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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant,

v

F & E OIL, INC.,

Defendant-Appellee.

Supreme Court No. 162907

Court of Appeals
Docket No. 350220

Lower Court
Wayne Circuit Court
Case No. 18-003569-NO

BRIEF OF AMICUS CURIAE OF MICHIGAN DEFENSE TRIAL COUNSEL, INC.

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STATEMENT OF JURISDICTION

Amicus curiae Michigan Defense Trial Counsel, Inc. (MDTC) agrees with the parties' statements of the basis for jurisdiction.

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STATEMENT OF INTEREST OF AMICUS CURIAE

MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. MDTC was established in 1979 to enhance and promote the civil-defense bar. It accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil defense lawyers. MDTC appears before this Court as a representative for Michigan's civil defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1] This Court's order directing the Clerk to schedule oral argument invited interested parties to move for permission to file briefs amicus curiae. See *Kandil-Elsayed v F & E Oil, Inc*, ___ Mich ___, ___; 969 NW2d 69, 70 (2022).

[1] This brief, having been drafted entirely by the undersigned counsel, was not authored by counsel for any party in this case. MCR 7.313(H)(4). No party or individual other than the amicus curiae made monetary contributions to the preparation of this brief.

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QUESTION PRESENTED

Should this Court decline Plaintiff's invitation to overrule *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2002), where the Court's holding in that decision represented a further refinement of decades of Michigan's common law regarding premises liability and the foreseeability of an unreasonable risk of harm posed by an open and obvious condition?

Plaintiff would answer:	"No."
Defendant would answer:	"Yes."
The Trial Court would answer:	"Yes."
The Court of Appeals would answer:	"Yes."
Amicus Curiae MDTC answers:	"Yes."

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STATEMENT OF FACTS AND PROCEEDINGS

Amicus curiae MDTC adopts and incorporates the summary of the material facts and proceedings from Defendant's Answer to Plaintiff's Application for Leave to Appeal and Supplemental Brief filed in this Court.

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INTRODUCTION

Michigan's application and refinement of its premises liability common law and the "open and obvious" doctrine have been the result of decades of work by Michigan's leading jurists. The doctrine is a rule of prudence and judicial economy, and one that the people of Michigan rely upon when governing their private affairs. Like all decisions regarding the scope of a reasonable person's duty, it represents a policy decision that comports with traditional notions of fairness and substantial justice. The open and obvious doctrine, including the special aspects rule which was clarified in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), is entirely consistent with Michigan law as a whole.

Nonetheless, this Court has indicated a willingness to consider overruling this established and well-considered framework because of collateral concerns regarding comparative negligence. See *Kandil-Elsayed v F & E Oil, Inc*, ___ Mich ___, ___; 969 NW2d 69, 70 (2022) (directing the parties to address whether *Lugo* is consistent with Michigan's comparative negligence framework; and if not, directing the parties to address which approach the Court should adopt for analyzing premises liability cases under a comparative negligence framework).

As established by this Court's own decisions, whether a complained of hazard on a premises is open and obvious relates solely to the question of a premises possessor's duty of reasonable care. And the scope of a party's duty of reasonable care is always bounded by whether an unreasonable risk of harm was foreseeable, a fundamental question at issue in all negligence claims. The only difference in the realm of premises liability is that Michigan courts have determined, consistent with many other jurisdictions, that the bar for foreseeability of harm in that context is substantially higher when it comes to conditions on a premises that are open and obvious to a reasonable person.

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Michigan law presumes that a reasonable person is capable of safely traversing open and obvious accretions of snow, slush, and ice. This comports with the common-sense observation that such obstacles are a frequent and inevitable occurrence any person will encounter during a Michigan winter. By contrast, the question of comparative negligence relates solely to the computation of damages, which presumes that the elements establishing negligence on the part of the defendant have been satisfied. But there can be no negligence on the part of a defendant if a complained of condition on a premises was open and obvious unless such a condition has a "special aspect" which warrants modification of the defendant's duty.

