "open the floodgates" argument. See Defendant's brief, p 26. What this reaction overlooks, however, is that a change does not always favor plaintiffs in these cases.

As it stands now, the defendant in an "invitee" case would be instructed that:

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> A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition of the land that was known to the possessor or that should have been known to the possessor in the exercise of ordinary care.
>
> *(In determining whether the possessor should know of the condition, you should consider the character of the condition and whether the condition existed for a sufficient length of time that a possessor exercising ordinary care would discover the condition.) [M Civ J I 19.03(a).]

Under Restatement Third, the jury would only be asked if the landowner's actions represented "reasonable care," without the additional "known to the possessor or that should have been known" requirement.

7. **"Practical workability" is only one prong of a *Robinson* analysis.**

Defendant states that "*Stitt* does not defy practical workability." (Defendant's brief, p 25.) As plaintiff argued in her first supplemental brief, however, in order to make *Stitt* – in the sense of the three-status system – "work," courts have had to narrow, expand, alter and create new categories of plaintiffs and corresponding duties within the supposedly "clear rules that have easily been applied . . ."

RELIEF REQUESTED

Plaintiff-appellant Linda Molitoris, through her attorney Barbara H. Goldman, respectfully asks that this honorable Court REVERSE the January 4, 2024 opinion of the Court of Appeals and ADOPT the dissenting opinion of Gleicher, J.

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

In compliance with MCR 7.212(B)(1), counsel for plaintiff-appellant certifies that this brief contains no more than 2,631 words.

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