

**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 SUPPLEMENTAL BRIEF
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STATE OF MICHIGAN
COURT OF APPEALS

LINDA MOLITORIS,

Plaintiff-Appellant,

v

SAINT MARY MAGDALEN
CATHOLIC CHURCH,

Defendant-Appellee.

UNPUBLISHED

January 4, 2024

No. 364820

Livingston Circuit Court

LC No. 22-31366-NO

Before: GLEICHER, C.J., and SWARTZLE and YATES, JJ.

PER CURIAM.

The landscape of slip-and-fall jurisprudence in Michigan changed dramatically on July 28, 2023, when our Supreme Court rendered its opinion in *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95; ___ NW2d ___ (2023), which reframed the analysis of open and obvious defects in premises liability cases filed by invitees. But in designing that new approach, our Supreme Court reaffirmed “that the three traditional status-based categories—licensee, invitee, and trespasser—remain” the law in Michigan. *Id.* at 143. Plaintiff, Linda Molitoris, insists that she can avail herself of the new approach because she was an invitee when she fell on ice in a church parking lot. The trial court rejected plaintiff’s premises liability claim, characterizing her as a licensee (rather than an invitee) and concluding that she cannot meet any of the requirements she must satisfy to prevail on a claim for premises liability as a licensee. We agree, so we shall affirm the trial court’s award of summary disposition to defendant under MCR 2.116(C)(10).

I. FACTUAL BACKGROUND

Plaintiff is both a parishioner and a volunteer at defendant, Saint Mary Magdalen Catholic Church (“the Church”). On February 22, 2021, plaintiff went to the Church to perform volunteer work at Magdalen’s Kitchen, a weekly event where free meals are prepared and served to those in the community. Plaintiff arrived at the Church at 3:00 p.m. that day. She did not encounter issues with snow or ice as she walked through the parking lot and went into the Church. Plaintiff did not go outside again until she left the Church at approximately 7:00 p.m. Plaintiff exited through the same door she had used to enter the Church, and then she walked towards her vehicle in the parking

lot. Plaintiff asserts that she was looking where she was going and did not see snow or ice in the parking lot. Plaintiff does not remember precipitation falling at that time, and she does not recall the pavement in the parking lot appearing wet. Plaintiff insists that the parking lot was dark at the time she left and that the lights in the parking lot were not on. As plaintiff stepped off the sidewalk and into the parking-lot area, she suddenly slipped and fell to the ground. Plaintiff alleges that, as she was on the ground, she could feel ice in the area around her. As a result of her fall, plaintiff suffered a fractured left wrist that required surgery, fractures to her pelvis, and a fractured hip.

On January 18, 2022, plaintiff filed this action against the Church for ordinary negligence and premises liability. When the Church sought summary disposition, plaintiff agreed to dismiss her claim for ordinary negligence and proceed only on a premises-liability theory. Plaintiff argued that the Church owed her a duty as an invitee. The Church asserted that it did not owe her a duty based on the fact that plaintiff was a licensee when she suffered her injuries. The trial court decided from the bench on January 5, 2023, that plaintiff was a licensee and awarded summary disposition under MCR 2.116(C)(10) to the Church on that basis. The trial court thereafter memorialized its ruling in an order entered on January 24, 2023. This appeal now follows.

II. LEGAL ANALYSIS

Plaintiff argues on appeal that the trial court erred in characterizing her as a licensee, rather than an invitee, because that determination must be made by a jury. Beyond that, plaintiff contends that the Church breached a duty it owed to her and had constructive notice of the ice on which she fell. For those reasons, plaintiff asserts that the trial court erred in awarding summary disposition to the Church under MCR 2.116(C)(10). “We review de novo a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* at 160. “When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Id.* The motion may be granted only “when there is no genuine issue of material fact.” *Id.* “ ‘A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.’ ” *Id.* Applying these standards, we must decide whether the trial court properly determined that plaintiff could not succeed on her premises liability claim.

A. INVITEE OR LICENSEE

“All negligence actions, including those based on premises liability, require a plaintiff to prove four essential elements: duty, breach, causation, and harm.” *Kandil-Elsayed*, 512 Mich at 110. “The first element, duty, ‘is essentially a question whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.’ ” *Id.* “In the context of premises liability, ‘a landowner’s duty to a visitor depends on that visitor’s status.’ ” *Id.* at 111. Michigan law recognizes “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*, 462 Mich 591, 596; 614 NW2d 88 (2000). Each of the “categories corresponds to a different standard of care that is owed to those injured on the owner’s premises.” *Id.* “Thus, a landowner’s duty to a visitor depends on that visitor’s status.” *Id.*

The outcome of plaintiff's premises-liability claim largely turns on whether plaintiff was a licensee or an invitee when she fell on ice in the Church parking lot. A landowner like the Church owes a much greater duty to an invitee than to a licensee. A licensee is someone permitted to enter the premises of another by virtue of the landowner's consent. *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). A landowner owes a licensee only a duty to warn of hidden dangers "the landowner knows or has reason to know of, and only if the licensee does not know or have reason to know of the dangers involved." *Burnett v Bruner*, 247 Mich App 365, 378; 636 NW2d 773 (2001). Significantly, a landowner "owes no duty of inspection or affirmative care to make the premises safe" for a visit by a licensee. *Stitt*, 462 Mich at 596.

In contrast, an invitee is a person "who enters upon the land of another upon an invitation" that "carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises" and make the premises safe for the invitee. *Id.* at 596-597. A landowner "has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe[.]" *Id.* at 597. "Thus, an invitee is entitled to the highest level of protection under premises liability law." *Id.* On appeal, plaintiff contends that, when she fell in the Church parking lot, she was an invitee entitled to the highest level of premises liability law protection. For its part, the Church insists that the trial court properly characterized plaintiff at that point in time as a mere licensee.

Individuals who enter onto church property for noncommercial purposes are licensees as a matter of law. *Id.* at 595, 604. The primary consideration when determining a visitor's status at the time of the injury is "the owner's reason for inviting persons onto the premises[.]" *Id.* at 604. If evidence is presented "from which invitee status might be inferred, it is a question for the jury." *Id.* at 595. But when a plaintiff fails to offer evidence that creates a factual dispute as to whether a church invited people onto its property for "an essential commercial purpose," see *id.* at 606, the plaintiff's status as a licensee should be decided by the court. *Sanders*, 303 Mich App at 5-6. The predominant or essential purpose for which the Church invited people onto its premises for Magdalen's Kitchen was to feed the less fortunate. No one bought any meals at that community event, so any income generated by that event should be considered insufficient to establish that the event had a commercial purpose. *Stitt*, 462 Mich at 604 ("the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees").

Here, the trial court reasoned that, "at the time she fell, [p]laintiff was on the [d]efendant's premises as a volunteer, and her activities were not commercial in nature, nor done for commercial purposes." Similarly, in *Kosmalski v St John's Lutheran Church*, 261 Mich App 56; 680 NW2d 50 (2004), this Court concluded that a volunteer injured while working at a church's vacation bible school "in the job of a playground helper" was not offering "child-care services for 'a material or commercial purpose' rather than one of 'a spiritual, religious or social nature.'" *Id.* at 57, 62-63. This Court reached that conclusion, and thereby treated the injured volunteer as a licensee, even though the volunteer was not a church member. *Id.* at 62. Accordingly, the trial court in this case ruled in a manner faithful to our precedent in concluding that plaintiff was a licensee—as opposed to an invitee—when she went to the Church to serve as a volunteer at Magdalen's Kitchen.

B. PLAINTIFF'S CLAIM AS A LICENSEE

Our conclusion that plaintiff was a licensee, rather than an invitee, when she fell on ice and suffered injuries in the Church parking lot does not necessarily defeat her premises liability claim. Indeed, *Kosmalski* illustrates that a licensee injured on the premises of a church while performing volunteer activities may survive summary disposition when there are “hidden dangers the [church] knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved.” *Id.* at 65. In those circumstances, the church owes the licensee “a duty to warn the licensee of any hidden dangers[.]” *Id.* To be sure, the duty to warn is limited to hazards the church actually knows exist, so the church owes no duty to warn of hazards just because further inspection might have revealed the hazards. *Shaw v Wiegartz*, 1 Mich App 271, 277; 135 NW2d 565 (1965). Also, if the licensee knows or has reason to know of a hazard and the risk involved, the church has no duty to warn the licensee of the hazard. *Blackwell v Franchi*, 502 Mich 918, 919; 914 NW2d 900 (2018). In sum, Michigan does not impose “a duty owed by a landowner to his licensees to repair or to inspect his property.” *Burnett*, 247 Mich App at 372. “Rather, the landowner simply owes the licensee a duty to warn of unreasonably dangerous conditions, when the licensee neither knows nor has reason to know of the condition and risk involved.” *Id.*

In granting the Church summary disposition under MCR 2.116(C)(10), the trial court relied on four conclusions on which no genuine issue of material fact exists. First, the record contains no evidence that the Church was aware of the icy condition of the parking lot. Second, plaintiff has lived in Michigan for decades and readily understood on the evening of her fall that there could be ice in the parking lot on a cold day in February. Third, plaintiff has not established that the ice on which she fell presented an unreasonable risk of harm. Fourth, because plaintiff was a licensee, the Church had no duty to inspect the parking lot, discover the ice, or either remove the ice or warn plaintiff of its existence. Placing these conclusions in the analysis of a premises liability claim of a licensee such as plaintiff, the trial court appropriately resolved defendant's summary disposition motion. Specifically, the Church owed no duty to warn plaintiff of the icy parking lot because the Church was unaware of that hazard, the Church had no duty to inspect the parking lot, and plaintiff had sufficient experience in Michigan to know, or have reason to know, of the risk of ice on a cold night in February. See *Stitt*, 462 Mich at 596. Beyond that, the icy parking lot did not constitute an “unreasonably dangerous condition.” *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11, 19-20; 643 NW2d 212 (2002) (“The mere presence of ice, snow, or frost on a sloped rooftop [off which plaintiff fell] generally does not create an unreasonably dangerous condition.”). Consequently, even though “a landowner owes a licensee a duty to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved[.]” *Kosmalski*, 262 Mich App at 65, plaintiff cannot satisfy any—much less all—of those requirements. As a result, the trial court correctly awarded summary disposition to defendant under MCR 2.116(C)(10) on plaintiff's premises liability claim.

Affirmed.

/s/ Brock A. Swartzle
/s/ Christopher P. Yates

STATE OF MICHIGAN
COURT OF APPEALS

LINDA MOLITORIS,

Plaintiff-Appellant,

v

SAINT MARY MAGDALEN
CATHOLIC CHURCH,

Defendant-Appellee.

UNPUBLISHED

January 4, 2024

No. 364820

Livingston Circuit Court

LC No. 22-31366-NO

Before: GLEICHER, C.J., and SWARTZLE and YATES, JJ.

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

Linda Molitoris slipped and fell on black ice in a church parking lot, sustaining severe injuries. Since Molitoris was at the church to prepare meals for the needy rather than to enrich the church financially, Michigan law categorizes her as a licensee—a non-business visitor with consent to be on the premises. The majority correctly holds that because Molitoris was a licensee, the church was obligated to warn her only of hidden dangers creating an unreasonable risk of harm that the church knew about, and no direct evidence supports that it was aware of the black ice. And even if a duty to inspect the parking lot existed, my colleagues declare, the black ice did not present an unreasonable danger.

The majority’s status-based description of the church’s minimal duty of care conforms with Michigan law. But I cannot agree with the majority’s determination that a parking lot sheathed in black ice is not unreasonably dangerous. That conclusion rests on obiter dictum from a case involving a fall from an icy roof, *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11, 19-20; 6443 NW2d 212 (2002) (“The mere presence of ice, snow, or frost on a sloped rooftop [off which a plaintiff falls] generally does not create an unreasonably dangerous condition.”). According to the majority, Molitoris was obligated to anticipate the presence of black ice because she “has lived in Michigan for decades and readily understood on the evening of her fall that there could be ice in the parking lot on a cold day in February.” Her intrinsic knowledge as a Michigander, the majority reasons, transformed the invisible black ice into a foreseeable danger.

In *Hoffner v Lanctoe*, 492 Mich 450, 463-464; 821 NW2d 88 (2012), our Supreme Court rejected the “prominently cited notion” that ice and snow hazards are “obvious to all” and automatically eliminate a jury-submissible premises liability case. Contrary to the majority and the *Perkoviq* dicta, snow and cold temperatures do not create an irrefutable presumption of accompanying ice. While “wintry conditions, like any other condition on the premises, may be deemed open and obvious,” the question remains “whether the *individual* circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger.” *Hoffner*, 486 Mich at 464 (emphasis added). Regarding invitees, “a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation” by taking “reasonable measures” within a “reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.” *Id.* (quotation marks and citation omitted).¹

This language instructs courts to apply a fact-specific analysis in ice cases rather than rubber-stamping a “wintry conditions” rule deeming every patch of ice on property open and obvious as a matter of law. Logically, there is no reason that a different rule should apply to licensees, even though a different standard of care applies. And in *Kandil-Elsayed v F & E Oil, Inc.*, ___ Mich ___; ___ NW2d ___ (2023) (Docket Nos. 162907 and 163430), the Supreme Court explicitly jettisoned *Perkoviq*’s reasoning along with the standard of care approach to ice and snow hazards, holding that whether an invitee should have discovered an allegedly open and obvious danger “is relevant to the defendant’s breach and the plaintiff’s comparative fault[.]” *id.*, slip opinion at 2. Questions of breach and comparative fault are almost always for a jury to resolve. “Rather than conduct a narrow analysis of whether an obvious danger . . . poses an ‘unreasonable risk of severe harm,’ ” the Supreme Court decreed in *Kandil-Elsayed*, a “fact-finder should consider whether ‘the possessor should anticipate the harm despite such . . . obviousness.’ ” *Id.*, slip op at 43, quoting 2 Restatement Torts, 2d, § 343A, p 218 (second omission in original). “[W]hether a land possessor should anticipate harm from an otherwise open and obvious danger is a relevant inquiry under *breach*, not duty.” *Id.*

That said, the *Kandil-Elsayed* majority also held that “the three traditional status-based categories—licensee, invitee, and trespasser—remain in effect, reserving the question of whether to adopt the Third Restatement’s blanket reasonable-care standard for a later time.”² *Id.*, slip op at 39. This case is a poster child for jettisoning the status distinctions.

¹ This holding flowed from an earlier case, *Quinlivan v Great Atlantic & Pacific Tea Co, Inc.*, 395 Mich 244, 261; 235 NW2d 732 (1975), in which the Supreme Court held that although an invitor does not guarantee an invitee’s safety, “the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation.” *Id.* This requires “that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.” *Id.*

² The Third Restatement of Torts eliminated status-based categories and created one general duty of care owed to anyone who entered a land possessor’s property. See 2 Restatement of Torts, 3d, § 51, p 242.

Under current Michigan law, the church owed Molitoris no duty to even try to make the parking lot safe for her and her fellow volunteer meal-preparers. Yet had Molitoris slipped and fallen on black ice in the parking lot of the Marco's Pizza restaurant just down the road, a jury would decide whether the premises owner was liable for failing to remove or to warn of the danger. And had the victim of the church's black ice been a farmer selling vegetables to the church for use in the meals that Molitoris was preparing, the church would be liable for the farmer's injuries. Perhaps the moral of this story is that under Michigan's current premises liability law, no good deed goes unpunished.

Why has the obviously inequitable invitee-licensee distinction persisted in Michigan? Historically, these common-law distinctions "were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Kermarec v Compagnie Generale Transatlantique*, 358 US 625, 630; 79 S Ct 406; 3 L Ed 2d 550 (1959). The United States Supreme Court explained in *Kermarec* that "modern common-law courts" have tinkered with the distinctions, creating "subclassifications" and delineating "fine gradations in the standards of care which the landowner owes to each." *Id.* Because these adjustments "produced confusion and conflict," the Supreme Court eliminated them in admiralty law, adopting "a single duty of reasonable care in all the circumstances." *Id.* at 631-632.

Many state courts followed suit in cases of premises liability. According to the jurisdictional vote count described in *Koenig v Koenig*, 766 NW2d 635, 640 (Iowa, 2009), "a bare majority of states have now departed from the original trichotomy in some fashion[.]"³ The Iowa Supreme Court summarized in *Koenig* that abolishing the distinctions avoids "confusion," allowing for the use of "an easily applicable standard." *Id.* at 643-644. The *Koenig* Court reasoned that "[t]he difficulty in distinguishing between invitees and licensees underscores another disadvantage of the classification—people do not alter their behavior based on an entrant's status as an invitee or licensee." *Id.* at 644. *Koenig* underscored this observation by retelling a compelling hypothetical scenario developed by the West Virginia Supreme Court:

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away. . . . What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees. [*Id.*, quoting *Mallet v Pickens*, 206 W Va 145, 150; 522 SE2d 436 (1999).]

Despite the inconsistencies and the fundamental unfairness of the status distinctions, our Supreme Court unhesitatingly re-dedicated itself to continuing them in *Stitt v Holland Abundant*

³ The "trichotomy" is the distinction between invitees, licenses, and trespassers. In this concurring opinion I limit my discussion to the invitee-licensee distinction.

Life Fellowship, 462 Mich 591, 604; 614 NW2d 88 (2000). *Stitt* announced a “quid pro quo” standard of care in premises liability cases, holding that

the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner’s commercial business interests. It is the owner’s desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner’s reason for inviting persons onto the premises is the primary consideration when determining the visitor’s status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose.

This rationale is merely an homage to feudalism, a system that allowed landowners to “act as they pleased within the confines of their own property.” *Koenig*, 766 NW2d at 638.

“Perhaps the protection afforded to landowners by these rules was once perceived as necessary in view of the sparseness of land settlements, and the inability of owners to inspect or maintain distant holdings.” *Smith v Arbaugh’s Restaurant, Inc*, 469 F2d 97, 101; 152 US App DC 86 (1972). Judge David Bazelon observed in *Smith* that “[t]he prestige and dominance of the landowning class in the nineteenth century contributed to the common law’s emphasis on the economic and social importance of free use and exploitation of land over and above the personal safety of those who qualified as trespassers or licensees.” *Id.* Alternatively stated by the Massachusetts Supreme Court, “The feudal conception that the landowner was a sovereign within his own boundaries provided the justification for a line of decisions that predicated the existence and distinguished the degree of a landowner’s liability for injuries occurring on his land on the type of relationship existing between the landowner and the injured party.” *Mounsey v Ellard*, 363 Mass 693, 695; 297 NE2d 43 (1973).

Tort law has evolved considerably even since *Kermanrec*, *Smith*, and *Mounsey*, including in Michigan. The Michigan Supreme Court found our state’s guest passenger statute unconstitutional in 1975, explaining that

[t]o deny guests recompense for negligently inflicted injury, death or loss cannot be justified as a reasonable means to promote hospitality, foster gratitude, prevent collusion, perjury or fraud, reduce insurance premiums, or protect generous drivers from ‘vexatious litigation’ by ungrateful guests or conniving hitchhikers. [*Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 681; 232 NW2d 636 (1975) (citation omitted).]