In other words, the scope of a premises holder's duty in this context is a policy decision, and it is a sound one informed by decades of jurisprudence. Rather than require a premises holder to guess at the unforeseeable idiosyncratic traits and propensities of all potential invitees, this rule imposes an objective standard where the premises holder is entitled to presume—as in other areas of negligence—that certain risks are reasonable and pose no foreseeable harm to a reasonable person. This comports with the rationale that the most efficient risk avoidance measure in this context is the reasonable person who enters a premises. It is far more reasonable to expect that such a person will be able to avoid conditions that are open and obvious rather than expecting a premises holder to remain eternally vigilant to guard against any and every open and obvious condition that objectively poses no unreasonable risk of harm.

Under the established factors this Court considers when overruling decisions entitled to stare decisis, a mere potential disagreement with Michigan's open and obvious doctrine is not a sufficient rationale to discard decades of caselaw. If this Court introduces an entirely new framework to address premises liability claims, such a dramatic shift in the law would create chaos for the people of Michigan as they would suddenly become unwilling participants in a bold new

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judicial experiment. Similarly, if this Court adopts a different framework to address premises liability claims, then Michigan's lower courts may be left adrift in a sea of non-binding authority, which will inevitably result in inconsistent decisions that will require further action by this Court.

However, if this Court were inclined to adopt any new doctrine considering the facts of this case, it should also consider adopting the "continuing storm" doctrine as articulated by Defendant in its Supplemental Brief. The doctrine is part of the jurisprudence of many sister snowbelt states. And that doctrine would resolve the case currently before this Court, albeit on grounds that the trial court and the Michigan Court of Appeals did not consider.

The continuing storm doctrine is a rule of prudence that recognizes that it would be inefficient and unreasonable to expect premises holders to put themselves at risk to clear accumulations of snow, slush, or ice while a winter weather storm is ongoing. Here, Plaintiff's alleged injuries arose during an ongoing storm and resulted from the effects of that storm, but Defendant would not be liable for those injuries because the storm was ongoing. This comports with common sense, and with the reality of how the people of Michigan conduct themselves during winter weather events. Thus, if this Court should adopt any new doctrine, it should be the continuing storm doctrine.

ARGUMENT

I. This Court has held for decades that the foreseeability of an unreasonable risk of harm affects a premises possessor's duty of reasonable care.

Despite plaintiff's arguments to the contrary, Michigan's common law regarding premises liability has served this state well for decades. Specifically, the refinement of the "open and obvious" doctrine in *Lugo* provided a clear but flexible rule, which was informed by decades of precedent. And this Court held in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992), Michigan's adoption of comparative negligence had no impact on the threshold

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determination of the scope of a premises holder's duty of care to an invitee. Fundamentally, the primary rationale underlying Michigan's premises liability common law and the open and obvious doctrine is that a premises possessor should not be held liable for an unforeseeable unreasonable risk of harm.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The element of duty bears on the issues before this Court.

"Duty is a legally recognized obligation to conform to a particular standard of conduct to protect others against an unreasonable risk of harm." *Laier v Kitchen*, 266 Mich App 482, 495-496; 702 NW2d 199 (2005) (quotation marks and citations omitted). Whether a duty exists is ordinarily a question of law for the court, but "if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the fact-finder." *Id*.

"Duty exists because the relationship between the parties gives rise to a legal obligation," but "overriding public policy may limit the *scope* of that duty." *Bertrand v Alan Ford, Inc (After Remand)*, 449 Mich 606, 614; 537 NW2d 185 (1995). "Thus, the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007). This inquiry involves considering (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the burden on the defendant, and (4) the nature of the risk presented. *Id*. "When the harm is not foreseeable, no duty can be imposed on the defendant." *Id*. at 508.

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Courts in Michigan recognize three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee. *Stitt v Holland Abundant Life Fellowship (Amended Opinion)*, 462 Mich 591, 596; 614 NW2d 88 (2000). Each category "corresponds *to a different standard of care* that is owed to those injured on the owner's premises." *Id*. (emphasis added). In addition to the common law categories, the Legislature has the power to carve out other subcategories for which a different standard of care might apply. See *Benton*, 270 Mich App at 443 n 2 (noting that the Legislature's enactment of MCL 554.139 imposed a higher standard of care on landlords towards their tenants when compared to the duty imposed on other invitors).

This Court has long held that a premises holder's duty of reasonable care, like all other persons, does not extend to guarding against unforeseeable risks. Simply put, if a harm is not foreseeable, then there can be no duty to prevent that harm. *Certified Question*, 479 Mich at 505. This is not a rule that absolves a premises holder or any other person of their general duty of reasonable care, but rather a recognition that the scope of that duty must be bounded by a rule of reasonableness.

Thus, a premises holder must always protect her invitees from unreasonable risks of harm. *Bertrand*, 449 Mich at 609. But that duty does not extend to all possible risks, or require a premises holder to maintain a perfectly safe domain. "Perfection is neither practicable nor required by the law . . . ." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). Moreover, "the overriding public policy of encouraging people to take reasonable care for their own safety *precludes* imposing a duty on the possessor of land to make ordinary steps 'foolproof.' " *Bertrand*, 449 Mich at 616-617 (emphasis added).

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Accordingly, this Court's decisions on the scope of a premises holder's duty have been both clear and consistent for decades. While this Court could delve into the annals of history to try and track the development of this rule, the Court need not go on such a lengthy sojourn into the past. This Court provided a crystallized rule of law in this regard about 60 years ago, which has been further refined since. As explained below, a brief overview of the development of premises liability regarding the definition of a premises holder's duty of reasonable care illustrates the consistency and clarity of this Court's holdings.

II. The scope of a premises holder's duty of reasonable care has been thoughtfully and deliberately articulated by this Court for decades without ever conflating that rule with the distinct and unrelated doctrines of assumption of risk or contributory negligence.

A. Application of Prosser

In 1965, this Court adopted Dean William Lloyd Prosser's "statement of the rules regarding occupiers of land," and his explanation that there was " 'no liability, however, for harm resulting from conditions from which no unreasonable risk was to be anticipated.' " *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965), quoting Prosser, Torts (2d ed), § 61, p 459. As Dean Prosser explained, the " 'mere existence of a defect or danger is not enough to establish liability . . . .' " *Kroll*, 374 Mich at 373, quoting Prosser, Torts (2d ed), § 61, p 459.

In other words, from *Kroll* onward, a premises holder's duty of reasonable care did not extend to safeguarding against unforeseeable risks of harm. In adopting Dean Prosser's explanation, the Court expressly disavowed any attempt at short-circuiting an evaluation of the foreseeability of the harm by merely pointing to the fact that there was some defect or danger on the land. Thus, the threshold determination, as in other negligence cases, required an objective evaluation of whether a harm was foreseeable. This is because "negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of

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harm." Restatement of Torts, 2d, § 282 (1965). However, there is no indication in *Kroll* that this Court was influenced by or even considered the Second Restatement of Torts—or any drafts of that document—the relevant volumes of which were also published in 1965.

This Court once again relied on that section of Dean Prosser's treatise, albeit a later edition, in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). There, the Court explained that the "duty a possessor of land owes his invitees is not absolute," and that it does not "extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself." *Id*. at 500, citing 2 Restatement Torts, 2d, § 343A, p 218, and Prosser & Keeton, Torts (5th ed), § 61, pp 425-427. Notably, the second part of that latter clause was merely a reformulation of Dean Prosser's underlying observation: a premises possessor has no duty to guard against obvious and apparent dangers because no unreasonable risk of harm could be anticipated from such dangers.

Indeed, the third edition of Dean Prosser's treatise provided that " 'in the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself." *Broadhurst v Davis*, 146 Ind App 329, 331; 255 NE2d 544 (1970), quoting Prosser, Torts (3d ed), § 61, pp 402-403.

Thus, when viewing Dean Prosser's full delineation of the scope of duty of a premises possessor towards invitees—a demonstrably influential view based upon decades of Michigan jurisprudence—that duty did not extend to unforeseeable risks of harm because a possessor could expect that an invitee would be capable of avoiding any harm from such "obvious and apparent" conditions. Prosser, Torts (3d ed), § 61, pp 402-403.

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The foregoing reveals that Michigan's evolution of premises liability common law was not merely beholden to either the First or Second Restatement of Torts but was also in accord with the explanations and reformulations set forth by the preeminent scholar in the field of torts. And the linchpin in the evolution of premises liability in Michigan was the focus on whether an unreasonable risk of harm was reasonably foreseeable to the premises possessor.