The doctrine of charitable immunity met the same fate in *Parker v Port Huron Hosp*, 361 Mich 1, 25; 105 NW2d 1 (1960). Historically, many rationales were advanced in support of charitable immunity; *Parker* discusses a sampling. *Id.* at 11-16. Akin to *Stitt*’s explanation for maintaining the distinctions between a landowner’s duty toward invitees and licensees, charitable immunity rested in part on an economic protectionism theory: that charities’ assets should be shielded from dissipation because they are funded by donations and serve worthy purposes. The policy

judgments at the center of *Stitt*, the guest passenger rule, and the charitable immunity doctrine exempt certain actors from the consequences of their carelessness, forcing the injured person to shoulder the economic and physical burdens. Two of these three harsh and discredited doctrines were discarded decades ago.

The common law of torts has moved toward a general standard of care grounded in reasonableness. See 1 Restatement Torts, 3d, § 7, comment *a*, p 77 (“ . . . actors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm.”) The Third Restatement eliminates the categorical distinctions of premises liability law, explaining that “[a]t the time these status-based duties were developed, no general duty of care existed, and duties were based on relationships or specific activities. Thus, the status-based duties imposed on land possessors were consistent with basic negligence law and were the basis for imposing *any* duty on land possessors.” 2 Restatement Torts, 3d, §51, comment *a*, p 242. “[T]he status-based duties for land possessors are not in harmony with modern tort law,” the Third Restatement summarizes, rejecting them in favor of “a unitary duty of reasonable care to entrants on the land.” *Id.*

The *Stitt* majority clung to an old rule rather than explaining why a social guest or a volunteer such as Molitoris is less worthy of the law’s protection than someone who was on the land with a business purpose. General negligence principles should apply to her claim. This does not mean that the church that welcomed her as a volunteer is automatically liable for Molitoris’s fall. Absent the application of the licensee rule, a jury may find that the black ice was unforeseeable, or that Molitoris was solely at fault. Churches and homeowners may purchase insurance (and undoubtedly Saint Mary Magdalen Catholic Church has done so) covering even gratuitous visitors. A system that promotes reasonable care across the board benefits landowners *and* visitors by treating all people alike, encouraging safety, and compensating the injured. I urge the Supreme Court to reconsider *Stitt* and to join the modern world of premises liability.

/s/ Elizabeth L. Gleicher

Order

November 8, 2024

166699

LINDA MOLITORIS,
Plaintiff-Appellant,

v

SAINT MARY MAGDALEN CATHOLIC
CHURCH,
Defendant-Appellee.

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

SC: 166699
COA: 364820
Livingston CC: 2022-031366-NO

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On order of the Court, the application for leave to appeal the January 4, 2024 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether this Court should adopt the Third Restatement of Torts' reasonable-care standard in lieu of traditional status-based categories to determine a premises possessor's duty to persons who suffer physical harm caused by a condition on the land, *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000); see also *Kandil-Elsayed v F & E Oil, Inc.*, 512 Mich 95, 143-144 (2023); and (2) whether adopting the Third Restatement's reasonable-care standard, and thus overruling *Stitt*, 462 Mich at 591, comports with the doctrine of stare decisis, see *Robinson v City of Detroit*, 462 Mich 439 (2000).

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Radke v Truesdell* (Docket No. 167162).

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



t1105

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 8, 2024

Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

LINDA MOLITORIS,

Plaintiff,

vs

Case No. 22-031366-NO

ST. MARY MAGDALEN CHURCH,

Defendant.

/

OPINION

BEFORE THE HONORABLE L. SUZANNE GEDDIS

Howell, Michigan - Thursday, January 5, 2023

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WITNESSES

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None.

EXHIBITS

Introduced

Admitted

None.

1 Howell, Michigan
2 Thursday, January 5, 2023
3 - - -
4 (At 3:40 p.m., proceedings begin)
5 THE CLERK: Calling case 22 -
6 THE COURT: Just one --
7 THE CLERK: Sorry.
8 THE COURT: Just one second.
9 Counsel, can you state your name for the record
10 and spell your last name so that she's got it?
11 MR. AHMAD: Of course, Your Honor.
12 THE COURT: Thank you.
13 MR. AHMAD: It's Jay, last name Ahmad, Ahmad, my
14 P number is 43206.
15 THE COURT: I'm sorry for interrupting you.
16 THE CLERK: You're fine.
17 Calling case 22-31366-NO, Linda Molitoris versus
18 St. Mary Magdalen Church.
19 Your appearances, please?
20 MR. AHMAD: Jay Ahmad on behalf of the
21 Plaintiff, Your Honor.
22 THE COURT: Thank you.
23 MR. ZICK: Daniel Zick on behalf of Defendant,
24 St. Mary Magdalen Church.
25 THE COURT: Thank you.

1 This is Defendant's motion for summary
2 disposition under MCR 2.116(C) (10) .

3 Mr. Zick, do you want to -- since this is your
4 motion, do you want to go first?

5 MR. ZICK: Yes, Your Honor. Thank you.

6 THE COURT: Mm-hmm.

7 MR. ZICK: Your Honor, this is a premises
8 liability case involving a slip and fall on ice, and one
9 of the very few premises liability cases where you will
10 not hear a defense attorney sitting here saying the words
11 open and obvious.

12 THE COURT: Mm-hmm.

13 MR. ZICK: And the reason for that is the
14 Plaintiff in this case is a licensee on the church's
15 premises at the time of her fall, so the open and obvious
16 doctrine does not need to be invoked here, because we're
17 dealing with a different standard of care.

18 Michigan law is very clear -- our appellate
19 courts have made very clear in the cases of Stitt,
20 Sanders, and Kosmalski, all published opinions that were
21 cited in our brief, that church parishioners and
22 volunteers are licensees, or -- are licensees, rather than
23 invitees, unless they're on the church's premises for some
24 other commercial purpose, and the few cases that have
25 found them to be invitees have been at a church carnival

1 that was done, or something outside of normal church-like
2 activities.

3 The Plaintiff in this case was volunteering at
4 Magdalen's Kitchen, which is a weekly event that the
5 church holds to give away food to the needy. She was
6 volunteer, these were free meals that were being given
7 away to the public; there was no commercial purpose for
8 Ms. Molitoris to be at the church that evening. She was
9 simply there as a volunteer.

10 Now, Plaintiff in her response attempts to make
11 an argument that because she wasn't there for a
12 quote/unquote religious purpose, or because community
13 outreach activities could potentially increase church
14 membership, that that is bestowing a commercial benefit on
15 the church, and I'll -- I'll direct the Court, as we did
16 in our reply brief, back to the cases of Stitt, Sanders,
17 and Kosmalski, where Michigan's appellate courts have held
18 even direct donations from parishioners to the church
19 itself directly does not render the parishioner a business
20 invitee. They are still there for religious purposes,
21 they just happen to be engaging in charity. And this is a
22 charity -- charitable cause too in -- in donating the
23 meals.

24 And so once we establish that the Plaintiff is,
25 in fact, a licensee in this case, we then look at the very

1 limited duties owed to licensees in premises liability
2 cases, and in essence that duty is a duty to warn of
3 hidden dangers, which the Plaintiff is not aware of, which
4 the property owner is aware of, and which the Plaintiff
5 cannot be reasonably expected to discover.

6 Now Plaintiff's own sworn testimony in this case
7 negates any -- any notion that there should have been
8 knowledge on the part of the church. She says the weather
9 conditions, I wasn't expecting ice out there. The only
10 thing that she raised in her deposition was the fact that
11 she didn't feel lighting conditions were adequate in the
12 parking lot, and while we have a factual dispute on
13 whether the church lights were or not, the fact of the
14 matter is, is that the hazard that we're talking about
15 isn't the lighting. The hazard we're talking about is ice
16 in the parking lot, and lighting conditions there's no
17 duty to warn of, we cite case law in our brief that
18 affirms that. There's no duty to warn of lighting
19 conditions, because whether lights are on or not, whether
20 it's dark or it's light is considered in itself open and
21 obvious, and I -- I said I wasn't going to use that
22 phrase, but there it is, but ultimately, the church did
23 not have any duty to Ms. Molitoris here, because there was
24 no knowledge, and to the extent that the church should
25 have know of ice in the parking lot, Ms. Molitoris, a

1 lifelong resident of Michigan, also would have had
2 constructive notice of that, so there's simply no duty.

3 So Plaintiff cannot establish a prima facie case
4 of premises liability.

5 Now, in the other count of Plaintiff's
6 complaint, they attempt to plead a -- a cause of ordinary
7 negligence. Michigan's appellate courts have frequently
8 rejected the attempt to turn a premises case into an
9 ordinary negligence case. We look at the hazard, not the
10 language used in pleadings, and the hazard here ultimately
11 is ice, so that's a condition on the premises, and for
12 that reason, Plaintiff's count of ordinary negligence also
13 should be dismissed.

14 THE COURT: Okay.

15 Response?

16 MR. AHMAD: Thank you, Your Honor.

17 Plaintiff doesn't contest the dismissal of the
18 ordinary negligence claims. I agree with Brother Counsel
19 that this is a straight premises liability claim.

20 Unfortunately, that's probably where our
21 agreements end.

22 Initially, the disagreement over whether the
23 Plaintiff is a invitee or licensee hinges on this Court's
24 interpretation of not only the case law, but whether or
25 not there was a benefit that inured to the church by Ms.

1 Molitoris assisting with the community outreach in helping
2 prepare meals at the church property, so that those meals
3 could be served at the church property for the less
4 fortunate.

5 I think it's unquestionable that there is a -- a
6 tangible benefit to the church that inures to the church
7 by having this community outreach, by providing meals to
8 the -- the public, the less fortunate, which the Plaintiff
9 in this case assisted them with.

10 Indeed, if we look at the Defendant's own brief,
11 Your Honor, page 7 of the Defendant's brief, they say an
12 invitee is a person who enters upon the land of another
13 upon an invitation. Well, Ms. Molitoris was invited by
14 the church to help prepare these meals. She is a classic
15 invitee going to the church to help them, help the church
16 provide meals to the public.

17 A similar case can be found in the case that we
18 cited in our brief, Your Honor, White versus Badalamenti,
19 where slip and fall on ice, the plaintiff is at the home
20 of an individual, the defendant, who is watching the
21 plaintiff's child. The plaintiff is going to the
22 defendant's home to pick up the child. The plaintiff is
23 not paying the defendant any money to watch her child. So
24 there is no pecuniary benefit that inured to the defendant
25 in that case, and yet -- and yet, the Court of Appeals

1 found in that case that simply because there wasn't money
2 exchanged does not mean that a benefit did not inure to
3 the defendant by watching this child, and that it would be
4 a mistake to characterize an exchange of benefits that
5 weren't pecuniary as only social by default in those
6 circumstances.

7 And I think that's particularly apposite to this
8 case, where the benefit that's being provided to the
9 church by people coming in so that they can provide free
10 meals is far more tangible than watching someone else's
11 child, which the Court found was still of benefit to the
12 Defendant, such that it created an invitee status in the
13 Plaintiff at that time.

14 So if we look at what the invitee status allows
15 this Plaintiff in terms of a duty, the Defendant in its
16 brief says that if this Court finds that Ms. Molitoris is
17 an invitee, there is no question that they are not
18 entitled to summary disposition. Their entire argument --
19 their entire argument hinges on this Court finding as a
20 matter of law, viewing all the facts in a light most
21 favorable to the Plaintiff that the Plaintiff is an
22 invitee -- or I'm sorry, a licensee. Failing that, the
23 motion must be denied, and the Defendant agrees with that.

24 If we then move beyond, if -- if this Court
25 believes, again contrary to what I am arguing, but if this

1 Court then finds no, you know what, Mr. Ahmad, I
2 appreciate your argument, but I think Ms. Molitoris was a
3 licensee, that does not end the inquiry. The Defendant, I
4 know in their reply brief seemed to indicate or imply to
5 the Court that the Plaintiff agreed that if they're a
6 licensee, well then summary disposition was appropriate.
7 That is absolutely 100 percent not true.

8 If you look at, again, the White versus
9 Badalamenti case, which is instructive for several
10 reasons, not the least of which the invitee analysis, but
11 the Court went on in White versus Badalamenti to further
12 reverse the trial court's finding that not only did they
13 not believe she was a licensee, but that she was an
14 invitee, but even if she was a licensee, it was still a
15 question of fact as to whether the defendant knew or
16 should have known of the hazard, and whether or not that
17 hazard was unreasonable, so they reversed the trial court
18 on both counts; finding that the plaintiff was a licensee
19 was reversed, they found that she was an invitee, and that
20 even if that finding of a licensee was correct, it was a
21 question of fact as to whether the defendant owed a duty
22 to that plaintiff, and whether they breached that duty.

23 The Blackwell case versus Franchi, a much more
24 recent case, Your Honor, is also instructive. This Court
25 may recall the Blackwell case, where the plaintiff was a

1 clear licensee at the home of friends for a Christmas
2 party. Actually it was a work Christmas party. And she
3 walked into a room, which was dark, and didn't see a step
4 down and fell and fractured her ankle. Trial court
5 reversed, saying that, you know, dark, it's open and
6 obvious, too bad for you; the Court of Appeals reversed
7 saying as a licensee, you are still entitled, even in a
8 dark room, to believe that it's reasonably safe, and that
9 the defendant owed a duty to you as a licensee, a clear
10 licensee in that case, to make sure that the -- the
11 premises was well lighted and safe.

12 That is completely applicable to this case, Your
13 Honor. The contention -- the core contention is that
14 there was a hazard because Ms. Molitoris was faced with a
15 pitch -- essentially a pitch black parking lot, which the
16 Defendant either knew or had to have known, it's their
17 parking lot and their lighting, and it was completely
18 pitch black. We know that because the deposition
19 testimony indicates that when the Plaintiff fell, she had
20 to basically play a game of Marco Polo for someone to find
21 her as she laid on the ground because it was so dark.

22 So this case is applicable to Blackwell, that
23 ruling finding that it's a question of fact whether or not
24 the Defendant breached their duty to the licensee is
25 completely applicable to this case.

1 Look at the elements of a -- a licensee. What
2 duty is owed. Was this a hazard that the Defendant -- or
3 the Plaintiff could have -- or should have discovered.
4 Absolutely not, it was pitch black. It's black ice. Was
5 there an unreasonable risk of harm. It's the same risk of
6 harm that existed in Blackwell and White. Did the
7 Defendant know or should have known. Well, they certainly
8 knew that their lot was not adequately lit. At minimum,
9 that creates a fact question, which must be resolved by
10 the jury.

11 So in summary, Your Honor, Ms. Molitoris is an
12 invitee and the motion should be denied, or even if this
13 Court finds that she's a licensee, the duty that was owed
14 by the Defendant was breached, or at a minimum, a fact
15 question exists as to whether it was breached, and this
16 matter should proceed to trial.

17 THE COURT: All right. Thank you.

18 MR. ZICK: Your Honor, if I could respond just
19 briefly?

20 THE COURT: Very briefly.

21 MR. ZICK: Okay.

22 Your Honor, Brother Counsel distorts the term
23 invitee by -- by pointing to the Court the fact that Ms.
24 Molitoris was quote/unquote, invited to the church. That
25 is not the test for an invitee. An invitee is a business

1 invitee, it's somebody on a property to bestow a
2 commercial benefit to the church, and when counsel
3 represents that she was there to -- to bestow this
4 tangible benefit, the tangible benefit he suggests is
5 quite intangible. It's that hypothetically, this
6 community outreach will hypothetically encourage people to
7 join the church, who will hypothetically then give
8 voluntary donations of unknown amounts.

9 The Michigan Supreme Court in the Stitt case
10 held that even voluntary donations directly from an
11 individual on a church's property does not mean that they
12 are an invitee. They are there as part of their
13 membership with the church. In fact, they pointed out,
14 they said indeed we find that many religious people would
15 find it offensive to have their charitable donations
16 characterized as commercial.

17 Ms. Molitoris was there out of charity, not
18 commercial -- or not any commercial purpose, so her
19 presence on the church's premises, just like the cases
20 involving church parishioners and volunteers that have
21 been decided in published decisions binding on this Court,
22 she is a licensee, and as a licensee, the -- the duties
23 owed to her are very limited, and there is a dispute, she
24 is actually the only person -- counsel makes reference to
25 this pitch black -- black parking lot. She's the only

1 person that testified that the lights were off. Everyone
2 else who testified regarding whether they remembered the
3 lights were on or off, said they were actually on, so this
4 idea that there's some pitch black parking lot really is
5 not supported in the record, but ultimately, the duty is
6 to warn of dangers that are known to the church and that
7 Ms. Molitoris did not have reason to know of.

8 We're not talking about lighting, because she
9 can see whether it's dark or not as she's already walking
10 through that parking lot. The question becomes the hazard
11 in this case, the ice; did the church have reason to know
12 of it. No, they did not. She testified -- under oath she
13 says no, I don't think they needed to salt or clear the
14 parking lot that day, I -- I was surprised by the weather,
15 I -- it had been warmer. That right there tells us that
16 the church did not have notice, and that she cannot meet
17 her burden to make out a prima facie negligence case, or
18 prima facie premises liability case as a licensee.

19 Thank you, Your Honor.

20 THE COURT: Thank you. Okay.

21 Plaintiff is a parishioner and volunteer at St.
22 Mary's Catholic Church -- St. Mary's Magdalen, I think,
23 Catholic Church. On February 22nd, '21, she was
24 volunteering at a weekly church event where the church
25 prepares and provides free meals to the community. As

1 Plaintiff was leaving the church at approximately 7 p.m.
2 that day, she walked through the church parking lot, and
3 she slipped and fell. Plaintiff indicated after she fell,
4 she could feel the ice beneath her.

5 Plaintiff stated the lights in the parking lot
6 were not on, but several other volunteers stated the
7 lights were on and the weather was clear.

8 When she fell, Plaintiff suffered a fractured
9 left wrist, requiring surgery, fractures to her pelvis,
10 and a fractured right hip.

11 I feel very sorry for the Plaintiff, just to let
12 you know, I have broken my wrist recently. It's not fun,
13 especially when you're right-handed.

14 But to continue with my opinion, on January
15 18th, '22, Plaintiff filed a two-count complaint alleging
16 count one negligence, count two premises liability.
17 Essentially, Plaintiff asserts Defendant was negligent in
18 failing to maintain the parking lot. She also asserts
19 Defendant had a duty to inspect the parking lot and remove
20 any dangerous condition or warn her of the risk of harm,
21 but failed to do so.

22 Defendant filed a motion for summary disposition
23 under MCR 2.116(C)(10), asserting Plaintiff cannot
24 maintain her claim for ordinary negligence, as this is
25 really a premises liability case.

1 Michigan law is clear that where a plaintiff's
2 claim arises as a result of allegedly hazardous conditions
3 on land, the plaintiff's claim sounds solely in premises
4 liability.

5 In this case, Plaintiff's complaint alleges she
6 was injured as a result of a hazardous condition on the
7 land, that being ice in the church parking lot.

8 Because Plaintiff's complaint sounds in premises
9 liability only, her allegations of ordinary negligence
10 cannot be maintained and are dismissed as a matter of law.

11 Defendant next -- next asserts on that day
12 Plaintiff was injured, she was a licensee, and therefore
13 the church had no duty to inspect the parking lot,
14 discover and remove the ice, or warn her -- warn her the
15 ice was present.