As discussed above, the evaluation of the foreseeability of a risk harm is a mandatory and threshold inquiry. In contrast, the narrowly-tailored doctrine of "assumption of risk,"[2] which is applicable only in the context of injuries incurred in the course of employment, and the abolished doctrine of "contributory negligence" are entirely separate matters that have no bearing on this Court's decisions regarding premises liability.

B. The assumption of risk doctrine has no application here.

This Court approved of the assumption of risk defense in 1862. *Mich Central R Co v Leahey*, 10 Mich 193, 196 (1862). Later, this Court explained that assumption of risk was "a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk." *Bauer v American Car & Foundry Co*, 132 Mich 537, 541; 94 NW 9 (1903). In other words, "under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed, expressly or impliedly, to assume." *Id*.

In the intervening years, this Court applied the assumption of risk defense to other contexts, including ordinary negligence. See *Waltanen v Wiitala*, 361 Mich 504, 508; 105 NW2d 400, 402

[2] In *Estate of Livings v Sage's Investment Group, LLC*, 507 Mich 328, 351; 968 NW2d 397 (2021) (MCCORMACK, C.J., concurring), three justices of this Court opined that the obvious and open doctrine was initially justified in part by the assumption of risk doctrine.

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(1960)[3] (explaining that assumption of risk was "a defense to negligence, whether it be ordinary 'mere' negligence, or such negligence plus 'a wilful and wanton disregard for public safety' "). In 1965—the same year this Court decided *Kroll*—this Court held that "the doctrine of assumption of risk in this State properly is applicable only to cases in which an employment relationship exists between the parties," and possibly "where there has been an express contractual assumption of risk." *Felgner v Anderson*, 375 Mich 23, 55-56; 133 NW2d 136 (1965). The Court therefore overruled other decisions that applied the defense in other inappropriate contexts, including as to ordinary negligence claims. *Id*.

Given the Court's nearly contemporaneous correction and limitation of the "assumption of risk" doctrine in *Felgner* and the Court's clarification regarding premises liability claims in *Kroll*, it is unlikely that the Court errantly imported the "assumption of risk" doctrine into the realm of premises liability. Also telling is the Court's consideration of Dean Prosser's treatise in *Felgner*, and its decision to forgo adopting Dean Prosser's attempt at squaring "assumption of risk" and contributory negligence because such a justification came too late and was too tenuous to comport with the laws of Michigan. *Felgner*, 375 Mich at 45-46. This illustrates that this Court was not adopting treatises and restatements in 1965 wholesale, and the Court instead was engaged in a thoughtful and deliberate development of this state's common law.

C. Likewise, contributory negligence does not underlie the doctrine.

Similarly, the abolished doctrine of contributory negligence has no application here. In 1851, this Court explained that it was "a well settled principle of law, that where an injury of which a plaintiff complains is the result of his own negligence or fault, or of the negligence or fault of both parties, without intentional wrong on the part of the defendant, no action can be maintained."

[3] Overruled by *Felgner v Anderson*, 375 Mich 23 (1965).

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Williams v Mich Cent R Co, 2 Mich 259, 260 (1851). Thus—from its very adoption in this state—the defense of contributory negligence could be raised even if both parties were negligent, and therefore had no bearing on the threshold evaluation of a defendant's duty.

This Court—which was well aware of the defense of contributory negligence—need not have and never did incorporate the distinct doctrine of contributory negligence in the inquiry regarding a premises possessor's duty of reasonable care. Further, in 1953, this Court underscored the distinction between the determination of a defendant's standard of reasonable care in a premises liability case and the separate question of a plaintiff's purported contributory negligence. See *Torma v Montgomery Ward & Co*, 336 Mich 468, 481-482; 58 NW2d 149 (1953) (holding that the evidence required a jury to determine the separate questions of (1) the defendant's negligence, and (2) the plaintiff's contributory negligence).

Regardless, this Court abolished the doctrine of contributory negligence decades ago without any effect upon Michigan's premises liability common law, and rightly so. See *Placek v Sterling Hts*, 405 Mich 638, 650; 275 NW2d 511 (1979) (abolishing contributory negligence and adopting comparative negligence).

In *Riddle*, this Court squarely rejected the assertion that Michigan's adoption of comparative negligence required the abrogation of the "open and obvious" doctrine. *Riddle*, 440 Mich at 98. The Court explained that the open and obvious doctrine related to what constituted "reasonable care under the circumstances must be determined from the facts of the case," and that "there is no absolute duty to warn invitees of known or obvious dangers." *Id*. at 97. In contrast, the Court explained that comparative negligence "is an affirmative defense" that was adopted to promulgate a "fair system of apportionment of damages" whereby a defendant could present

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evidence of a plaintiff's negligence to reduce liability. *Id*. at 98 (quotation marks and citation omitted).

Relying on *Williams*, this Court explained that "a premises owner is not an insurer of the safety of invitees," and the rule in Michigan is that a premises possessor is not liable for unforeseeable risks of harm, including unreasonable risks that cannot be anticipated or risks related to obvious and apparent dangers from which pose no risk of foreseeable harm to a reasonable person. *Id*. at 94. In passing, the Court noted that Section 343A of the Second Restatement of Torts was discussed in *Williams*, and the Court reiterated the existing common law in Michigan regarding the open and obvious doctrine. *Id*. However, in providing this summary to guide the public in the context of rejecting a fundamental challenge to this state's negligence caselaw, the Court cannot be faulted for not more finely stating that the rule in *Williams* was merely a refinement of the rule in *Kroll*—a rule which arose in Michigan independent from the Second Restatement of Torts.

In 1995, this Court further clarified the rule regarding the scope of an invitor's duty by once again relying in part on the Second Restatement of Torts to illustrate Michigan's *application* of the open and obvious doctrine. *Bertrand*, 449 Mich at 611. This Court explained that where "a condition is open and obvious, the scope of the possessor's duty may be limited . . . ." *Id*. at 610. But this Court explained that "the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care." *Id*. at 611.

This Court explained that when §§ 343 and 343A of the Second Restatement are read together, "the rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and

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realized its danger." *Id*. This was neither a major sea change nor a sudden departure from any of the aforementioned decisions of this Court. As had been the case for decades, a premises possessor's duty of reasonable care did not extend to guarding against unforeseeable risks, including the unforeseeable risk that a person would somehow not safely navigate around a plainly obvious and commonplace condition. Instead, the Court merely reiterated the long-standing common law rule.

III. *Lugo* and subsequent decisions of this Court further refined the open and obvious doctrine by articulating the "special aspects" rule to delineate when an open and obvious condition nonetheless poses a risk of foreseeable harm.

In 2001, this Court issued *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2002). Like its predecessors, *Lugo* was entirely consistent with Michigan's common law regarding premises liability. Of particular focus in *Lugo* was addressing when an open and obvious condition nonetheless posed a risk of foreseeable harm. The Court distinguished between "ordinary open and obvious conditions" that are "everyday occurrence[s]" and which should be observed by "a reasonably prudent person," and those conditions which have "special aspects that give rise to a uniquely high likelihood of harm or severity of harm." *Id.* at 519, 523-524. The Court explained that "there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to *anticipate harm* from that condition." *Id*. at 525 (emphasis added).

This Court concluded that a special aspect must be present to render a risk of harm arising from an open and obvious condition foreseeable, because "if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous." *Id*. The Court could not "imagine an open and obvious condition that is unreasonably dangerous, but lacks special aspects making it so." *Id*.

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While the body of the majority opinion in *Lugo* did not use the word "foreseeable" a single time, in footnote two, the Court further explained how the special aspects rule was one of foreseeability. The Court explained that, in this context, "it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori,* that is, before the incident involved in a particular case," and that it would be "be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm." *Id*. at 519 n 2. Simply put, "the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable." *Id*. But the Court explained that the role of the special aspects rule was to expressly permit claims where "unusual open and obvious conditions could exist that are unreasonably dangerous." *Id*.

In short, the Court's fashioning of the special aspects rule was intended to provide guidance regarding the foreseeability of harm related to an open and obvious condition. As explained by the Court in *Lugo*, and previously in *Kroll*, *Williams*, and *Bertrand*, a premises holder is entitled to presume that a reasonable person will face no unreasonable risk of harm when confronted with such commonplace conditions. But there is an exception if what would otherwise be an ordinary open and obvious condition was peculiar in some way, rendering the harm from that condition foreseeable based on that "special aspect."