16 Plaintiff counters that she was an invitee, as
17 the church received a pecuniary benefit from her being
18 there, in that her volunteer activities constitute
19 community outreach, which allows the church to advertise
20 its service, increase its membership, and build its
21 coffers. Michigan law provides that to attain the status
22 of an invitee, a plain -- plaintiff must be on the
23 property for a business purpose, and must show the
24 premises were held open for a commercial purpose, and that
25 is Stitt versus Holland Abundant Life Fellowship, 462

1 Michigan 591, a 2000 case.

2 The Court finds at the time she fell, Plaintiff
 3 was on the Defendant's premises as a volunteer, and her
 4 activities were not commercial in nature, nor done for
 5 commercial purposes.

6 Accordingly, the Court finds Plaintiff was a
 7 licensee on the day she was injured. As a licensee, the
 8 only duty the church had to warn -- had --

9 THE CLERK: Judge, I don't know if they can hear
 10 us. We may have lost the Zoom, so I just --

11 THE COURT: Thank you.

12 Okay, I'm not sure what you guys heard and
 13 didn't hear. I was looking down. The video clerk saw
 14 that you were no longer up there on Zoom. Do you think
 15 you -- could -- could you still hear me talk or not?

16 MR. ZICK: No, Your Honor.

17 MR. AHMAD: Yes, I missed --

18 THE COURT: No? Okay. I'm going to back up for
 19 a paragraph or two here.

20 Defendant next asserts that on the date
 21 Plaintiff was injured, she was a licensee, and therefore
 22 the church had no duty to inspect the parking lot,
 23 discover and remove the ice, or warn her the ice was
 24 present.

25 Plaintiff counters that she was an invitee, as

1 the church received a pecuniary benefit from her being
2 there, in that her volunteer activities constitute
3 community outreach, which allows the church to advertise
4 its service, increase its membership, and build its
5 coffers. Michigan law provides that to attain the status
6 of an invitee, a plaintiff must be on the property for a
7 business purpose, and must show the premises were held
8 open for a commercial purpose, citing Stitt versus Holland
9 Abundant Life Fellowship, 462 Michigan 591, a 2000 case.

10 The Court finds at the time she fell, Plaintiff
11 was on the Defendant's premises as a volunteer, and her
12 activities were not commercial in nature, nor done for
13 commercial purposes.

14 Accordingly, the Court finds Plaintiff was a
15 licensee on the day she was injured. As a licensee, the
16 only duty the church had to Plaintiff was to warn
17 Plaintiff of hidden dangers, which posed an unreasonable
18 risk of harm, of which the church was aware, and of which
19 Plaintiff was -- was not aware.

20 Plaintiff testified at her deposition that she
21 is a lifelong Michigan resident, is familiar with Michigan
22 winters, and is aware that freezing temperatures bring ice
23 and slippery conditions. And I cite Plaintiff's
24 deposition at page 53.

25 Under these circumstances, Defendant has

1 establish Plaintiff had reason to know of the potential
2 for ice in the parking lot. The Court notes Plaintiff
3 presented no evidence to show the church was actually
4 aware of the formation of ice in the parking lot.

5 Additionally, Plaintiff presented no evidence
6 that there was anything special about the ice in question.
7 From all accounts, the ice simply formed in the parking
8 lot when the temperature dipped below zero. There can be
9 no question that ice is an ordinary hazard in Michigan.
10 Just because Plaintiff slipped and fell to the ground,
11 which is truly unfortunate, does not mean the ice
12 presented an unreasonable risk of harm.

13 Defendant asserts and this Court agrees
14 Plaintiff's premises liability claim must fail as a matter
15 of law, since one, Plaintiff produced no evidence the
16 church was aware of the patch of ice in the parking lot;
17 two, Plaintiff has been a Michigan resident for 60 plus
18 years, and has reason to know that there could be ice in a
19 parking lot on a cold February day; three, Plaintiff has
20 not shown that the patch of ice she fell on presented an
21 unreasonable risk of harm; and four, as a licensee,
22 Defendant had no duty to inspect the parking lot, discover
23 the ice, and either remove it or warn Plaintiff.

24 Accordingly, the Court will grant Defendant's
25 motion for summary disposition under MCR 2.116(C) (10), and

1 dismiss Plaintiff's complaint, as Plaintiff's claim for
2 ordinary negligence sounds solely in premises liability,
3 and as Plaintiff has failed to state a prime facie claim
4 for premises liability as a matter of law.

5 So, I am granting Defendant's motion for summary
6 disposition. If -- Mr. Zick, if you could see to it that
7 you send us an order, I will give you the email address.
8 If you would send it to c as in cat brooks, b-r-o-o-k-s at
9 livgov.com. If you send me that order, I will sign it.

10 MR. ZICK: Thank you, Your Honor.

11 THE COURT: All right. Thank you. Thank you
12 everybody; I'm sorry we lost you on Zoom. Once in a while
13 that happens, and we never know when or why, but thank you
14 very much, everybody.

15 MR. AHMAD: Thank you, Your Honor.

16 (At 4:08 p.m., proceedings concluded)

17 - - -

CERTIFICATION

I certify that this transcript, consisting of 21 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable L. Suzanne Geddis on Thursday, January 5, 2023, as recorded.

Videotape proceedings were recorded and were provided to this transcriptionist by the court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceedings, or for the content of the videotape provided.



/s/ Deanna L. Harrison, CER 7464
Advantage Reporting
248-245-6610

Linda Molitoris
08/11/2022

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STATE OF MICHIGAN

IN THE 44th CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

LINDA MOLITORIS,

Plaintiff, Case No. 22-31366-NO
Hon. L. Suzanne Geddis

vs.

SAINT MARY MAGDALEN CATHOLIC
CHURCH,

Defendant.

The Deposition of LINDA MOLITORIS, taken by the
Defendant, pursuant to Notice, before Donna M. Gaft
(CSR-6478), a Notary Public within and for the County of
Oakland, (acting in Wayne County), State of Michigan, at
18927 Farmington Road, Suite 110, Livonia, Michigan, on
Thursday, August 11, 2022.

APPEARANCES:

OLIVER LAW FIRM
BY: DAVID BURKE, Esq.
18927 Farmington Road, Suite 110
Livonia, Michigan 48152
(248) 477-1900

Appearing on behalf of the Plaintiff.

FOSTER, SWIFT, COLLINS & SMITH, P.C .
BY: DANIEL S. ZICK, Esq.
313 South Washington Square
Lansing, Michigan 48933
(517) 371-8185

Appearing on behalf of the Defendant.



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LINDA MOLITORIS

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EXHIBITS

#1: Photograph 26
#2: Photograph 27
#3: Photograph 27

(Exhibits attached)

Linda Molitoris

08/11/2022

Page 3

1 Livonia, Michigan
2 Thursday, August 11, 2022
3 at or about 10:11 a.m.

4 - - -

5 LINDA MOLITORIS

6 a Plaintiff herein, having been duly sworn by the
7 Reporter/Notary Public, testified as follows:

8 MR. ZICK: Let the record reflect this is
9 the deposition of Linda Molitoris, taken pursuant to
10 notice, to be used for all purposes allowable under
11 the Michigan Court Rules.

12 EXAMINATION

13 BY MR. ZICK:

14 Q Ma'am, can you please state your name for the record.

15 A **Linda Molitoris.**

16 Q Have you ever had your deposition taken before?

17 A **No.**

18 Q So I'm going to go over some ground rules. I'm sure
19 your attorney has prepared you, but for the sake of
20 the record I'm going to go over a couple things.

21 First and foremost, as you can see to my
22 left, your right, we have a court reporter here.
23 She's taking down everything that is said between us.
24 With that, in order to have a clear record I'm going
25 to need verbal answers. So if you give me a nod of

1 the head or an uh-huh or an uh-uh, I'm going to say is
2 that a yes or is that a no.

3 **A Okay.**

4 **Q** I'm not trying to give you a hard time, I'm just
5 trying to make sure we have a clear record.

6 **A Correct.**

7 **Q** Secondly, we can only speak one at a time. It makes
8 it very difficult for the court reporter if multiple
9 people are speaking. So even though you may know
10 where I'm going with a question, allow me to finish my
11 question and I'll allow you the same courtesy with
12 your answers.

13 **A Okay.**

14 **Q** And then at any point if you do not understand my
15 question, don't hear it, please feel free to ask me to
16 repeat it. Okay?

17 **A Okay.**

18 **Q** Lastly, I don't think it's going to take very long,
19 but it's not an endurance contest so if you need to
20 take a break at any point let me know.

21 So you understand you were just placed
22 under oath by the court reporter?

23 **A Yes.**

24 **Q** So although we're not in a courtroom or in front of a
25 judge, the same rules apply. Okay?

1 **A** **Yes.**

2 **Q** Are you taking any medications that affect your
3 ability to testify today?

4 **A** **No.**

5 **Q** Are you on any medications currently?

6 **A** **Yes.**

7 **Q** What medications?

8 **A** **I take a thyroid medicine, I take a statin. I have**
9 **AFib so I take heart medicine for that.**

10 **Q** Is a statin, is that the thyroid medication?

11 **A** **No.**

12 **Q** What is the statin for?

13 **A** **Statin is -- a statin is for, to control cholesterol.**

14 **Q** Any other medications?

15 **A** **I take potassium, calcium. There's three different**
16 **medicines for my AFib, and that is it.**

17 **Q** None of those medications affect your ability to
18 remember things?

19 **A** **No.**

20 **Q** Now, our deposition notice that we sent included a
21 request for any documents you had in your possession.

22 Did you bring any documents with you to this
23 deposition?

24 **A** **No.**

25 **Q** So is it fair to assume any documents you had in your

- 1 possession you already supplied to your attorneys?
- 2 **A Correct.**
- 3 Q Did you review any documents in preparation for this
- 4 deposition today?
- 5 **A At home?**
- 6 Q Anywhere.
- 7 **A No.**
- 8 Q Have you spoken to anybody other than your attorneys
- 9 about this deposition today?
- 10 **A No.**
- 11 Q Ma'am, what is your date of birth?
- 12 **A 9/1/51.**
- 13 Q Where were you born?
- 14 **A Detroit, Michigan, Deaconess Hospital.**
- 15 Q Born in Detroit. Where did you grow up?
- 16 **A Detroit.**
- 17 Q Where did you attend high school?
- 18 **A Rosary High School in Detroit.**
- 19 Q Any post high school education?
- 20 **A Some college at Henry Ford, business classes.**
- 21 Q Any other?
- 22 **A No.**
- 23 Q What is your current address?
- 24 **A 600 Woodberry Lane in Brighton 48116.**
- 25 Q How long have you lived at that address?

- 1 **A** **Ten years.**
- 2 **Q** Does anybody else live at that address with you?
- 3 **A** **No.**
- 4 **Q** Are you currently married?
- 5 **A** **No. Divorced.**
- 6 **Q** When were you divorced?
- 7 **A** **I was divorced in, about 12 years ago.**
- 8 **Q** What is your former spouse's name?
- 9 **A** **Blaise, B-L-A-I-S-E, Molitoris.**
- 10 **Q** Any children?
- 11 **A** **Two daughters.**
- 12 **Q** I understand from your answers that would be Sarah
- 13 Molitoris and Julie?
- 14 **A** **Julie Mittan.**
- 15 **Q** Any grandchildren?
- 16 **A** **Two.**
- 17 **Q** What are their names?
- 18 **A** **Clare and Emoline.**
- 19 **Q** Who do Clare and Emoline belong to?
- 20 **A** **Julie.**
- 21 **Q** Any other marriages other than the one to Blaise?
- 22 **A** **I was married in 1975 to Stan Spiewak, S-T-A-N,**
- 23 **S-P-I-E-W-A-K.**
- 24 **Q** Where did you live prior to your current address?
- 25 **A** **I lived in South Lyon.**

- 1 Q Do you remember the address?
- 2 A 12990 Sue Dee, S-U-E D-E-E, Lane in South Lyon.
- 3 Q How long did you reside at that address?
- 4 A We lived there almost ten years. We built the home.
- 5 Q When you say "we" was that you and your ex-husband?
- 6 A Yes.
- 7 Q Have you lived in Michigan your entire life?
- 8 A Entire life.
- 9 Q Are you currently employed?
- 10 A I have a very, very part-time job watching children.
- 11 Q How many hours a week do you watch children?
- 12 A I watch children only during the school year, every
- 13 other week for approximately four hours a day.
- 14 Q How many children?
- 15 A At home right now there are three.
- 16 Q Are these children family members?
- 17 A No.
- 18 Q Are they children of friends or acquaintances?
- 19 A I met them through church.
- 20 Q So four hours a day, five days a week, every other
- 21 week?
- 22 A Uh-huh, basically, yeah.
- 23 Q So about 40 hours a month?
- 24 A About, yeah.
- 25 Q Currently you're not doing that?

- 1 **A** **No, it's the summer.**
- 2 **Q** Is it your plan to do that once school starts?
- 3 **A** **Yes.**
- 4 **Q** And, I don't know, how many kids? I don't know if I
- 5 asked that.
- 6 **A** **This is going to be the 11th year, and there was four,**
- 7 **one is already out of the household.**
- 8 **Q** Are these kids from the same family?
- 9 **A** **Same mother.**
- 10 **Q** How long have you been doing that; you said 11 years?
- 11 **A** **Yes, this school year will be 11 years.**
- 12 **Q** And you're paid for it?
- 13 **A** **Yes.**
- 14 **Q** How much are you paid an hour?
- 15 **A** **\$12 an hour.**
- 16 **Q** And I assume this is you're paid in cash?
- 17 **A** **Uh-huh, yes.**
- 18 **Q** Are you 1099?
- 19 **A** **No.**
- 20 **Q** Do you file taxes on this amount?
- 21 **A** **No.**
- 22 **Q** Prior to this current childcare position did you have
- 23 any other employment?
- 24 **A** **After I retired from AAA -- I was at AAA for 40 years,**
- 25 **and after I retired from AAA I watched an elderly lady**

1 for awhile until she went in a nursing home. That was
2 maybe for a year.

3 Q About a year?

4 A Yes.

5 Q And same situation, kind of a retirement job, post
6 retirement job I suppose?

7 A Yes, fill my time up.

8 Q Yeah. Let's go to AAA. You worked for AAA. What was
9 your position there?

10 A I started out as a collection clerk, and I was a
11 supervisor for many years in collections. And then
12 when I had my daughter I ended up going back part
13 time, 20 hours a week. And that's when I retired, I
14 was working in underwriting with umbrella policies,
15 and I retired after 40 years.

16 Q So you weren't one of these claim reps that these guys
17 hate, right?

18 A No, never worked in claims, always in collections and
19 underwriting.

20 Q So sounds like you worked for AAA the majority of your
21 career. Any other employers, like formal employment
22 that you had in your life?

23 A Prior to AAA?

24 Q Yes.

25 A I worked at Dearborn Medical. I worked for four

1 doctors, two ob/gyns and a surgeon and a pediatrician.
2 Just in the office making appointments, signing the
3 clients in and out.

4 Q How long did you work there?

5 A Until I got my job at AAA. Maybe a year and a half.

6 Q What's the timeframe?

7 A I graduated in 1969 from Rosary. I started working at
8 Dearborn Medical probably right after that. And then
9 I started at AAA in February of '70.

10 Q During your time with Dearborn Medical and AAA, did
11 you ever have any workers' compensation claims?

12 A None.

13 Q Any on-the-job injuries ever?

14 A None.

15 Q Now, I understand your current health insurance, we've
16 received information, you've got Blue Cross Blue
17 Shield of Michigan which appears to be a Medicare
18 Advantage Plan?

19 A Yes.

20 Q Obviously you have Medicare as well?

21 A Yes.

22 Q Any other form of insurance?

23 A No.

24 Q Dating back to last year, was there any other forms of
25 insurance you may have?

- 1 **A** **No.**
- 2 **Q** I'm just trying to clarify because I'm trying to see
- 3 if there are any liens or anything like that that we
- 4 need to be aware of?
- 5 **A** **No.**
- 6 **Q** Now, we're here today to talk about an accident that
- 7 occurred at Saint Mary Magdalen Church?
- 8 **A** **Right.**
- 9 **Q** How long have you been attending Saint Mary's?
- 10 **A** **Probably around eight years.**
- 11 **Q** And how is it that you first began to attend Saint
- 12 Mary's?
- 13 **A** Our former priest at our church retired. We got a new
- 14 priest, did not care for him. Friends went to Mary
- 15 Magdalen and I switched over to Mary Magdalen.
- 16 **Q** And you also volunteer at the church, correct?
- 17 **A** **I do.**
- 18 **Q** How long have you been volunteering there?
- 19 **A** **I've been volunteering there probably just shortly**
- 20 **after I joined, because I was active in my other**
- 21 **church.**
- 22 **Q** Are you still active at Mary Magdalen?
- 23 **A** **Yes, I am.**
- 24 **Q** How often do you attend service?
- 25 **A** **Every week unless I'm out of town.**

- 1 Q That would be Sundays?
- 2 A Yeah.
- 3 Q And then in addition to attending mass do you also
- 4 volunteer still?
- 5 A Yes.
- 6 Q How often do you volunteer?
- 7 A I volunteer in two different areas. One of them is
- 8 for funeral luncheons, we put on funeral luncheons.
- 9 I'm one of them that helps get the meal together. So
- 10 that's random, whenever we have one. And Magdalen's
- 11 Kitchen.
- 12 Q Magdalen's Kitchen, how frequent is that?
- 13 A Magdalen's Kitchen is every Monday unless it's a
- 14 holiday.
- 15 Q What is it you do at Magdalen's Kitchen?
- 16 A I help put the meal together.
- 17 Q Are you cooking?
- 18 A Yes, I'm cooking. We have a lead cook and they tell
- 19 us our jobs, and we do it and we feed people.
- 20 Q Who is the lead clerk there?
- 21 A It was Jeri Gawlowski.
- 22 Q Gawlowski?
- 23 A Yes, it was Jeri. And then she quit the church and
- 24 quit her job there, she was the bookkeeper. And then
- 25 Dave is now I believe the head. And I don't know

- 1 **Dave's last name, I'm sorry.**
- 2 Q Is it Dave Rychlik?
- 3 A **Yes.**
- 4 Q We've had a lot of these names thrown around. Any
5 other individuals you regularly encounter at the --
- 6 A **Marcia McBride is another one that I usually work**
7 **with.**
- 8 Q Anyone else?
- 9 A **As leads, no.**
- 10 Q What about in meal preparation, anybody else who
11 assists with that?
- 12 A **There's a Mary Lou Silver, I think is her last name.**
13 **She's one of them. And she's the only one that --**
14 **other people just come and go, you know, they're not**
15 **that, yeah.**
- 16 Q Outside of the church do you have any hobbies or
17 social clubs that you --
- 18 A **I volunteer at Gleaners Shared Harvest Pantry in**
19 **Brighton. It is Livingston Gleaners Food Bank and**
20 **Shared Harvest Pantry is, shares the building with**
21 **them and we have a food pantry.**
- 22 Q What do you do there?
- 23 A **I answer phones now, make appointments for people.**
- 24 Q You say "now." Is there another role that you did
25 previously?