Thus, while a premises holder may be able to reasonably presume that other reasonable people will be able to avoid the harm posed by an ordinary open and obvious condition, this presumption is eliminated if it is shown that a special aspect is present. In the case of a special aspect, the premises holder is left in the best position to prevent the unreasonable risk of harm to his or her invitees who would otherwise be ill equipped to confront the peculiar risk of harm

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created by the special aspect. By articulating the special aspects doctrine, this Court did not break new ground, but instead merely solidified and further explained the rule for determining whether an open and obvious condition posed an unreasonable risk of harm.

And, as discussed above, the special aspects rule is wholly consistent with decades of this Court's decisions regarding premises liability. There is a clear lineage in the development of this strand of Michigan's common law dating back to at least *Kroll*, if not further. The special aspects doctrine is a reasonable and flexible rule that is intended to account for those unusual or peculiar circumstances where an open and obvious condition nonetheless carries with it a foreseeable unreasonable risk of harm. Since *Lugo*, this Court has continued to refine the special aspects doctrine by further delineating contexts where it applies. And given the decades this Court has spent developing Michigan's premises liability common law, it would be unjustified to suddenly discard the central rule of foreseeability, which is the crux of the doctrine.

IV. It would be contrary to the rule of stare decisis to overrule *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2002) based on a mere disagreement with the holding of that decision.

There is no conflict between Michigan's adoption of comparative negligence and its premises liability common law. Moreover, for all the reasons discussed above, Michigan's premises liability common law has been developed for decades by the state's leading jurists, and it is a fair and flexible set of reasonable rules which are continually being clarified and refined by this Court as needed. There is no cause to veer from this well-trod path into the unknown by imposing a new premises liability framework on our jurisprudence. And if the Court were to consider fundamentally shifting such a significant element of Michigan's common law, then the rule of stare decisis should serve to stay this Court's hand.

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The rule of stare decisis is one that works to ensure predictability, and thus fairness, in the application of the law. "Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed." *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990). "Alterations are not usually made in a doctrine which is serving well, and with which the bench, bar and public are satisfied." *Kirby v Larson*, 400 Mich 585, 618; 256 NW2d 400 (1977), holding mod on other grounds by *Placek*, *supra*. "Indeed, this Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so." *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010).

This Court has explained that, before departing from the doctrine of stare decisis, a court should determine whether: (1) the decision at issue was wrongly decided, (2) the decision at issue defies practical workability, (3) reliance interests would work an undue hardship if the decision at issue was overruled, and (4) changes in the law or facts no longer justify the decision at issue. *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). These determinations are necessary because "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Id*. at 465. Thus, a court must examine "the effects of overruling." *Id*. at 466.

If this Court were to conclude that Michigan's premises liability common was not compatible with the doctrine of comparative negligence, then this Court would need to overrule decades of precedent. Given the weighty questions at stake here, including those of public policy, judicial economy, and the public's interest, this Court should apply the four factors identified in *Robinson* before departing from stare decisis.

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Here, all four factors weigh in favor of letting *Lugo* stand as precedent and thus preserving Michigan's common law regarding premises liability. First, *Lugo* was correctly decided and represents a further refinement of Michigan's long-standing common law holding that a premises possessor should not be liable for unforeseeable risks. As discussed above, there is no conflict between the "special aspects" rule and comparative negligence. Instead, those rules relate to entirely different matters. A showing of comparative negligence is relevant only *after* a plaintiff has established that a defendant was negligent in the first place, and a showing of comparative negligence serves only to reduce the defendant's liability.

In contrast, whether an open and obvious condition has a special aspect is part of the threshold determination of whether an unreasonable risk of harm was foreseeable. Michigan common law has long provided that an ordinary open and obvious condition does not create a foreseeable risk of unreasonable harm because such a mundane and obvious condition poses no serious risk to a reasonable person. And the special aspects rule merely solidifies and clarifies the exception to the foregoing principle; in the case of a peculiar open and obvious condition, such a condition can pose an unreasonable risk of *because* of the condition's special aspect.

The decision as to where to draw the line on a party's duty of reasonable care is fundamentally one of public policy, but this Court has consistently and long held that a duty of reasonable care does not extend to reasonable risks of harm associated with ordinary and commonplace conditions. *Kroll*, 374 Mich at 373; *Bertrand*, 449 Mich at 616-617. Similarly, the Court has reiterated that the fact a harm occurred is not enough to show that an unreasonable risk of harm was foreseeable. *Kroll*, 374 Mich at 373; *Lugo*, 464 Mich at 519 n 2.