- 1 A I used to give the paperwork to the clients, to our
2 clients that would come in, and set up their
3 appointments for the next time that they could come
4 in. Explain our program to them, take intake
5 information on them. But after Covid they've gone
6 completely paperless so they put me on phone.
- 7 Q So that position is no longer?
- 8 A Right.
- 9 Q How long have you been volunteering at Gleaners?
- 10 A Probably nine or ten years.
- 11 Q Any other place where you volunteer?
- 12 A No, that's just church and Gleaners.
- 13 Q Any other social organizations you belong to?
- 14 A No.
- 15 Q Any hobbies?
- 16 A I love to bake cookies.
- 17 Q I'm sure the grandchildren like that?
- 18 A And so does the church and everybody else, yes,
19 Gleaners, yes.
- 20 Q What else?
- 21 A I'm very, very sociable. I have a lot of friends from
22 first grade on. No, I'm just filling my time.
- 23 Q Any gym memberships?
- 24 A I belong to Silver Sneakers, and I do have a gym
25 membership until Covid hit, and now I just do Silver

- 1 Sneakers at home. You can do videos at home.
- 2 Q What is Silver Sneakers?
- 3 A That's a program that I get through my Blue Cross that
- 4 they offer videos, they have live classes that you can
- 5 go on their website and say I want to do a Zumba class
- 6 or I want to do this, or I want to do a weightlifting
- 7 class. And it gives the information of how intense it
- 8 can be, and you just sign up and it pops up on your
- 9 computer. And I sit in my living room and I do the
- 10 stuff.
- 11 Q What types of programs do you typically do through
- 12 Silver Sneakers?
- 13 A I do weightlifting in my chair, with bands and stuff.
- 14 That's about all I do with them.
- 15 Q Do you use free weights or just the bands?
- 16 A Bands.
- 17 Q These are resistant bands?
- 18 A Yeah.
- 19 Q You said in your chair, so this is --
- 20 A Yeah, I just pull out my dining room chair.
- 21 Q Any other regular exercise?
- 22 A No.
- 23 Q Do you walk or anything like that?
- 24 A I walk, mailbox and stuff, but, yeah.
- 25 Q Do you walk for exercise?

- 1 **A** **Not anymore. I used to, but not anymore.**
- 2 **Q** When you say you used to, when did that stop?
- 3 **A** **After I fell.**
- 4 **Q** Is that something that any doctors told you you're no
5 longer able to do?
- 6 **A** **No.**
- 7 **Q** Has any doctor advised you that you shouldn't do it?
- 8 **A** **No.**
- 9 **Q** Is it something you've chose to limit because of pain?
- 10 **A** **Pain, uh-huh.**
- 11 **Q** And pain where?
- 12 **A** **In my hip.**
- 13 **Q** Which hip?
- 14 **A** **Right hip.**
- 15 **Q** Can you describe for me what a typical day would be
16 like?
- 17 **A** **Typical day for me is getting up seven or eight in the**
18 **morning, having a bowl of fruit, catching up on the**
19 **news, contacting friends, either on the phone or my**
20 **devices. I usually have some plans to do something**
21 **with somebody almost every day.**
- 22 **Q** The home you live in, that's a house?
- 23 **A** **It's a condo. It's a ranch condo.**
- 24 **Q** Do you receive any assistance around your condo?
- 25 **A** **No.**

- 1 Q You're able to cook, clean, remove trash?
- 2 A **Yes.**
- 3 Q Probably a no, but do you need any assistance right
- 4 now with personal care; dressing, grooming, anything
- 5 like that?
- 6 A **No.**
- 7 Q As we sit here today you mentioned walking gives you
- 8 pain in your right hip, correct?
- 9 A **Correct.**
- 10 Q As we sit here today are you having any other pain
- 11 right now?
- 12 A **No.**
- 13 Q Other than your right hip, does anything else bother
- 14 you with activity?
- 15 A **No.**
- 16 Q Now, this incident happened February 22, 2021; is that
- 17 right?
- 18 A **Correct.**
- 19 Q At that time who was your primary care physician?
- 20 A **Dr. Brandy Eberhardt.**
- 21 Q And where is Dr. Eberhardt located?
- 22 A **She's on Pontiac Trail in South Lyon.**
- 23 Q Do you know what practice she's with?
- 24 A **There's only the two doctors.**
- 25 Q Would it be South Lyon Family Docs?

- 1 **A** **Yes.**
- 2 **Q** And from your records, I see at that time you suffered
- 3 from AFib, sleep apnea, you had your gallbladder
- 4 removed at one point?
- 5 **A** **Years ago, yes.**
- 6 **Q** Any other ailments or medical conditions that you had?
- 7 **A** **No.**
- 8 **Q** Looks like your doctor was Dr., your heart doctor was
- 9 Dr. Hester at Michigan Heart?
- 10 **A** **Yes.**
- 11 **Q** I take it he's a cardiologist?
- 12 **A** **Yes, for my AFib.**
- 13 **Q** And then your family doc was Dr. Eberhardt. Were
- 14 there any other doctors that you treated with on a
- 15 regular basis in the ten years prior to this incident?
- 16 **A** **My dentist, my eye doctor.**
- 17 **Q** Who is your eye doctor?
- 18 **A** **I recently changed two years ago to LOL Eye Care in**
- 19 **Howell.**
- 20 **Q** Who is your dentist?
- 21 **A** **Dr. Brian Petersburg in Brighton on Grand River.**
- 22 **Q** And obviously you wear glasses?
- 23 **A** **Yes.**
- 24 **Q** Those are prescription?
- 25 **A** **Yes.**

- 1 Q Do you wear those all the time?
- 2 A Yes.
- 3 Q Do you have separate glasses that you use for
- 4 different activities?
- 5 A (Nodding head no).
- 6 Q Do you ever wear contacts?
- 7 A Not anymore.
- 8 Q Going back, the first question you shook your head and
- 9 then I moved passed it, but do you have other glasses
- 10 that you wear for other activities?
- 11 A No.
- 12 Q Thank you for that. So other than the conditions that
- 13 we discussed, you had no other medical conditions that
- 14 you can recall prior to this incident?
- 15 A No.
- 16 Q Have you ever been diagnosed with diabetes?
- 17 A Pre.
- 18 Q Prediabetes?
- 19 A Yes.
- 20 Q Did you ever have any issues with neuropathy, numbness
- 21 in your feet?
- 22 A No.
- 23 Q Where was your gallbladder removed?
- 24 A My girls were probably two and four, and they're in
- 25 their 30's now, so many, many years ago. Probably

- 1 **30 years ago.**
- 2 Q Do you remember where?
- 3 A **Oh, where it was removed?**
- 4 Q Yes.
- 5 A **Yes, gallbladder removed at Oakwood Hospital in**
- 6 **Dearborn.**
- 7 Q Prior to this incident did you ever any issues with
- 8 chronic pain?
- 9 A **No.**
- 10 Q Had you had any prior injuries that you had been
- 11 hospitalized for?
- 12 A **No.**
- 13 Q Had you ever been involved in a slip and fall incident
- 14 before?
- 15 A **No.**
- 16 Q Had you ever been in a car accident?
- 17 A **No.**
- 18 Q And you mentioned no work injuries?
- 19 A **No.**
- 20 Q Any other medical conditions prior to February last
- 21 year that we haven't discussed?
- 22 A **I do not believe so.**
- 23 Q And have you ever applied for Social Security
- 24 Disability?
- 25 A **No.**

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- 1 Q Ever been involved in any other lawsuit?
- 2 A **No.**
- 3 Q Never been a party to a lawsuit?
- 4 A **No.**
- 5 Q And you mentioned you've never given testimony or a
6 deposition before?
- 7 A **No.**
- 8 Q So this incident happened February 22, 2021; is that
9 correct?
- 10 A **Correct.**
- 11 Q Do you remember what the weather was like that day?
- 12 A **I walked into the church. Not really.**
- 13 Q Let's back up. You said you walked into the church.
14 What time do you arrive at the church?
- 15 A **We arrive at about 3:00 or 3:30.**
- 16 Q Do you recall what you did prior that day?
- 17 A **I probably worked at Gleaners, because I worked at
18 Gleaners on Monday mornings, and Magdalen Kitchen is
19 always on a Monday. So I was probably at Gleaners.**
- 20 Q But you don't know for sure, right?
- 21 A **Uh-uh.**
- 22 Q You gave me a list of medications earlier. Are those
23 medications the same now as they were at that time
24 last year?
- 25 A **Yes.**

1 Q And to your recollection you would have taken those
2 medications that day?

3 A **Absolutely.**

4 Q Do you recall what the temperature was like that day?

5 A **No.**

6 Q Do you know if it was below freezing?

7 A **No.**

8 Q Do you recall any snow falling that day?

9 A **No.**

10 Q Do you recall if it was raining that day?

11 A **No.**

12 Q Do you recall any snow or rain in the days preceding?

13 A **I don't remember.**

14 Q You said you arrived at the church at 3:00 that day.

15 Did anybody go with you to the church?

16 A **No.**

17 Q You drove yourself?

18 A **Uh-huh, correct.**

19 Q Do you recall if it was light out at the time you
20 arrived?

21 A **Yes.**

22 Q And do you recall the road conditions that day?

23 A **No.**

24 Q Do you recall the condition of the parking lot that
25 day?

- 1 **A** **No.**
- 2 **Q** Did you encounter any problems walking from your
3 vehicle to the church that day?
- 4 **A** **No.**
- 5 **Q** You mentioned that you arrive at 3:00. What time does
6 Magdalen's Kitchen start?
- 7 **A** **We allow people in at 5:30, and we serve them dinner**
8 **at 6:00.**
- 9 **Q** How long does dinner run?
- 10 **A** **About 45 minutes.**
- 11 **Q** Do you recall anyone else who was working at
12 Magdalen's Kitchen that day?
- 13 **A** **No.**
- 14 **Q** Do you know if Mark Dobek was there?
- 15 **A** **Yes, he's a dishwasher.**
- 16 **Q** Do you know if Jeri Gawlowski was there?
- 17 **A** **Yes.**
- 18 **Q** Do you know if Bill Gawlowski was there?
- 19 **A** **Yes.**
- 20 **Q** Do you remember any other individuals that were there?
- 21 **A** **Mary Lou and probably one or two other people, but I**
22 **don't know.**
- 23 **Q** Can't say for certain?
- 24 **A** **Yeah.**
- 25 **Q** From the point where you entered the church to the

1 point where you left that evening, did you go outside
2 at all?

3 A No.

4 Q Are there any windows in the area of Magdalen's
5 Kitchen?

6 A No.

7 Q So you would have been at the church. Do you recall
8 what time you left the church that evening?

9 A I usually leave after 7:00, so sometime after 7:00.

10 Q So you had been inside the past four hours?

11 A Uh-huh, yes.

12 Q During that time do you recall anybody making any
13 statements about the weather?

14 A No.

15 Q Do you remember Bill Gawlowski making a comment that
16 people should be careful because it's slippery
17 outside?

18 A No.

19 Q And you left after 7:00?

20 A Correct.

21 Q Was it dark out at that time?

22 A Yes, it was dark.

23 Q Were there lights on in the parking lot?

24 A No.

25 Q Can you take me through then in your own words how

1 this incident occurred?

2 A I left the church on the side door, which we enter and
3 go from, from the kitchen. I walked down the
4 sidewalk, headed towards my car. I got to the main
5 parking lot and I remember slipping, and I remember my
6 hand, my wrist hitting, and then I remember my face
7 hitting, and then my hip twisting. And I remember
8 being on the ground not able to -- I knew not to get
9 up. And I remember there was ice around me.

10 Q So, first, I'm going to show you this photograph. Is
11 this the door you would have exited through?

12 A Yes, that's the door.

13 MR. ZICK: We'll mark this as Exhibit 1.

14 MARKED FOR IDENTIFICATION:

15 DEPOSITION EXHIBIT 1

16 BY MR. ZICK:

17 Q And I'm going to show you a couple photographs here
18 and I would like for you to make an "X" where you
19 believe the fall occurred. So do you see on any of
20 those photographs where your fall would have occurred?

21 A Approximately. I usually park right here.

22 Q Go ahead and initial that "X". So you say
23 approximately right there. Is that visible then in
24 this picture, or is that angle not showing it?

25 A It's probably right around here.

1 Q And this might be --

2 A Do you want me to initial this?

3 Q Sure. And this might be a better angle, I'm not sure.

4 A It could be even maybe a little bit over from right
5 here.

6 Q So it's not in that photograph?

7 A No.

8 MR. ZICK: So we'll mark these two
9 exhibits here just so we have an idea. Let's mark
10 that as 2 and this as 3.

11 MARKED FOR IDENTIFICATION:

12 DEPOSITION EXHIBITS 2 and 3

13 BY MR. ZICK:

14 Q Now I'm going to back up and ask some more specific
15 questions about what you just told me. So as you were
16 exiting the church were you carrying anything?

17 A My purse.

18 Q Anything else in your hands?

19 A No.

20 Q I assume your purse is over your shoulder?

21 A Usually, yeah.

22 Q What type of shoes were you wearing that day?

23 A An athletic shoe. We used to call them tennis shoes.

24 Q Do you still have those shoes?

25 A I'm not sure.

1 Q Can you check when you go home and if you do can you
2 provide those to your attorney?

3 A **Yes, absolutely.**

4 Q Thank you, I appreciate that. Now, as you walked
5 through the parking lot were you looking where you
6 were walking?

7 A **Yes.**

8 Q Did you notice any snow or ice in the parking lot?

9 A **No.**

10 Q Did you see snow or ice in the grassy areas around the
11 parking lot?

12 A **No.**

13 Q Was there any snow mounds or anything that looked like
14 it had been plowed recently?

15 A **No.**

16 Q Just to be clear, you're saying there was not snow
17 mounds or do you not recall?

18 A **I don't recall.**

19 Q Do you recall if it was snowing at the time you were
20 walking out to your car?

21 A **No, I don't.**

22 Q Do you recall if it was raining?

23 A **No.**

24 Q Do you recall if the pavement appeared wet at all?

25 A **No.**

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1 Q What was the temperature like at the time you were
2 walking out to your car?

3 A 30's, 40's. I couldn't even tell you to be honest.

4 Q Now, you mentioned you noticed ice all around you
5 after you fell?

6 A Yes.

7 Q How was it that you noticed that ice?

8 A Because I was laying in the parking lot.

9 Q Could you see the ice?

10 A I could feel the ice, I could not see it.

11 Q You could feel it with your hands?

12 A Yeah.

13 Q Could you feel approximately how big the section of
14 ice was under you?

15 A No, because I couldn't move.

16 Q And as you're on the ground did anybody approach you?

17 A Not until Mark came out and I yelled for help.

18 Q How long was that?

19 A Probably five or ten minutes.

20 Q So you're on the ground approximately five or
21 ten minutes before anyone comes?

22 A Yes.

23 Q Did you have a cellphone on you at that time?

24 A Yes.

25 Q Were you able to reach that?

- 1 A No.
- 2 Q Was it in your purse?
- 3 A Yes.
- 4 Q When Mark came out what happened?
- 5 A I saw Mark come out and I yelled to him. And he said
- 6 where are you, and I said I'm in the parking lot. And
- 7 he said just keep talking. And in the dark he found
- 8 me.
- 9 Q After Mark found you did he help you up?
- 10 A He said, can I get you up, and I said I don't believe
- 11 I should try to get up.
- 12 Q Did anybody else come out while you were on the
- 13 ground?
- 14 A Mary Lou came out, and he yelled to her, Linda is out
- 15 here on the ground. She looked at me and she ran to
- 16 her car and got a blanket for me to cover me up.
- 17 Q Anybody else?
- 18 A Gradually Jeri and Bill came out. They were the last
- 19 two because they have to lock up. They came out and
- 20 wondered what was going on in the parking lot. Mark
- 21 had already called 911 and Jeri made the phone call
- 22 over to the rectory to tell Father Shawn, don't worry,
- 23 there's going to be an ambulance coming through. And
- 24 then we just waited for the ambulance.
- 25 Q Approximately how long did it take for the ambulance

1 to get there?

2 **A I would say 15 minutes.**

3 **Q Where did the ambulance take you?**

4 **A I chose St. Joe's.**

5 **Q Do you recall how long you were at the hospital?**

6 **A I was in the hospital over a week and then I was**
7 **transferred to Wellbridge.**

8 **Q What treatment was provided to you at the hospital?**

9 **A The hospital, I had surgery on my wrist because it was**
10 **shattered, I was basically in the bed the whole time**
11 **because of my hip and my pelvis. My face was swollen,**
12 **but that was just ice for that, there were no**
13 **stitches, yeah.**

14 **Q Did they put any hardware in your wrist?**

15 **A Oh, yes.**

16 **Q Did that hardware later have to be removed?**

17 **A No.**

18 **Q You still have it in your wrist?**

19 **A Yes.**

20 **Q Does it cause you pain or anything?**

21 **A No.**

22 **Q Plates and screws?**

23 **A Yes, according to my daughter.**

24 **Q And then you went to Wellbridge for inpatient**
25 **rehabilitation, right?**

- 1 **A** **Correct.**
- 2 **Q** And I assume there you did physical therapy?
- 3 **A** **When I was allowed to, yes.**
- 4 **Q** How long were you at Wellbridge?
- 5 **A** **I believe it was about six weeks or longer.**
- 6 **Q** And from Wellbridge you're then discharged home?
- 7 **A** **Correct.**
- 8 **Q** Did you have any care in your home after your
- 9 discharge?
- 10 **A** **Yes.**
- 11 **Q** Who did you receive that care from?
- 12 **A** **PT came out, OT came out, and a nurse came out.**
- 13 **Q** Were those all associated with The Care Team?
- 14 **A** **Yes.**
- 15 **Q** That's the home healthcare?
- 16 **A** **Yes.**
- 17 **Q** Did you receive any care from your daughters?
- 18 **A** **Yes, I had a daughter fly in from California.**
- 19 **Q** Which one?
- 20 **A** **Sarah. And she was able, she works for UCLA so**
- 21 **because of Covid she was working from home, not in her**
- 22 **office, so she was able to come and work at my dining**
- 23 **room table when she wasn't taking care of me.**
- 24 **Q** How long did Sarah stay with you?
- 25 **A** **Sarah stayed with me two weeks or two and a half**

1 weeks.

2 Q What types of things did she do?

3 A All the cooking, she made sure I got up, she helped me
4 around the condo. I was then on a walker and a
5 wheelchair. She took care of me, made sure I took my
6 meds, made sure I was okay, helped me get in and out
7 of bed.

8 Q Anybody else provide any assistance to you?

9 A I had occasional friends stop by to say hi, but really
10 Sarah was my caregiver.

11 Q Those friends were more like visitors?

12 A Yes.

13 Q What about Julie?

14 A Julie is a teacher in Okemos, so she -- that was
15 teaching time. So on the weekends she would come in
16 and check up on us, but she was teaching.

17 Q And February obviously is part of the school year?

18 A Yes.

19 Q So did you miss any time from caring for --

20 A Yes, I never finished out the school year with the
21 family who I watch their children.

22 Q Do you know specifically how many days then of work
23 you missed?

24 A I have no idea.

25 Q Do you know when the school year ended for Brighton?

1 **A** **It was St. Pat's School and Brighton High School.**

2 **They usually end June.**

3 **Q** Are you alleging as part of this lawsuit that you lost
4 wages from being unable to work that period of time?

5 **A** **I did lose wages, yes.**

6 **Q** Other than what we covered, was there anything else
7 that anyone had to do for you after you were
8 discharged home from Wellbridge?

9 **A** **I had friends come and they put in a walk, a ramp, so**
10 **I could get in and out in my wheelchair.**

11 **Q** Who put that ramp in for you?

12 **A** **I had got -- while I was in Wellbridge I had a company**
13 **come out and give me an estimate, it was outrageous,**
14 **thousands of dollars, and I said no thank you.**

15 And then I called a medical supply
16 company and they said they had some that you could
17 rent by the month. And so one of my friends went over
18 and measured how much I needed and he went and picked
19 it up. And two of my friends' husbands put it in for
20 me before I came home from the hospital.

21 **Q** So they installed the ramp that was rented?

22 **A** **Yes.**

23 **Q** Did you pay them for that?

24 **A** **No, I did not pay my friends.**

25 **Q** Did they ask for any payment?

- 1 **A** **No.**
- 2 **Q** Did you ever promise to pay them anything?
- 3 **A** **No.**
- 4 **Q** This was friends helping out of the goodness of their
- 5 heart?
- 6 **A** **Yes.**
- 7 **Q** But you did have to pay for the rental of the ramp?
- 8 **A** **Yes.**
- 9 **Q** Was the name of the medical supply company, was it
- 10 Access?
- 11 **A** **No, Advanced Medical.**
- 12 **Q** Advanced Medical?
- 13 **A** **Yes.**
- 14 **Q** Do you recall how much you had to pay for that?
- 15 **A** **I do not.**
- 16 **Q** Was it covered by your insurance?
- 17 **A** **No.**
- 18 **Q** So you had to pay out of pocket for that?
- 19 **A** **Yes.**
- 20 **Q** Any other medical equipment? You've talked about a
- 21 walker, a wheelchair, and the ramp.
- 22 **A** **The wheelchair, they advised me at Wellbridge to**
- 23 **request that as my one piece of medical equipment. So**
- 24 **a wheelchair was dropped off at my condo for me.**
- 25 **The walker, my daughter went up to the**

1 Brighton Senior Center, they have a closet and she
2 picked me up a walker. And she picked me up, they had
3 a bathtub stand so I could get in and out of my
4 walk-in shower without standing up in it.

5 Q Those were items that weren't prescribed?

6 A They told me I needed them. They told me I needed
7 them, but instead of purchasing them or renting them
8 we went through that closet.

9 Q So you didn't have to pay for them?

10 A No, and we returned them.

11 Q How long did you use the walker?

12 A Oh, a few months. Quite a few months.

13 Q What about the wheelchair, how long did you use that?

14 A I was in the wheelchair probably a good six,
15 eight weeks after I got home.

16 Q And the tub device?

17 A I used that until we returned it, until my daughter
18 left, because it was a very easy sit-down, slide in,
19 slide out.

20 Q Do you know how long you used that?

21 A A few months, two or three months.

22 Q Any other assistive devices you can think of?

23 A On my walker they had to put -- there was a name for
24 it, I can't remember it -- a piece of equipment so my
25 wrist would stay like this, so that was an extra piece

1 of equipment that had to be ordered.

2 Q When you say "stay like this", just for the record, it
3 would stabilize your wrist?

4 A Yes, and I wouldn't use it.

5 Q To prevent it from flexing?

6 A Yes, flexing or me using it.

7 Q Following your wrist surgery did you have a cast or
8 splint on your wrist?

9 A Both.

10 Q How long?

11 A Probably eight weeks or more.

12 Q So generally you had the walker for about six to
13 eight weeks?

14 A Yes.

15 Q Had the cast for about six to eight weeks?

16 A After I got home.

17 Q After you got home. Wheelchair was returned around
18 the same time the walker was?

19 A Yes.

20 Q Beyond six to eight weeks were you able to ambulate
21 without any assistive devices?

22 A I had a cane.

23 Q How long did you use the cane?

24 A I used the cane months afterwards for stability, yeah.

25 Q Was it one of these, the four-prong canes?

- 1 **A** **No, I was told not to get a four-prong cane.**
- 2 **Q** **Just a standard cane?**
- 3 **A** **Yes.**
- 4 **Q** **Why were you told not to get a four-prong?**
- 5 **A** **My PT lady said she had seen people get hurt with**
6 **them, they rely on them or something, I don't know.**
- 7 **She said, Linda, do not get that, get a**
8 **regular cane. And that's what I did, I followed her**
9 **instructions.**
- 10 **Q** **How long did you use the cane again?**
- 11 **A** **Once I was out of the walker I used it all the time**
12 **around the house, anywhere I went, yeah.**
- 13 **Q** **Do you remember when you stopped using the cane?**
- 14 **A** **Probably sometime in the summer.**
- 15 **Q** **How long did you go to physical therapy?**
- 16 **A** **After my PT was done at home I went to, I believe it**
17 **was eight weeks or ten weeks of therapy twice a week.**
- 18 **Q** **So you said after your PT was done at home. How long**
19 **did you do PT at home?**
- 20 **A** **About six weeks.**
- 21 **Q** **So you did six weeks at home?**
- 22 **A** **Yes.**
- 23 **Q** **And then you did eight weeks at physical therapy?**
- 24 **A** **Yes, at Probility.**
- 25 **Q** **And that was -- you just said the name?**

- 1 **A** **Probility.**
- 2 **Q** Probility?
- 3 **A** **Yes.**
- 4 **Q** Was the cane the last assistive device that you've
- 5 used?
- 6 **A** **Yes.**
- 7 **Q** And that was last summer?
- 8 **A** **Yes.**
- 9 **Q** You haven't used any assistive devices since that
- 10 time?
- 11 **A** **No.**
- 12 **Q** Since completing physical therapy, which sounds like
- 13 it was also last summer?
- 14 **A** **Yes.**
- 15 **Q** Have you had any additional treatment?
- 16 **A** **No.**
- 17 **Q** Do you do any home exercises on a regular basis?
- 18 **A** **With Silver Sneakers I do.**
- 19 **Q** Is that related to your injuries or something you do
- 20 for personal fitness?
- 21 **A** **Personal.**
- 22 **Q** Currently does anyone assist you with any daily
- 23 activities?
- 24 **A** **No.**
- 25 **Q** When is the last time you received any assistance with

- 1 daily activities?
- 2 A Probably -- boy, my daughter left, probably a month or
- 3 so or couple months after my daughter left.
- 4 Q Who was providing that assistance?
- 5 A I had friends that would help me out or drive me. I
- 6 had my daughter on the weekends, she would help me.
- 7 Q Was there a period of time you did not drive yourself?
- 8 A Oh, yes.
- 9 Q How long was that?
- 10 A I did not drive for a good two or three months after I
- 11 got out of the rehab.
- 12 Q Who would drive you?
- 13 A Friends, family.
- 14 Q What are the names of the friends and family that
- 15 would drive you?
- 16 A Pat Vanbuskirk, would be one. Rochel Tuzimsky would
- 17 drive me, pick up groceries. It was all after my
- 18 daughter left.
- 19 Q Any other individuals you can remember?
- 20 A Not off the top of my head, no.
- 21 Q And Sarah lives in Los Angeles?
- 22 A Yes.
- 23 Q How often do you see Sarah?
- 24 A I see her probably once a year.
- 25 Q Has she been back since she left?

- 1 **A** **No.**
- 2 **Q** How often do you see Julie?
- 3 **A** **I see Julie maybe once a month, especially during the**
4 **school year. I see Julie more in the summer because**
5 **she's not teaching.**
- 6 **Q** Did Julie have to come and provide you any additional
7 assistance last summer?
- 8 **A** **She would do my laundry for me when she came in, she**
9 **would do shopping for me when she would come in,**
10 **prepare meals, take me if I had to go someplace, yeah.**
- 11 **Q** When Julie wasn't around were you doing your own
12 laundry?
- 13 **A** **I could do my own laundry, but -- yes, yes, I would do**
14 **my own if she wasn't around.**
- 15 **Q** Were you doing your own shopping?
- 16 **A** **Not very much of it.**
- 17 **Q** Who else did your shopping then?
- 18 **A** **Pat would shop, Rochel would shop for me, I want to**
19 **say my sister might have come in and shopped for me**
20 **too.**
- 21 **Q** What is your sister's name?
- 22 **A** **Sharon Muston, M-U-S-T-O-N.**
- 23 **Q** Where does Sharon live?
- 24 **A** **In Grand Blanc.**
- 25 **Q** Do you have any other siblings?

- 1 **A** **A brother.**
- 2 **Q** What is your brother's name?
- 3 **A** **Doug Muston.**
- 4 **Q** Where does he live?
- 5 **A** **He lives in Lapeer area, Metamora.**
- 6 **Q** I take it your maiden name is Muston?
- 7 **A** **Yes.**
- 8 **Q** Any relation to a John Muston?
- 9 **A** **No.**
- 10 **Q** Would your brother ever provide any assistance?
- 11 **A** **He came for a visit.**
- 12 **Q** Not really assistance?
- 13 **A** **No.**
- 14 **Q** So your sister would help from time to time?
- 15 **A** **Uh-huh.**
- 16 **Q** Currently you are able to drive?
- 17 **A** **Yes.**
- 18 **Q** And you started driving again sounds like last summer
- 19 as well?
- 20 **A** **Yes.**
- 21 **Q** We talked about your right hip. Are there any other
- 22 activities -- you mentioned you have pain when
- 23 walking?
- 24 **A** **Yes.**
- 25 **Q** Is that every time you walk?

- 1 **A** **Yes.**
- 2 **Q** Does it vary in whether you're walking a lot or a
3 little?
- 4 **A** **Yes.**
- 5 **Q** Does it get worse the more you walk?
- 6 **A** **Yes.**
- 7 **Q** Does it hurt to stand?
- 8 **A** **Sometimes.**
- 9 **Q** Does it hurt to sit in a chair?
- 10 **A** **No.**
- 11 **Q** Any other things that your right hip bothers you when
12 doing?
- 13 **A** **Basically getting up and down, steps.**
- 14 **Q** Has any doctor talked about any potential need for
15 surgery on the hip?
- 16 **A** **No.**
- 17 **Q** Has any doctor told you you have arthritis in the hip?
- 18 **A** **No.**
- 19 **Q** Have you seen any doctor about your hip pain?
- 20 **A** **Not since I've been released from the hip doctor.**
- 21 **Q** You haven't addressed hip pain with your primary care
22 physician?
- 23 **A** **Yes.**
- 24 **Q** Has she given you any recommendations for that?
- 25 **A** **The only thing I take is Tylenol.**

- 1 Q You haven't been prescribed any pain killers?
- 2 A No.
- 3 Q Any anti-inflammatories?
- 4 A No.
- 5 Q Has she discussed any concern of arthritis or anything
- 6 in the joints?
- 7 A No.
- 8 Q Beyond what you just told me, is there anything else
- 9 that your hip bothers you when doing?
- 10 A Just general walking, getting up and down.
- 11 Q What about your wrist?
- 12 A Wrist can tighten up and be sore in the morning, and
- 13 once in awhile I get a sharp pain if I grab something
- 14 but it's in pretty good shape.
- 15 Q Those issues you didn't have before this incident?
- 16 A No.
- 17 Q Do you have the same strength in your left wrist as
- 18 you do in your right?
- 19 A No.
- 20 Q Has that changed?
- 21 A Yes. Since the fall, yes.
- 22 Q Okay. So by "no" I take it you mean that you have
- 23 less strength in your left wrist?
- 24 A Correct.
- 25 Q Are you able to gauge, is it 50 percent, is it 75?

- 1 **A** I would say it's maybe 25 percent less than I have in
2 this one.
- 3 **Q** Do you find that the range of motion in that wrist is
4 reduced at all?
- 5 **A** A little bit.
- 6 **Q** Are you right-handed or left-handed?
- 7 **A** I'm right-handed.
- 8 **Q** So right-hand dominant?
- 9 **A** Yes.
- 10 **Q** Is there anything that you're unable to do with your
11 left hand now?
- 12 **A** I don't lift anything heavy with it at all.
- 13 **Q** Anything else?
- 14 **A** Not that I can think of.
- 15 **Q** Any activities, talking broader, any activities that
16 your hip or your wrist prevents you from doing now
17 that you did before this fall?
- 18 **A** I'm not able to walk for very long distances with my
19 hip. I used to walk in Kensington a lot and I don't
20 do that anymore.
- 21 **Q** How long would you walk in Kensington?
- 22 **A** In Kensington I would walk three to four miles.
- 23 **Q** How often would you do that?
- 24 **A** Two or three times a week.
- 25 **Q** Any other physical exercise that you regularly did

1 before this incident?

2 **A I used to do Zumba and other things like that. I**
3 **don't do any of that anymore.**

4 **Q How often would you do Zumba?**

5 **A Couple times a month.**

6 **Q Where would you attend Zumba at?**

7 **A I would do it on Silver Sneakers.**

8 **Q And you don't do that program?**

9 **A No.**

10 **Q So Silver Sneakers, is it an app?**

11 **A Yes.**

12 **Q Does it track your exercises that you do?**

13 **A I'm not sure if it does or not.**

14 **Q Would it tell you you did this program on this date?**

15 **A I don't know, to be honest.**

16 **Q Other than Zumba and Silver Sneakers and walking in**
17 **Kensington Park, any other physical exercise you did**
18 **before this fall?**

19 **A No.**

20 **Q Walking. Are there any other activities that you no**
21 **longer do?**

22 **A Not that I can think of.**

23 **Q So as we sit here today, is it fair to say the primary**
24 **change in your life from now to before this fall would**
25 **be walking and lifting objects with your left hand?**

- 1 **A** **Yes.**
- 2 **Q** Is there any other, anything else I'm missing?
- 3 **A** **It's really the hip has stopped me from doing a lot**
- 4 **more activities than I used to do.**
- 5 **Q** Any other activities other than the walking?
- 6 **A** **No, not that I can think of.**
- 7 **Q** Are there times when somebody wants to say, hey, let's
- 8 go out to dinner and you say, I can't, my hip is
- 9 bothering me?
- 10 **A** **Yes.**
- 11 **Q** How often has that happened to you?
- 12 **A** **A few times, once or twice a month maybe.**
- 13 **Q** Do you recall the last time that happened?
- 14 **A** **No, I do not.**
- 15 **Q** Let's talk a little bit about the damages you're
- 16 seeking in this lawsuit. Do you know if you have any
- 17 unpaid medical bills?
- 18 **A** **Yes, I do.**
- 19 **Q** Who are your unpaid bills with?
- 20 **A** **Wellbridge Rehab. I believe there's still some left**
- 21 **with the hip doctor. Blue Cross Blue Shield -- or,**
- 22 **I'm sorry, Providence -- St. Joe's, I'm sorry, St.**
- 23 **Joe's. When I get them now I just send them over**
- 24 **here.**
- 25 **Q** Sure. So you've provided, all bills that you have you

- 1 provided those to your attorneys?
- 2 **A Yes.**
- 3 Q And are these amounts that either a service has not
- 4 covered by your insurance or copays, deductibles,
- 5 those things?
- 6 **A I have no idea.**
- 7 Q And you talked about lost wages?
- 8 **A Uh-huh.**
- 9 Q You're currently back working in childcare?
- 10 **A Not right now. School hasn't kicked back in.**
- 11 Q Is it your plan to return?
- 12 **A Yes.**
- 13 Q So this incident happened in February of 2021, right?
- 14 **A Yes.**
- 15 Q In the fall of 2021, did you return to childcare?
- 16 **A No.**
- 17 Q You didn't?
- 18 **A No.**
- 19 Q Have you returned to watching those kids at any point
- 20 between now and last February?
- 21 **A Yes.**
- 22 Q When did you return to doing that?
- 23 **A Last school year.**
- 24 Q So at the start of the school year?
- 25 **A Yes.**

- 1 Q So that would be the fall of 2021?
- 2 A Yes.
- 3 Q So going back --
- 4 A Yeah, I'm sorry. I didn't finish up the year, I fell.
- 5 And I don't work in the summer, but I went back last
- 6 September.
- 7 Q So if we're talking about what lost wages you're
- 8 seeking, it would be confined from February 2021 to
- 9 the end of the 2021 school year, correct?
- 10 A Correct.
- 11 Q And then you were able to return for the '21/'22
- 12 school year?
- 13 A Yes.
- 14 Q And it's your intent to return for the 2022/2023
- 15 school year?
- 16 A Yes.
- 17 Q And that's paid at \$12 an hour?
- 18 A Yes.
- 19 Q And approximately 40 hours a month?
- 20 A Approximately.
- 21 Q Now, are you seeking any compensation in this case for
- 22 noneconomic loss, or what they call pain and
- 23 suffering?
- 24 A I don't know, yes.
- 25 Q I'm looking at the complaint that was filed by your

1 attorneys. Have you reviewed this complaint?

2 **A Yes.**

3 Q So looking at Paragraph 10, Subparagraph E, you
4 mentioned you sustained shock and emotional damage?

5 **A Uh-huh.**

6 Q Can you describe that for me?

7 **A I had never fallen before, never broke anything in my**
8 **body before. I was truly in shock that this happened**
9 **to me. Being put on the ambulance and being in so**
10 **much pain, being taken to St. Joe's and having to be**
11 **restricted in that bed, both at Wellbridge and the**
12 **hospital, having to be rolled over on my bad side,**
13 **which was both sides, it was horrible. It was**
14 **absolutely excruciating. To have people do all my**
15 **personal care.**

16 Q Have you had any counseling or therapy for emotional
17 issues?

18 **A No.**

19 Q Any past history of counseling for mental health
20 treatment?

21 **A No.**

22 Q Any past history of depression or anxiety?

23 **A Yes, I do take a slight medicine for that.**

24 Q What medication is that?

25 **A I'm bad about that. It's on my list.**

- 1 Q Is it taken daily?
- 2 A **Yes.**
- 3 Q How long have you taken that?
- 4 A **Quite a few years.**
- 5 Q Again, as with the others, it doesn't effect your
- 6 ability to drive, walk?
- 7 A **No.**
- 8 Q Does it cause any dizziness or balance issues?
- 9 A **No.**
- 10 Q The other thing in here, Subparagraph F, it says loss
- 11 of the normal enjoyment of life. So you talked about
- 12 the period of time up through the end of last summer.
- 13 As we sit here today, do you feel that you experience
- 14 any loss of the normal enjoyment of your life?
- 15 A **I'm really a very active person with friends, family,**
- 16 **doing volunteer work. It was hard for me to not be**
- 17 **able to do that. I'm a very sociable person, very**
- 18 **sociable.**
- 19 Q Anything else currently?
- 20 A **No.**
- 21 Q You cite, continuing medical expenses. Do you know,
- 22 since last summer is there anything specifically
- 23 related to this accident that you've treated for?
- 24 A **No.**
- 25 Q And I'm not going to commit you to the fact that you

1 may or may not have expenses in the future, but do you
2 currently have any scheduled doctor appointments
3 related to the injuries you sustained in this fall?