The role of the special aspect rule is to clarify that a plaintiff may not establish negligence by merely pointing to the fact that a harm related to an ordinary open and obvious condition, such

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as stray bits of gravel or commonplace accretions of snow or slush. Instead, the law requires the plaintiff to make a showing that there was something objectively peculiar about the condition that created an unreasonable risk of harm. This is a flexible and prudent rule that serves to balance the interests of premises holders and the public. Premises holders may not properly argue that "no matter what the open and obvious peril, even a thirty-foot-deep unguarded or unmarked pothole, if it was open and obvious, no tort claim would lie," and by contrast, invitees may not properly argue that it is unreasonable "to expect invitees to avoid common potholes . . . ." *Lugo*, 464 Mich at 519 n 2. The gray area between these two extremes has been continuously clarified since the rule was elaborated upon in *Lugo*, and there is no reason to depart from that decision and body of interpreting jurisprudence now.

For all the reasons discussed above, and in Defendant's Supplemental Brief, *Lugo* was not wrongly decided, and Michigan's premises liability regime is wholly consistent with the doctrine of comparative negligence. Thus, the first factor weighs dispositively against departing from stare decisis. Nonetheless, the remaining factors are addressed to further show that there is no cause to deviate from stare decisis here.

Second, as discussed in detail above, Michigan's courts have routinely applied this standard and refined it further, thus demonstrating that the open and obvious doctrine is a practical and flexible rule. Moreover, if the people of this state truly desired the scope of a premises holder's duty to be expanded in a way that overturned decades of precedent, then there is a path to do so through the legislative process. The Legislature is free to set a different or higher standard of reasonable care in this context, and it has done so in the past. See *Benton*, 270 Mich App at 443 n 2. And as explained by the Colorado Supreme Court, Colorado's state legislature preempted the open and obvious doctrine altogether by enacting a comprehensive premises liability statute. *Vigil*

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v Franklin, 103 P3d 322, 328-329 (Colo, 2004). Michigan's premises liability common law works, and if the people of Michigan develop a desire for a new regime, they have every power to create one through the Legislature. Thus, the second *Robinson* factor weighs strongly against departing from stare decisis here.

Third, any person in this state who qualifies as a premises possessor—which is a large class of people that includes tenants, homeowners, business owners, and even affects the scope of many employees' duty of care—has a substantial reliance interest in maintaining the status quo regarding the open and obvious doctrine. "As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. In considering reliance interests, the Court will endeavor to avoid results that "would produce chaos." *Id*. And the Court will be less deferential to recent decisions that were decided by a narrow margin. *Id*. at 468.

Lugo was not decided recently, nor was *Bertrand*, *Riddle*, *Williams*, or *Kroll*. Thus, there is no cause to conclude that the people of this state have not come to rely on those decisions due to their recency. In terms of showing reliance on those decisions, it is commonly understood in Michigan, as well as elsewhere, that a premises possessor need not endeavor to make his or her premises perfectly safe against all risks of harm. And it would create chaos to suddenly upend that reasonable boundary on liability, because litigants would invariably embark on expeditions to discover the new outer limits of liability. Homeowner, tenants, businesses, and employees would be hailed into court to litigate these novel claims. And Courts would face this onslaught of novel claims without the benefit of decades of guidance from this Court in the form of previously binding

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precedent. Thus, courts will inevitably rely on different sources of persuasive authority and reach inconsistent results.

And all of this will culminate in the need for this Court to resolve these novel questions time and time again for the foreseeable future. This Court has limited time and a limited docket, and thus it is questionable whether it would be prudent to intentionally create so much uncertainty in this well-developed area of the law with the full knowledge that it will take years for a fully developed replacement to Michigan's current precedent to emerge. In other words, this factor weighs strongly against departing from stare decisis because doing so will inevitably create chaos.