4 **A No.**

5 Q Nothing upcoming right now?

6 **A No.**

7 Q So you have lived in Michigan, by my count, would that
8 be since 1951, right?

9 **A Correct.**

10 Q Do you spend your winters here or are you one of those
11 lucky people that escapes?

12 **A I'm here.**

13 Q All winter?

14 **A Basically, yes.**

15 Q Don't make it out to LA and stay at Sarah's?

16 **A No.**

17 Q So you're familiar with the nastiness of Michigan
18 winters, probably as familiar as anybody in this room?

19 **A Right.**

20 Q You're aware that winter in Michigan brings freezing
21 temperatures, right?

22 **A Yes.**

23 Q And you're aware of the fact with freezing
24 temperatures brings ice and slippery conditions,
25 right?

- 1 **A** **Yeah.**
- 2 **Q** Your allegations in this case essentially are that the
- 3 church failed to take reasonable measures to protect
- 4 you from this fall, right?
- 5 **A** **Correct.**
- 6 **Q** That's a fair summary?
- 7 **A** **Correct.**
- 8 **Q** In your own words, what do you believe the church
- 9 failed to do?
- 10 **A** **Looking back at it, I think the lights should be on in**
- 11 **the parking lot if there's people in that building at**
- 12 **night.**
- 13 **Q** Do you know what time the lights come on in the
- 14 parking lot?
- 15 **A** **No, I do not.**
- 16 **Q** Anything else you feel the church failed to do?
- 17 **A** **No.**
- 18 **Q** You don't recall whether it appeared that they should
- 19 have salted or plowed that day?
- 20 **A** **No, because when I walked in it was clear as far as I**
- 21 **remember, and then when I walked out I had no idea**
- 22 **what had happened while we were in there.**
- 23 **Q** So your primary, I guess, allegation of fault is that
- 24 the lights should have been on in the parking lot?
- 25 **A** **Yes.**

1 Q Were there any other exterior lights of the church
2 that were on?

3 A Not that I know of, because we come out this one door.

4 MR. ZICK: That's all I have. Thank you
5 very much.

6 MR. BURKE: None for me.

7 (At approximately 11:15 a.m., the
8 deposition was concluded.)

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Linda Molitoris

08/11/2022

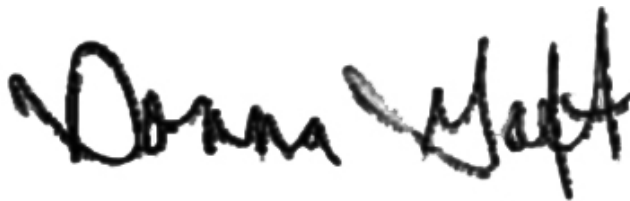
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CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I, Donna M. Gaft, CSR, a Notary Public in
and for the above county and state, do hereby certify that
this deposition was taken before me at the time and place
hereinbefore set forth; that the witness was by me first duly
sworn to testify to the truth; that this is a true, full and
correct transcript of my stenographic notes so taken; and
that I am not related, nor of counsel to either party, nor
interested in the event of this cause.



Donna M. Gaft, CSR-6478
Notary Public, Oakland County, Michigan
My Commission Expires: June 30, 2026

Linda Molitoris

08/11/2022

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08/11/2022

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Jeri Gawlowski
09/19/2022

1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON
3
4 LINDA MOLITORIS,
5 Plaintiff,
6 vs. Case No. 22-31366 NO
7 Hon. L. Suzanne Geddis
8 SAINT MARY MAGDALEN CATHOLIC
9 CHURCH,
10 Defendant.

11 _____

12

13

14 The Deposition of JERI GAWLOWSKI,
15 Taken via Hanson Remote,
16 Commencing at 11:31 a.m.,
17 Monday, September 19, 2022,
18 Before Kathleen A. Reising, CSR-4409.

19

20 Court reporter, witness and attorneys appearing remotely.

21

22

23

24

25



Jeri Gawlowski
09/19/2022

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1 APPEARANCES:

2

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Jeri Gawlowski
09/19/2022

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1 Remote Deposition

2 Monday, September 19, 2022

3 11:31 a.m.

4

5 THE STENOGRAPHER: My name is Kathleen
6 Reising, a Michigan State Notary Public and certified
7 shorthand reporter and this deposition is being held
8 via videoconferencing equipment. The witness and
9 reporter are not in the same room. The witness will be
10 sworn in remotely pursuant to agreement of all parties.
11 The parties stipulate that the testimony is being given
12 as if the witness was sworn in person.

13 JERI GAWLOWSKI,
14 was thereupon called as a witness herein, and after
15 having first been duly sworn to testify to the truth,
16 the whole truth and nothing but the truth, was examined
17 and testified as follows:

18 MR. BURKE: Hi, Jeri. My name is David
19 Burke and I'm the attorney representing Linda Molitoris
20 in this case.

21 Before we begin, have you ever been in a
22 deposition before?

23 THE WITNESS: No.

24 MR. BURKE: Okay. I'll just very briefly
25 then go over the ground rules.

1 First, it's important that we avoid talking
2 over each other. This is especially important over
3 Zoom because we have the court reporter here and she
4 needs to take down everything we are saying so we need
5 to try our best just to -- I'll give you time to speak
6 and I ask that you give me time to speak as well.

7 **THE WITNESS: Okay.**

8 MR. BURKE: Next, we need to do our best to
9 answer aloud, so that means we avoid things like
10 nodding our head or shrugging our shoulders because the
11 court reporter can't take those things down.

12 If at any point you don't understand my
13 question, please let me know and I'll rephrase it. And
14 if at any point you need a break, let us know, but this
15 will not take very long.

16 **THE WITNESS: Okay.**

17 EXAMINATION

18 BY MR. BURKE:

19 Q. So to begin, could you please state your full name?

20 A. **Jeri Gawlowski.**

21 Q. And what is your educational background?

22 A. **I have a Bachelor's Degree.**

23 Q. What program was that?

24 A. **Bachelor of Science in Accounting.**

25 Q. Okay. And when did you complete your program?

1 A. In ancient history. '82, I think, or '83 -- '82.

2 Q. Thank you.

3 And could you tell me your involvement with
4 St. Mary Magdalen Church?

5 A. At the time -- I'm no longer there, but I was the
6 bookkeeper and I was the coordinator of Magdalen's
7 Kitchen, which was the community meal that we were
8 working on that night.

9 Q. When did you stop being involved with St. Mary's?

10 A. Last August.

11 Q. Okay. And while you were with St. Mary's did you have
12 a direct supervisor or something like that?

13 A. Well, the pastor's always the supervisor, so yeah.

14 Q. Okay. Did you review anything in preparation for your
15 deposition today?

16 A. No, don't have anything to review.

17 Q. Do you have an independent recollection of being at St.
18 Mary's on February 22nd, 2021?

19 A. Yes.

20 Q. It was a Monday.

21 A. Yes.

22 Q. Do you know what was going on at St. Mary's that
23 evening?

24 A. We were cooking the meal, which at that time we would
25 cook it and pack it up for carryout.

1 Q. Do you have a memory of what the weather was like that
2 day?

3 A. So it wasn't snowing. It was cold. I don't know if
4 there was a little precipitation in the evening or not,
5 but it wasn't like actively snowing.

6 Q. Do you have a memory of what the sidewalk and parking
7 lot looked like that day?

8 A. So the sidewalk right outside of the door was slippery
9 because my husband had gone out to take out the trash
10 and he came in, warned us that the sidewalk was
11 slippery. I think something was dripping off the roof
12 to make that slippery. I don't think that the parking
13 lot was slippery.

14 Q. Okay.

15 A. At least, you know, not that I saw.

16 Q. Do you personally know Linda Molitoris?

17 A. Yeah.

18 Q. Okay. And you are aware that Miss Molitoris suffered a
19 fall at St. Mary's, correct?

20 A. Yes.

21 Q. When did you first hear about her fall?

22 A. So she went out ahead of the rest of us. She must have
23 been like the first one to leave, so when we -- two or
24 three of us walked out she was laying in the parking
25 lot.

1 Q. Do you remember if Linda was still at the kitchen when
2 Bill made that comment?

3 A. Yes, she was. Everyone still was. He really made sure
4 we all heard him. He didn't want us to fall down.

5 Q. Did you have any discussions with anybody about Linda's
6 fall?

7 A. I suppose we all talked about it after it happened.

8 Q. What was that discussion about?

9 A. Just, you know, we knew she was hurt, we were, you
10 know, we were keeping in touch with her when she was in
11 the hospital and then rehab.

12 Q. Do you remember how Linda appeared when you first saw
13 her after the fall?

14 A. What do you mean? She was laying kind of on her side.

15 Q. Talking about maybe like facial appearance. Like, did
16 she appear like she was in pain or ...

17 A. Yeah, yeah, she couldn't -- she couldn't move.

18 Q. And did she say anything to you after you saw her?

19 A. I'm sure she must have, but I don't recall. I'm sure
20 she told us that she couldn't get up or whatever, so we
21 called 911.

22 Q. That's fine.

23 Do you know how the ground looked around her
24 in the area that she fell?

25 A. What do you mean?

1 Q. Was it wet at all or was it dry? If you remember.

2 A. So I don't believe that it was slippery, but I'll tell
3 you that I do think there was -- where the handicap
4 sidewalk kind of meets the blacktop there was a little
5 lip there which is what I thought maybe she tripped on.

6 Q. Okay.

7 A. But that's, you know, I don't know that for sure.

8 Q. Do you have any maintenance responsibilities at -- or
9 had any responsibilities at St. Mary's?

10 A. Maintenance responsibilities?

11 Q. Yes.

12 A. Like what?

13 Q. As far as snow and ice removal.

14 A. No, I paid the bills.

15 Q. That's fine. I'll just go over these questions pretty
16 quickly, see if you might know, but it's fine if you
17 don't.

18 Do you know what company St. Mary's hires
19 for snow removal?

20 A. Blade Runners.

21 Q. Okay. Do you know after how many inches of snow Blade
22 Runners arrives to clear snow?

23 A. I don't remember what the contract said.

24 Q. Okay. And this is an ongoing contract; right, it's not
25 like a case-by-case basis, it's --

1 A. Right, we paid it annually and they came whenever, you
2 know, whatever the contract said. I don't know if it
3 was one and a half or two inches. I don't know. And
4 they salted regularly too. And they mostly did that
5 when they thought it was slippery, but we could call
6 them if we needed them.

7 Q. And that was going to be my next question. So when
8 Blade Runners comes to St. Mary's they know to show up
9 by themselves, they know that there's snow on the ground
10 and they show up?

11 A. Yeah, yeah, but you know, there were probably times
12 when we thought it was slippery and we called them too.

13 Q. Okay.

14 A. And they left a bucket of salt outside the building
15 that we could use. Usually -- I'm pretty sure my
16 husband put some salt on that walkway that night, but
17 that isn't where she fell anyway.

18 Q. How long does Blade Runners usually take to arrive
19 after snow starts falling?

20 A. I'm not really sure. I only worked there two days a
21 week, so I didn't really pay attention to that.

22 Q. That's okay.

23 A. I'm sure that -- I know that like if it was on a Sunday
24 they would have to have it plowed before it was mass
25 time and, you know, that kind of thing. Wasn't as

1 urgent during the week, I suppose.

2 Q. And I know this usually depends on how much snow is
3 actually on the ground, but do you know how long Blade
4 Runners typically takes to complete clearing out the
5 parking lot and sidewalk?

6 A. Oh, I don't know. It's a big parking lot, so it
7 probably takes a couple -- good couple hours, I'm sure.

8 Q. Okay. At least an hour?

9 A. Oh, at least.

10 Q. Okay.

11 A. I'm sure it's more than that.

12 Q. Okay. Do you know if someone from St. Mary's
13 supervises Blade Runners when they perform their
14 services or if they're just left on their own?

15 A. They're left on their own, I imagine.

16 Q. Okay.

17 A. If there were any issues the maintenance department
18 would probably intervene, but ...

19 Q. And do you know if there's any log or record of snow
20 removal services as like a record of each time Blade
21 Runners would come to St. Mary's?

22 A. So I remember for sure that when they salted they
23 would -- that would be itemized on the bill because
24 they charged us per application. I don't know about
25 the plowing because that was, like, an annual contract.

1 Q. Okay. Would you agree with me that ice on the sidewalk
2 or parking lot can be dangerous?

3 A. Yes.

4 Q. And would you agree with me that it is important to
5 ice -- sorry -- to salt ice or snow on the sidewalk or
6 parking lot?

7 A. Yes.

8 Q. And would you agree with me that ice on a sidewalk
9 could increase the risk of falling?

10 A. Yes.

11 Q. Okay. If someone were to fall on ice at St. Mary's who
12 should they report that to?

13 A. So if there was a staff member present they would
14 report it to anybody on the staff. If they -- so if
15 they fell, nobody was out they'd just come in and try
16 to find somebody that was working there.

17 Q. Would that staff member then take it to someone further
18 up the ladder or --

19 A. Well, we all knew about an incident report form that we
20 would fill out and then we would send that to I think
21 it's Gallagher Bassett.

22 Q. Do you know if an incident report was filled out for
23 Linda's fall?

24 A. Yes, I filled it out.

25 Q. Okay. And who did you speak to when you filled out the

1 incident report?

2 A. Who did I speak to; what do you mean?

3 Q. Did you only speak to Linda or was there anyone else
4 you spoke to about the -- when you were filling out the
5 incident report?

6 A. Well, nobody else was there when I filled it out, but I
7 believe I did put down Mary Lou Silver and Mark Dobek,
8 that they were present, and of course I let the pastor
9 know.

10 Q. Have you ever fallen on ice or snow at St. Mary's?

11 A. No.

12 Q. Okay. Do you know of other instances of people falling
13 on ice or snow at St. Mary's?

14 A. I know one.

15 Q. Other than Linda?

16 A. Yes.

17 Q. Could you tell me about that instance?

18 A. What's his name? Gary March, it was -- I actually
19 think it was a Christmas -- it was Christmas Eve after
20 Linda fell, he came out late -- late at night after
21 their midnight mass and slipped on the ice and fell
22 backwards on his head. It was in another part of the
23 parking lot, but yeah.

24 Q. And this is a similar question, but do you know of any
25 instances of people complaining about ice or snow at

1 St. Mary's?

2 **A. I don't think so.**

3 Q. Okay. That's fine. I'm sorry. I missed a question.

4 I wanted to ask you earlier so I'm going to jump back
5 to the fall itself.

6 **A. Okay.**

7 Q. Could you tell me the lighting at the time of you
8 finding Linda?

9 **A. The parking lot lights were on.**

10 Q. Okay. And could you tell me around the time of day you
11 think it was?

12 **A. Usually we were getting done around 7:00, so the lights**
13 **come on -- they're on a photocell and they're also on**
14 **an energy management system, so ...**

15 MR. BURKE: Okay. Those are all the
16 questions I have.

17 **THE WITNESS: Okay.**

18 MR. BURKE: Dan might have a couple more.

19 MR. ZICK: Miss Gawlowski, my name is Daniel
20 Zick. I'm an attorney for the church in this matter.
21 I just have a few follow-up questions here and then
22 we'll let you be on your way.

23 **THE WITNESS: Okay.**

24 EXAMINATION

25 BY MR. ZICK:

1 Q. What time did Magdalen's Kitchen begin?

2 A. Well, I would usually get there around 3:00 and
3 everybody else that was cooking came anytime between
4 3:00 and 4:00.

5 Q. Do you recall the time you arrived on the date of this
6 incident?

7 A. Not exactly, but I was always there around 3:00 -- at
8 3:00 to get started.

9 Q. And when you arrived around that time was the parking
10 lot slippery at all?

11 A. Not that I recall.

12 Q. Did you have any issues entering the building, walking
13 through the parking lot?

14 A. No. And I always had things to carry in, so I don't
15 recall if it was slippery.

16 Q. You may have already answered this, but do you recall
17 any precipitation on that day before you arrived at
18 Magdalen's Kitchen?

19 A. I don't think there was any earlier in the day. It may
20 have been kind of spitting later in the evening, not
21 really snow, but ...

22 Q. So when you arrived was the parking lot clear?

23 A. Yes.

24 Q. And the parking lot was dry?

25 A. I believe so.

1 Q. Do you remember if there was any snow or rain in the
2 days prior to this?

3 A. I don't remember.

4 Q. Do you recall seeing any -- I'm sorry. Do you recall
5 seeing any snow or ice in the grass areas?

6 A. I don't think so.

7 Q. Was there any snow piled up around the parking lot from
8 plowing previously that week?

9 A. No.

10 Q. And then what time did you leave Magdalen's Kitchen
11 that evening?

12 A. So I don't know exactly, but usually anywhere between
13 6:45 and 7:00 was when we would be finished. I was
14 always the last one to come out, but -- so it was
15 between 6:45 and 7:00, I think.

16 Q. Between 3:00 p.m. when you arrived approximately and
17 6:45 or 7:00 when you left did you ever go outside
18 during that time period?

19 A. No, not -- no.

20 Q. Did you observe whether Miss Molitoris had gone outside
21 during that time period?

22 A. She did not.

23 Q. I understand --

24 A. Well, I -- so I shouldn't say we didn't go outside. We
25 would hand out the meals under the portico and I did

1 that. She did not do that. So it's dry under there,
2 you know, covered.

3 Q. As you handed out meals do you recall seeing any
4 precipitation?

5 A. No.

6 Q. Did any of the people -- I assume -- sorry, strike
7 that.

8 I assume people would walk up and you would
9 hand them the meals?

10 A. But they would pull their car right up by the door and
11 sometimes get out or sometimes we just put it in the
12 car.

13 Q. Okay.

14 A. It was -- but it was a dry covered area.

15 Q. Okay. Do you recall anybody picking up meals that did
16 get out of their car complaining about the parking lot
17 being slippery?

18 A. No, because -- no, because my husband was always there.
19 And he actually put some salt on that other walkway.

20 He would have done something about it because he
21 volunteered, did a lot of help with maintenance there.

22 Q. And when you say your husband, Bill Gawlowski?

23 A. Bill Gawlowski, yeah.

24 Q. You mentioned that the lights were on in the parking
25 lot, correct?

1 A. Correct.

2 Q. In the area where you found Miss Molitoris did you have
3 any difficulty seeing in that area?

4 A. No. So the picture in my mind seems like there was a
5 light pole pretty close by.

6 Q. Were you able to see the ground?

7 A. Yeah.

8 Q. Did you visually see any ice in the area where she
9 fell?

10 A. No.

11 Q. Did you have any trouble walking through the parking
12 lot when you exited that evening?

13 A. No. And I was kind of shuffling my feet to see if it
14 felt slippery anywhere and I did not see anything
15 slippery or feel anything slippery.

16 MR. ZICK: All right. Thank you. That's
17 all I have.

18 MR. BURKE: No further questions from me.

19 (The videoconference deposition was
20 concluded at 11:50 a.m. Signature of the witness was
21 not requested by counsel for the respective parties
22 hereto.)

23

24

25

1 CERTIFICATE

2 STATE OF MICHIGAN

3 COUNTY OF MACOMB

4

5 I, KATHLEEN REISING, a Notary Public in
6 and for the above county and state, do hereby certify
7 that this deposition was taken before me at the time
8 and place hereinbefore set forth; that the witness was
9 by me first duly sworn to testify to the truth; that
10 this is a true, full and correct transcript of my
11 stenographic notes so taken; and that I am not related,
12 nor of counsel to either party, nor interested in the
13 event of this cause.