Fourth, there have been no changes in the law or underlying facts which require a reevaluation of Michigan's premises liability common law. In 1992, this Court considered and rejected the contention that the open and obvious doctrine was incompatible with comparative negligence. *Riddle v McLouth Steel Products Corp*, 440 Mich at 95. There have been no changes in the law or underlying facts since then which would warrant revisiting this settled question. And, as explained above, the special aspect rule derives from Michigan's longstanding precedent regarding the threshold determination of whether a condition on a premises poses a reasonably foreseeable unreasonable risk of harm. There is no cause to suddenly depart from decades of settled law, and thus this factor weighs strongly against deviating from stare decisis.

V. If this Court is inclined to adopt any new doctrine or framework regarding premises liability, it should consider adopting the continuing storm doctrine found within many of Michigan's sister snowbelt states.

Defendant's Supplemental Brief correctly observed that many of Michigan's sister states have adopted the "continuing storm" doctrine, and amicus concurs that this Court would be justified in adopting that doctrine given the vagaries of Michigan's winter weather. While Michigan's winter weather conditions were invariably worse while massive glaciers traversed the

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states and carved out the Great Lakes, that is cold comfort for the people of this state who—every year—must contend with ice, snow, slush, and everything in between. Michigan's winter weather maladies are not unique, and many of Michigan sister states have adopted a rule of prudence regarding the removal and remediation of conditions caused by nature's hibernal mores.

As explained by the Delaware Supreme Court, while a premises holder has "a duty to exercise reasonable care in keeping its premises safe for the benefit of business invitees," which includes "keeping the premises reasonably safe from natural accumulations of ice and snow," the premises holder "is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps." *Laine v Speedway, LLC*, 177 A3d 1227, 1229 (Del, 2018) (quotation marks and citation omitted). The rationale for this rule is that "changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action . . . ." *Id*. (quotation marks and citations omitted).

It would make perfect sense to adopt this doctrine in Michigan given the unpredictable nature of Michigan's weather. Unexpected precipitation is the norm, snowfalls defy the best prognostications offered by meteorologists, and thunder and lightning during a snowstorm is not unheard of. While a winter storm is ongoing in Michigan, all bets are off. Thus, it comports with reason and common sense that a premises possessor need not undertake the removal of ice and snow while such a storm is ongoing. It would be inefficient to require the constant removal of accumulated ice and snow, and there is no cause to require such a remediation where the condition was created by nature rather than by some misfeasance or malfeasance on the part of the premises holder.

Given the reasonableness of this doctrine, many of Michigan's sister states have adopted it. See *Kraus v Newton*, 211 Conn 191, 196; 558 A2d 240 (1989); *Alcala v Marriott Intern, Inc*,

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880 NW2d 699, 711 (Iowa, 2016); *Agnew v Dillons, Inc*, 16 Kan App 2d 298, 301; 822 P2d 1049 (1991); *Mattson v St Luke's Hosp of St Paul*, 252 Minn 230, 233; 89 NW2d 743 (1958); *Pareja v Princeton Intl Properties*, 246 NJ 546, 557; 252 A3d 184 (2021); *Solazzo v New York City Transit Auth*, 6 NY3d 734, 735; 843 NE2d 748 (2005); *Goodman v Corn Exch Nat'l Bank & Trust Co*, 331 Pa 587, 590; 200 A 642 (1938); *Walker v Mem Hosp*, 187 Va 5, 13; 45 SE2d 898 (1948); *Walker v Mem Hosp*, 187 Va 5, 13; 45 SE2d 898 (1948).

If this Court is concerned about reaching an aberrant result regarding the liability of a premises holder in this context, then any imposition of liability here would plainly conflict with the weight of the caselaw of Michigan's sister states. This question has been passed upon by many of those states, and each of the aforementioned states has concurred that there is no duty of reasonable care to remove an accumulation of snow and ice while a winter weather event occurs. Here, application of the doctrine would plainly defeat Plaintiff's claim because there appears to be no dispute that her injuries were related to an accumulation of snow and ice caused by an ongoing storm. Thus, this Court would be well justified to consider adopting the continuing storm doctrine to resolve this case on narrow and legally sound grounds.

REQUESTED RELIEF

Amicus curiae MDTC respectfully requests that the Court affirm the judgment of the Court of Appeals, reaffirm the Court's decades of precedent regarding premises liability, and refrain from overruling *Lugo*.

Respectfully submitted,

Michigan Defense Trial Counsel, Inc.

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