14

15

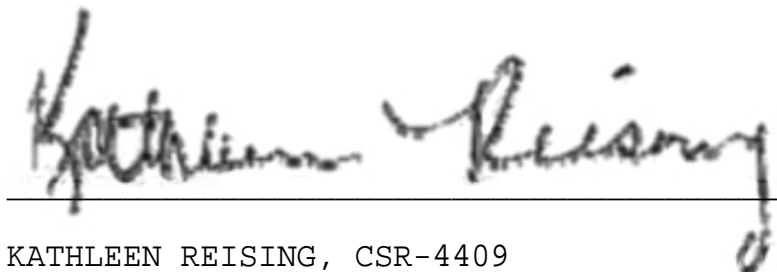
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21

KATHLEEN REISING, CSR-4409

22

Notary Public

23

Macomb County, Michigan

24

My commission expires 7-8-2024

25

Jeri Gawlowski
09/19/2022

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09/15/2022

1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON
3
4 LINDA MOLITORIS,
5 Plaintiff,
6 vs. Case No. 22-31366 NO
7 Hon. L. Suzanne Geddis
8 SAINT MARY MAGDALEN CATHOLIC
9 CHURCH,
10 Defendant.

11 _____

12

13

14 The Deposition of MARCUS DOBEK,

15 Taken via Hanson Remote,

16 Commencing at 3:04 p.m.,

17 Thursday, September 15, 2022,

18 Before Kathleen A. Reising, CSR-4409.

19

20 Court reporter, witness and attorneys appearing remotely.

21

22

23

24

25



1 APPEARANCES:

2

3 DAVID BURKE

4 Oliver Law Firm

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7 (248) 477-1900

8 Appearing on behalf of the Plaintiff.

9

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16

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1 Remote Deposition

2 Thursday, September 15, 2022

3 3:04 p.m.

4

5 THE STENOGRAPHER: My name is Kathleen
6 Reising, a Michigan State Notary Public and certified
7 shorthand reporter and this deposition is being held
8 via videoconferencing equipment. The witness and
9 reporter are not in the same room. The witness will be
10 sworn in remotely pursuant to agreement of all parties.
11 The parties stipulate that the testimony is being given
12 as if the witness was sworn in person.

13 MARCUS DOBEK,
14 was thereupon called as a witness herein, and after
15 having first been duly sworn to testify to the truth,
16 the whole truth and nothing but the truth, was examined
17 and testified as follows:

18 MR. BURKE: Hi, Mark. My name is David
19 Burke and I'm the attorney representing the Plaintiff
20 in this case.

21 Before we begin, have you ever been in a
22 deposition before?

23 THE WITNESS: I have not.

24 MR. BURKE: All right. I'll just briefly go
25 over the ground rules.

1 It's important that because we
2 are on Zoom we need to avoid talking over each other so
3 that the court reporter can take down what we are
4 saying.

5 Next, we need to avoid things such as
6 nodding our head or shrugging our shoulders because the
7 court reporter can't take those things down.

8 If at any point you don't understand my
9 question, please let me know and I'll rephrase it.

10 And if at any point you need a break just
11 let us know, but this will not take very long.

12 EXAMINATION

13 BY MR. BURKE:

14 Q. So to begin, can you please state your full name?

15 A. **Marcus Francis Dobek. It's not Mark.**

16 Q. What is your educational background?

17 A. **I have Associate's Degree, a Bachelor's Degree, and a**
18 **Master's Degree.**

19 Q. And what are those degrees in?

20 A. **Both -- the first two are for computer science, and my**
21 **last one at Central was for management and supervision.**

22 Q. Okay. Could you tell me your involvement with St. Mary
23 Magdalen Church?

24 A. **I'm a parishioner there for 25-plus years and attend**
25 **church there regularly. I volunteer on a number of**

1 things. For instance, I cut grass in the summertime,
2 and right now I've been doing dishes since the
3 beginning of Covid because we had the carryout thing,
4 but I was doing dishes pre-Covid too.

5 Q. Okay. Do you have a direct supervisor for any of the
6 volunteering you do at St. Mary's?

7 A. There is a guy that is head of facilities that -- for
8 lawn cutting, and then on the St. Mary Magdalen's
9 kitchen depending on the day there's a lead cook
10 assigned to that day. And basically, since I'm a
11 dishwasher they don't -- they just want the dishes
12 washed. I mean, it doesn't, you know -- I mean, I'm
13 not serving food, I'm not cooking food, you know, I'm
14 just washing dishes.

15 Q. Could you tell me the supervisor's name for the lawn
16 maintenance?

17 A. I don't have that.

18 Q. That's fine. Okay.

19 A. I don't have it.

20 Q. That's okay.

21 Did you review anything in preparation for
22 your deposition today?

23 A. I did not.

24 Q. Okay. Do you personally know Linda Molitoris?

25 A. I do not, other than working with her in the kitchen.

1 Q. Okay. Do you have an independent recollection of
2 volunteering on February 22nd, 2021? It would have
3 been a Monday, if that helps at all.

4 A. Yeah, it was always a Monday. That's when the kitchen
5 is open, it's always on Monday.

6 Q. Okay.

7 A. Then I was there.

8 Q. Do you have a memory of what the weather was like that
9 day?

10 A. Best of my recollection, it was warm during the day a
11 little bit and then it got below freezing that evening.
12 But other than that, there was no snow, no rain, no
13 nothing.

14 Q. What about the day before; was there any --

15 A. I have no idea.

16 Q. Okay. That's fine.

17 A. But there weren't piles of snow everywhere.

18 Q. Other than there not being any piles of snow, do you
19 have any other comments on what the sidewalk or parking
20 lot looked like that day?

21 A. As far as I was concerned it was dry, you know.

22 Q. Okay.

23 A. You know, there was not any ice anywhere else.

24 Q. Are you aware that Miss Molitoris suffered a fall at
25 St. Mary's?

1 A. Yes, I was the one that called 911.

2 Q. Okay. Did you have any discussions with anybody about
3 Miss Molitoris' fall?

4 A. No, other than when she was in the hospital they let me
5 know when I went to the subsequent meeting, the
6 preparation of the meeting or the meals, you know, that
7 she was in the hospital, that was pretty much it, and
8 that she broke her wrist, I believe.

9 Q. Okay. So I know you mentioned lawn maintenance, but do
10 you have any other maintenance responsibilities at St.
11 Mary's?

12 A. No.

13 Q. Do you know if there's a maintenance office on site at
14 St. Mary's?

15 A. There is.

16 Q. Okay.

17 A. Yeah, I just don't know -- I don't have the guy's name,
18 you know, on my fingertips. But I mean, if you go to
19 the parish website I believe that his name is listed
20 there.

21 Q. Okay. Thank you.

22 Would you agree that snow and ice removal
23 services would fall under the category of maintenance?

24 A. I do not know that because, you know -- I have assumed
25 and seen in the past with my 25 years that they

1 contract that out.

2 Q. Okay.

3 A. I mean, it's him and another, like, two other people,
4 that's it as far as the maintenance group.

5 Q. Basically what I'm trying to figure out is, would
6 whoever is in charge of maintenance also be in charge
7 of snow removal, basically?

8 A. I guess to procure the contract, but other than getting
9 them out there, I mean, I think that's the discretion
10 of the lawn care people.

11 Q. Okay. So you're not aware of what company they would
12 have hired?

13 A. I do not, not at that time, no.

14 Q. Okay. And you wouldn't be aware of any of the process
15 of how the company would remove snow or ice?

16 A. No.

17 Q. As far as snowplows, shovels or --

18 A. No.

19 Q. Okay. Do you know if the snow removal company is
20 supervised when they're performing their services?

21 A. I do not know that.

22 Q. Okay. That's fine.

23 Would you agree with me that ice on the
24 sidewalk or parking lot can be dangerous?

25 A. Sure.

1 Q. And do you agree that it's important to salt the
2 sidewalk if there's ice or snow on it?

3 A. Sure.

4 Q. And would you agree that ice on the sidewalk or parking
5 lot could increase the risk of falling?

6 A. Yes.

7 Q. And if someone were to fall on ice at St. Mary's who
8 should they report directly to?

9 A. Well, when Linda fell and I called 911 Geri Gerlowski
10 was the person that was supervising the kitchen at that
11 time, her and her husband Ron, so you know, I walked
12 out and Geri and Ron walked out after us and I had
13 already called 911 by the time they got there.

14 Q. Do you know if an incident report was filled out --

15 A. I do not know.

16 Q. Okay. Do you know who would have written an incident
17 report if one was written?

18 A. Nope.

19 Q. Okay. Have you ever fallen on ice or snow at St.
20 Mary's?

21 A. No.

22 Q. Do you know of other instances of people other than
23 Miss Molitoris people falling on ice or snow at St.
24 Mary's?

25 A. I do not.

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1 Q. Okay. What about do you know of any instances of
2 people complaining about ice or snow at St. Mary's?

3 A. No.

4 MR. BURKE: Okay. That is all I have.

5 THE WITNESS: Awesome.

6 EXAMINATION

7 BY MR. ZICK:

8 Q. Mr. Dobek, do you remember what time you arrived at the
9 church that day?

10 A. 5:30.

11 Q. 5:30?

12 A. Yes.

13 Q. And was it dark at that time?

14 A. Boy, that's a hard one to remember, but assuming it's
15 February it was probably getting close to dark.

16 Q. Do you recall whether the lights in the parking lot
17 were on at that time?

18 A. When I arrived I couldn't tell and -- but I do recall
19 then the lights -- when I left that, you know, there's
20 a light that is behind you as you walk out the door on
21 the building and there's a light in the parking lot. I
22 mean, you know, I don't think it would be any different
23 than me walking into Meijers.

24 Q. Okay. So by that do you mean that visually you could
25 see?

1 A. Sure, yeah.

2 Q. Okay. Did you think there was any issues or difficulty
3 seeing in the parking lot when you left that evening?

4 A. No.

5 Q. And again, when you said you left that evening was that
6 around the time you found Miss Molitoris?

7 A. I hung around probably -- we usually got out of there
8 about 7:00, 7:15, you know, some dates it was later,
9 but you know, I hung around until the ambulance took
10 her away.

11 Q. And at that time the lights were on?

12 A. The lights were on.

13 Q. Okay. Now, during your time at the church that evening
14 do you recall anybody making any statements about the
15 weather outside?

16 A. Yes.

17 Q. And what were those statements?

18 A. Bill Gerlowski said to the group that, you know, watch
19 yourself as you walk out -- because, you know, when
20 people get done doing their meals they're gone, so
21 people are leaving earlier than me and I was one of the
22 last ones to leave that day and I remember him saying
23 be careful, there could be ice out there, so ...

24 Q. Do you recall if Miss Molitoris was in there when Bill
25 made that announcement?

1 A. I cannot say that.

2 Q. Okay.

3 A. I cannot because I'm back in by the dishes, so ...

4 Q. He made that comment before you found Miss Molitoris,
5 right?

6 A. That's correct.

7 Q. Okay. Is it your understanding that Bill Gerlowski had
8 just come in from outdoors when he said that?

9 A. I don't know that.

10 Q. Okay.

11 A. I don't know that.

12 MR. ZICK: All right. That's all I have,
13 sir.

14 MR. BURKE: I have no additional questions.

15 (The videoconference deposition was
16 concluded at 3:16 p.m. Signature of the witness was
17 not requested by counsel for the respective parties
18 hereto.)

19

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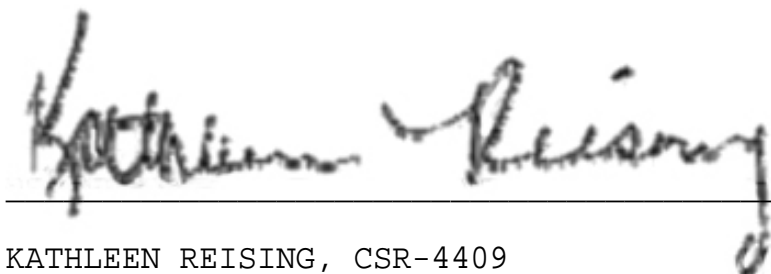
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CERTIFICATE

STATE OF MICHIGAN

COUNTY OF MACOMB

I, KATHLEEN REISING, a Notary Public in
and for the above county and state, do hereby certify
that this deposition was taken before me at the time
and place hereinbefore set forth; that the witness was
by me first duly sworn to testify to the truth; that
this is a true, full and correct transcript of my
stenographic notes so taken; and that I am not related,
nor of counsel to either party, nor interested in the
event of this cause.



KATHLEEN REISING, CSR-4409

Notary Public

Macomb County, Michigan

My commission expires 7-8-2024

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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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UNPUBLISHED CASES

Arnett v Benton, unpublished opinion of the Court of Appeals (Docket no. 211158 rel'd 10/15/99)

Gaitan v Lakeshore Habitat For Humanity, Inc., unpublished opinion of the Court of Appeals
(Docket no. 287116, rel'd 2/2/10)

Novotny-Moore v O'Dell, unpublished opinion of the Court of Appeals (Docket no. 342522, rel'd
6/6/19)

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Marcus ARNETT and Julie
Arnett, Plaintiffs-Appellants,

v.

Brenda BENTON, Reid Machinery, Inc.,
and Edward G. Reid, Defendants-Appellees.

No.

211158

.
|

Oct. 15, 1999.

Before: MURPHY, P.J., and GAGE and WILDER, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal as of right from a trial court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) in this dog-bite case. We affirm.

Plaintiff Marcus Arnett ("Arnett") went to defendants' business premises to install automobile glass pursuant to a work order. The work order that Arnett received contained the following instruction: "MOBILE FOR FRIDAY, GARAGE AVAIL. ABOVE ADDRESS GO TO FRONT OFFICE NOT GARAGE (DOGS IN GARAGE)." When Arnett arrived at defendants' business, however, he did not see the automobiles he was supposed to service in the front parking lot so he drove to the rear of the building and asked another employee on the premises where he could find the vehicles. According to Arnett, the employee directed him to look inside the bay storage area and, if the vehicles were not there, to proceed to the front office for assistance. Arnett entered the bay storage area and when he did not find the vehicles in that area, he proceeded through the interior of the building toward the front office. While inside the building, Arnett entered an interior work area, which was the garage referred to in the work order, and he was bitten by defendants' dogs.

The trial court granted defendants' motion for summary disposition, finding that Arnett was specifically instructed to report to the front office, and that he was warned that the dogs were in the garage, yet, he nonetheless entered the building through a rear entrance and proceeded through the interior of the building. The trial court concluded that Arnett was a "near trespasser" because he exceeded the scope of his invitation onto defendants' premises.

Plaintiffs argue that the trial court erred in granting summary disposition to defendants because there were genuine issues of material fact about Arnett's legal status on defendants' property at the time he was injured. We disagree.

We review the trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would preclude judgment for defendants as a matter of law. *Morales v. Auto-Owners Ins Co*, 458 Mich. 288, 294; 582 NW2d 776 (1998). In making this determination, this Court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence available, in a light most favorable to the nonmoving party, giving the benefit of any reasonable doubt to the nonmovant. *Id.*; *Radtke v. Everett*, 442 Mich. 368, 374; 501 NW2d 155 (1993).

The dog-bite statute, M.C.L. § 287.351; MSA 12.544, provides:

(1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

The parties do not dispute that defendants were the owners of the dogs, that Arnett did not provoke the dogs, or that he sustained injuries as a result of the dog bites. The only disputed issue is Arnett's status on the premises at the time he was injured.

*2 An injured party must show that he was an invitee or a licensee in order to be protected by the dog-bite statute. *Alvin v. Simpson*, 195 Mich.App 418, 420; 491 NW2d 604 (1992). A trespasser is not entitled to recovery under this statute. An "invitee" has been defined as follows:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is 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.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. [*Stitt v. Holland Abundant Life Fellowship*, 229 Mich.App 504, 506-508; 582 NW2d 849 (1998), quoting 2 Restatement Torts, 2d, § 332, p 176.]

A licensee has been defined as “a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof. *Alvin*, *supra* at 420; *Cox v. Hayes*, 34 Mich.App 527, 532; 192 NW2d 68 (1971). A trespasser is defined as “a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.” 2 Restatement Torts, 2d, § 329, p 171.

Arnett was invited to defendants' business to perform automobile glass repair work on their premises, and therefore, was a business invitee for purposes of entry onto defendant's premises to perform the work. See *Stitt*, *supra* at 506-508. However, when Arnett ventured into the garage without permission or invitation, he exceeded the scope of his invitation and became a trespasser in that particular area. *Constantineau v. DCI Food Equipment, Inc.*, 195 Mich.App 511, 515-516; 491 NW2d 262 (1992). Arnett's invitation onto defendants' premises, as reflected in the work order, was expressly limited to entering the building through the front office. Importantly, the work order explicitly directed him not to enter the garage. Plaintiffs have offered no evidence to rebut defendants' contention that Arnett was never given permission to enter the garage, and under these circumstances, permission cannot be implied. *Alvin*, *supra* at 421.

Further, even if we were to accept Arnett's argument that he was invited into the bay storage area by another employee, the employee did not direct Arnett to enter the front office through the interior of the building. Instead, the employee specifically advised Arnett that if he did not see the automobiles he

was supposed to work on in the bay storage area, he should proceed to the front office for assistance. These instructions, considered in the context of a work order which unequivocally directed Arnett to enter the building through the front office door, and further advised Arnett *not* to enter the garage where the dogs were located, cause us to conclude that Arnett exceeded the scope of his invitation onto defendants' property and he became a trespasser when he entered the garage. Accordingly, Arnett is precluded from recovering for his injuries under the dog-bite statute as a matter of law, *Constantineau*, *supra* at 515-516, and the trial court properly granted summary disposition to defendants.

*3 Plaintiffs next argue that even if Arnett was a trespasser on defendants' property, summary disposition was nonetheless improper because there were genuine issues of material fact as to whether defendants were negligent for keeping dangerous dogs in the building. We disagree.

In general, the law does not impose a duty on landowners to maintain their premises in a safe condition for trespassers. *Wymer v. Holmes*, 429 Mich. 55, 71, n 1; 412 NW2d 213 (1987); *Byrne v. Schneider's Iron & Metal, Inc.*, 190 Mich.App 176, 183; 475 NW2d 854 (1991). Those who venture into an area without permission or invitation must accept the responsibility for any resulting injuries. *Constantineau*, *supra* at 515. However, if a landowner knows or has reason to know that a trespasser is present, the landowner has a duty to use ordinary care to prevent injury to the trespasser from active negligence. *Torma v. Montgomery Ward & Co.*, 336 Mich. 468, 476-477; 58 NW2d 149 (1953); *Blakeley v. White Star Line*, 154 Mich. 635, 637; 118 NW 482 (1908). Here, in light of defendants' explicit instruction to Arnett not to enter the garage and their warning to Arnett of the presence of the dogs in the garage, we reject plaintiffs' argument that defendants should have known that Arnett would enter the garage and be confronted by the dogs.

Affirmed.

All Citations

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Douglas M. GAITAN and Tamie
R. Gaitan, Plaintiffs–Appellants,

v.

**LAKESHORE HABITAT FOR
HUMANITY, INC.**, Defendant–Appellee.Douglas M. Gaitan and Tamie
R. Gaitan, Plaintiffs–Appellees,

v.

**Lakeshore Habitat for Humanity,
Inc.**, Defendant–Appellant.

Docket Nos.

287116

, 288092.

|

Feb. 2, 2010.

West KeySummary

1 Summary Judgment 🔑 **Trespass**
Trespass 🔑 **Questions for jury**

There was a genuine issue of material evidence as to whether the worker exceeded the scope of his invitation when he used the scaffolding, and thus, the court erred when it granted summary disposition. The worker was at a job site to put a roof on a house when he fell to the ground and injured himself as to attempted to access the roof via scaffolding. The court incorrectly concluded as a matter of law that the worker exceeded his invitation when he used the scaffolding, and it should not have changed his status from an invitee to that of a trespasser. [MCR 2.116\(C\)\(10\)](#).

Ottawa Circuit Court; LC No. 07–058024–NO.

Before: [STEPHENS](#), P.J., and [GLEICHER](#) and [M.J. KELLY](#), JJ.**Opinion**

PER CURIAM.

*1 In docket no. 287116, plaintiffs Douglas M. Gaitan and Tamie R. Gaitan¹ appeal the trial court's July 23, 2008 opinion and order, which granted defendant Lakeshore Habitat for Humanity, Inc. summary disposition. In docket no. 288092, Lakeshore appeals the trial court's September 24, 2008 order denying costs and attorney fees to Lakeshore as case evaluation sanctions. These cases were consolidated on October 23, 2008. *Gaitan v. Lakeshore Habitat for Humanity, Inc.*, unpublished order of the Court of Appeals, entered October 23, 2008 (Docket Nos. 287116; 288092). In docket no. 287116, we reverse the trial court's July 23, 2008 opinion and order and remand for further proceedings. In docket no. 288092, we affirm the trial court's September 24, 2008 order, because, as a result of our reversal of the grant of summary disposition, sanctions are premature.

In this case, Gaitan, who worked for TNT Roofing, Inc. and was at a job site to put a roof on a house that was being constructed by Lakeshore, fell to the ground and injured himself when he was attempting to access a roof via scaffolding. In docket no. 287116, Gaitan argues that the question whether he retained his status as an invitee was a question of fact for the jury to resolve. He, also claims that he did not exceed the scope of his invitation, such that his status would change to that of a trespasser, because he reasonably believed that his invitation extended to the use of the scaffolding. Consequently, Gaitan argues that the trial court erred by finding as a matter of law that he was a trespasser on the scaffolding. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. [Coblentz v. Novi](#), 475 Mich. 558, 567, 719 N.W.2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. [Morales v. Auto–Owners Ins.](#), 458 Mich. 288, 294, 582 N.W.2d 776 (1998).

A motion under [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of the cause of action. [Maiden v. Rozwood](#),

461 Mich. 109, 119, 597 N.W.2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich. at 568, 719 N.W.2d 73. In evaluating a motion for summary disposition brought under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich. at 567–568, 719 N.W.2d 73. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden*, 461 Mich. at 121, 597 N.W.2d 817.

The tort of negligence has four elements: 1) a duty; 2) the breach of that duty; 3) proximate cause; and 4) damages. See *Moning v. Alfano*, 400 Mich. 425, 437, 254 N.W.2d 759 (1977). The “duty” element addresses “whether the defendant is under any obligation to the plaintiff to avoid negligent conduct.” *Id.* Duty is a question of law for the court to decide. *Id.*

*2 It is the relationship of the parties that determines what duties run between them. In this case, defendant is a landowner and plaintiff was a visitor on the landowner's premises. A visitor may be classified as a trespasser, a licensee,² or an invitee. *Campbell v. Kovich*, 273 Mich.App. 227, 235, 731 N.W.2d 112 (2006). A person who is on an owners premises for a commercial purpose is usually considered an invitee. *Kosmalski v. St. John's Lutheran Church*, 261 Mich.App. 56, 61, 680 N.W.2d 50 (2004). “Generally, a premises possessor owes a duty of care to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.” *Mann v. Shusteric Enterprises, Inc.*, 470 Mich. 320, 328–329, 683 N.W.2d 573 (2004) However, an invitee who exceeds the scope of their invitation can become a trespasser. *Constantineau v. DCI Food Equip., Inc.*, 195 Mich.App. 511, 515, 491 N.W.2d 262 (1992). A trespasser is a person who enters, remains on, or ventures into parts of, another's land without the owner's consent. *James v. Alberts*, 464 Mich. 12, 19, 626 N.W.2d 158 (2001); *Constantineau*, 195 Mich.App. at 514–516, 491 N.W.2d 262. No duty is owed by a landowner to a trespasser except to avoid injuring the trespasser by wilful and wanton misconduct. *Id.*

Plaintiff claims he was an invitee while defendant argues that plaintiff relinquished that status and became a trespasser when he exceeded the scope of his invitation by venturing onto the scaffolding. “The status of a person on the land of another is ordinarily a question of fact for the jury.” *Shears v. Pardonnet*, 80 Mich.App. 358, 361, 263 N.W.2d 373 (1977). In some circumstances the evidence may demonstrate the essence of a person's status as a matter of law. *Id.* However, if persons of average intelligence can disagree regarding the purpose for a visitor's presence, his status is a question of fact. *White v. Badalamenti*, 200 Mich.App. 434, 436, 505 N.W.2d 8 (1993).

We conclude that the trial court incorrectly concluded as a matter of law that Gaitan exceeded his invitation when he used the scaffolding, thereby changing his status from an invitee to that of a trespasser. The parties agree as to several essential facts. They agree that the scaffolding did not belong to TNT, Gaitan's employer. They also agree that Gaitan brought a ladder to the job site but chose to use the scaffolding instead. Additionally, there is agreement that while the ladder that was initially used to access the scaffolding had been removed, the scaffolding was not taped off and was accessible from the windows at the project site. The testimony establishes that Gaitan did not receive express permission to use the scaffolding, nor was he expressly refused access to the scaffolding.

We find that when viewing the evidence in the light most favorable to the non-moving party, a genuine issue of material fact exists as to whether Gaitan exceeded the scope of his invitation by using the scaffolding. This is not a circumstance like that *Munson v. Vane-Stecker Co.*, 347 Mich. 377, 79 N.W.2d 855 (1956), where the court found that there was no possible mutual advantage to the landowner and the visitor in the use of certain equipment. Given the absence of either express permission or prohibition, the absence of posting or taping off of the scaffolding, its easy access and the custom of TNT to use only its own equipment, persons could certainly disagree regarding whether Gaitan exceeded the scope of his invitation when he accessed the scaffolding. In declaring that Gaitan was trespassing on the scaffolding, the trial court improperly assumed the role of finder of fact. Therefore, we reverse the lower court's grant of summary disposition in favor of Lakeshore and remand for further proceedings. We refrain from addressing whether the scaffolding presented an open and obvious danger because the trial court did not reach the merits of that particular argument and because we conclude that the factual record is not adequately developed regarding the nature of the condition at issue.

*3 As a result of determining that summary disposition was improperly granted, it naturally follows that defendant is not entitled to relief in docket no. 288092. Because this case has not proceeded to verdict, sanctions are currently unavailable under [MCR 2.403\(O\)](#). However, Lakeshore is not precluded from pursuing sanctions once a verdict has been reached.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2010 WL 364195

Footnotes

- 1 Plaintiff Tamie R. Gaitan is Douglas M. Gaitan's wife. Tamie's claim relates to a loss of love, support, consortium, and companionship with Douglas; therefore, Tamie's claim is derivative of Douglas' claim. Douglas will hereafter be referred to as Gaitan.
- 2 Whether Gaitan was a licensee is not an issue herein.

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Mary Lucille NOVOTNY-
MOORE, Plaintiff-Appellant,

v.

Teddy Duane O'DELL,
Sr., Defendant-Appellee.

No.

342522

|

June 6, 2019

Otsego Circuit Court, LC No. 17-016740-NO

Before: Stephens, P.J., and Gleicher and Boonstra, JJ.

Opinion

Per Curiam.

*1 A jury determined that the defendant landowner was not negligent and therefore not liable to plaintiff for an injury she sustained on his land. Plaintiff complains that the trial court should have resolved as a matter of law whether she was an invitee or a licensee instead of directing the jury to decide the issue. The evidence created a question of fact in this regard, however, meriting the jury's consideration. Plaintiff further challenges the trial court's exclusion of evidence regarding the condition of the premises more than a month after her injury and the subsequent landowner's remedial actions. We discern no errors and affirm.

I. BACKGROUND

Seventy-six year-old Mary Novotny-Moore fell on March 17, 2016, at the home of her brother, Teddy O'Dell, Sr. O'Dell was holding a sale in preparation for his move to Florida. Novotny-Moore called ahead to confirm the sale and then brought her friend, June Cross, to purchase a chest of drawers.

Novotny-Moore bought a table and six chairs as well. After making their purchases, Novotny-Moore showed Cross the backyard. The women exited the back door and stepped onto a cement back porch. The cement slab was bordered with landscape timbers. Novotny-Moore stepped on a timber and claimed that it "gave way." She fell forward and hit her head. She described that the wood appeared "[w]eathered" and "[o]ld" and identified the cause of her fall as "[d]efective wood." Novotny-Moore claimed that right after her fall, O'Dell expressed that the wood "was splitting or cracking" and that "he thought he should have taken it up" earlier.

O'Dell, however, testified that no one had ever fallen on his back porch or complained about its condition. He had not "noticed" that "the timber [was] soft," only that "it had about an eighth of an inch wide crack almost the full length of the eight foot." To determine whether the timber was rotting, O'Dell asserted, he would have been required to dig it up. But, O'Dell conceded, he had installed the timber 14 years earlier and had never replaced it. O'Dell further asserted that he did not "know why [Novotny-Moore] fell"; he posited only that "[h]er foot might have slipped off of [the timber]." He would not "admit that [the timber] gave way when [Novotny-Moore] stepped on it because it was old."

Novotny-Moore alleged that she suffered dizziness, nausea, memory problems, pain and numbness, and hearing and vision loss after her fall. She did not immediately associate her symptoms with a head injury as she had long suffered from Meniere's disease, which also causes dizziness and nausea. Her symptoms following her fall were different in character and lasted longer. In June 2016, a cousin described suffering from dizziness and nausea following a head injury and "[a] light bulb c[a]me on." Novotny-Moore then reported the fall to her doctor, underwent an MRI, and began treatment. Due to the delay in realizing the cause of her injuries, Novotny-Moore did not timely preserve evidence regarding the condition of the subject landscape timber. Rather, she noted that the person who purchased the home from O'Dell replaced the timber "shortly after he moved in."

*2 Novotny-Moore filed a negligence (or premises liability) action against O'Dell, alleging that he knew or should have known of the dangerous condition and that he knew or should have known that Novotny-Moore did not know about the condition and could not have discovered it on her own. Novotny-Moore accused O'Dell of "violat[ing] his duty to properly maintain his home ... to prevent" injury and of failing to warn her of the condition. Neither party sought

summary relief following discovery and Novotny-Moore's claim proceeded to a jury trial. The jury determined that O'Dell was not negligent and the trial court entered "a no-cause of action verdict" in O'Dell's favor. Novotny-Moore appeals this judgment.

II. VISITOR STATUS

Novotny-Moore first contends that the trial court should have determined as a matter of law that she was an invitee at O'Dell's home and therefore that O'Dell owed her a duty to make the property safe. Novotny-Moore asserts that there was no question of fact that she was an invitee, rather than a licensee, and that the court should have instructed the jury as such.

Before trial, the attorneys and the judge apparently participated in a phone conference to discuss the jury instructions. The court recounted on the record, "There was a question potentially about whether or not Ms. Novotny-Moore was an invitee or a licensee." Plaintiff's counsel contended that Novotny-Moore was an invitee at O'Dell's home because he was conducting a moving sale for monetary benefit. Defense counsel asserted that there existed a question of fact for the jury because although Novotny-Moore purchased items at the sale, O'Dell's home was not a place of business and the sale would not "preclude[] [the jury] from still finding that his sister coming to his home would still be considered a social guest" and a licensee.

The court ruled, "I think it's pretty clear that there was an invitation to come over to view things. It was expressed." However, the transaction "doesn't fall distinctly within a business dealing;" "it was a ... garage sale and clearly wasn't his business." Ultimately, the court reasoned, "it boils down to whether or not the sale of property from a home to a sister, or to anyone else, is a business or commercial purpose." The court personally believed that the situation "probably loosely fits a commercial or business dealing[]," but found "it's obviously a question of fact." Accordingly, the court decided to read [M. Civ. JI 19.01](#) to allow the jury to determine whether Novotny-Moore was an invitee or licensee. Plaintiff's counsel renewed his objection before the court instructed the jury, but the trial court stood firm. The court noted that [M. Civ. JI 19.01](#) "should be given only if there is a factual issue as to the legal status of the Plaintiff as invitee, licensee, or trespasser." The court had "already determined after argument by counsel and

input, there is at least some factual issue as to that" and the issue had to be placed before the jury.

The trial court proceeded to instruct the jury on the various elements of the negligence/premises liability claim, including the duty of care. As to the duty of care, the court began by stating:

To determine the duty owed to Plaintiff, you must first determine whether Plaintiff was an invitee or licensee. An invitee is a person who is invited to enter or remain on land, premises, a place of business for a commercial benefit to the possessor of the land, premises, place of business, or for a purpose directly or indirectly connected with business dealings with the possessor. An invitation may be either expressed or implied.

A licensee is a person who is invited to enter on land, premises, a place of business for any purpose other than a business or commercial one, with the expressed or implied permission of the owner in control of the land, premises, place of business. A social guest is a licensee, not an invitee....

***3** "As a general rule, if there is evidence from which invitee status might be inferred, it is a question for the jury." *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 595; 614 N.W.2d 88 (2000). A party's status is therefore not automatically a question of law for the court to decide. As defined in *Stitt*, 462 Mich. at 596-597:

A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent.... Typically, social guests are licensees who assume the ordinary risks associated with their visit

... An "invitee" is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception. [Cleaned up.¹]

In *Stitt*, the Supreme Court took great pains to consider the parameters of invitee status. Ultimately, the Court reasoned:

[W]e conclude that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that

justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose. [*Id.* at 604.]

Another important lesson from *Stitt* is that the premises need not be primarily commercial in nature for a visitor to be considered an invitee; a person may be an invitee if the landowner opened the premises at a specific time for commercial purposes. In *Stitt*, the Court determined that individuals entering a church may be invitees if they are there for a fundraiser or are hired to complete a job. *Id.* at 601-603. But the visitors can also be licensees if they are there for a noncommercial purpose, such as to attend services or a meeting. *Id.* at 604-605.

A home, like a church, can be opened to guests for both commercial and noncommercial purposes. In *Hottman v. Hottman*, 226 Mich. App. 171, 175; 572 N.W.2d 259 (1997), this Court held that a relative who came to the defendant's home to gratuitously assist in repairing the defendant's roof was an invitee because he “was on defendant's premises for the purpose of performing services beneficial to defendant.” In *Kelsey v. Lint*, 322 Mich. App. 364, 376; 912 N.W.2d 862 (2017), although a dog-bite case, this Court held that visitors to a garage sale hold invitee status. Other jurisdictions have found the same. See *Couto-Pressman v. Richards*, 63 A.3d 856, 860 (Pa. Comm. Ct., 2012); *Filipowicz v. Diletto*, 350 N.J. Super 552, 558; 796 A.2d 296 (2002) (holding that people attend yard and garage sales “to shop” “not to engage in a social gathering” and therefore are invitees).

*4 O'Dell contends that there still remained a question of fact regarding Novotny-Moore's status because she had completed her business at the sale and essentially engaged in a frolic and detour by taking Cross outside to admire the backyard. This could transform Novotny-Moore's status to that of a licensee. In *Burnett v. Bruner*, 247 Mich. App. 365, 368-369; 636 N.W.2d 773 (2001), this Court declared that a visitor's status must be determined “at the time of the injury.” And a visitor's status on the land may change if he or she exceeds the scope of his or her invitation. See *Constantineau v. DCI Food Equipment, Inc.*, 195 Mich. App. 511, 515-516; 491 N.W.2d 262 (1992), citing *Hutchinson v. Cleveland-Cliffs*

Iron Co., 141 Mich. 346; 104 N.W. 698 (1905), and *Bennett v. Butterfield*, 112 Mich. 96; 70 N.W. 410 (1897).

We discern no error in the trial court's decision to leave to the jury the resolution of Novotny-Moore's status on the land. Novotny-Moore's “main purpose of going” to O'Dell's home was to bring a friend to purchase a chest of drawers. Indeed, Novotny-Moore called ahead to ensure that O'Dell was conducting his sale that day. However, the jury could reasonably conclude from the evidence that Novotny-Moore exceeded the scope of her invitation. Although no one directly testified that O'Dell did not have items for sale in the backyard, this would be a reasonable inference as the sale was held in March in Northern Michigan and the ground was “frozen” and “hard.” Both Novotny-Moore and O'Dell testified that Novotny-Moore took Cross into the backyard to show it off, and not to purchase any items. Had Novotny-Moore been a stranger who strayed from the sale to inspect other areas of the premises, she might have been deemed a trespasser. As she is the owner's sister, however, and was otherwise permitted to freely roam O'Dell's home, the jury could reasonably determine that she was a licensee. The facts before the court represented a close case, warranting leaving the issue to the jury as the finders of fact. Novotny-Moore is not entitled to relief in this regard.

III. ADMISSIBILITY OF EVIDENCE

Novotny-Moore also challenges the trial court's exclusion of testimony from Robert LaDuke, the person who purchased the home from O'Dell, that he fell on the same landscape timber within 40 days of the incident and that he replaced the timber to prevent another fall. The court also excluded a picture of the removed timber taken long after Novotny-Moore's fall. We review for an abuse of discretion a trial court's evidentiary rulings and consider de novo any underlying questions of fact. *Lockridge v. Oakwood Hosp.*, 285 Mich. App. 678, 699; 777 N.W.2d 511 (2009).

Plaintiff's counsel sought admission of LaDuke's testimony that shortly after he moved into O'Dell's former home, he discovered that the subject landscaping timber was rotted, leading him to replace it. Plaintiff's counsel conceded that remedial measures taken by a party are not admissible. However, counsel asserted, “there is no bar to [evidence of] subsequent remedial measures” taken by a nonparty. Plaintiff's counsel noted that he took a picture of the rotted timber after it was removed “last summer,” which would have

been the summer of 2017 and more than a year after Novotny-Moore's fall.²

Plaintiff's counsel asserted that LaDuke's testimony and the photograph were relevant because O'Dell claimed that he did not know and had no way to know about "the poor condition of this wood." Counsel contended that LaDuke's discovery of the timber's condition and the advanced state of the deterioration were evidence from which the jury could infer that O'Dell should have known of the timber's condition at the time of Novotny-Moore's fall. Counsel further asserted that the jurors could use their "common sense" about the rate of deterioration of wood.

*5 As to the remedial measure, plaintiff's counsel noted that such evidence is generally inadmissible because it would be a disincentive to premises owners to remedy dangerous conditions on their land. But counsel cited *Denolf v. Frank L. Jursik Co.*, 395 Mich. 661; 238 N.W.2d 1 (1976), and *Hadley v. Trio Tool Co.*, 143 Mich. App. 319; 372 N.W.2d 537 (1985), for the proposition that remedial measures taken by nonparties are admissible.

The court noted that Novotny-Moore had already testified without objection that LaDuke replaced the timber following her fall. Defense counsel interjected that he should have objected because that evidence was irrelevant to whether O'Dell knew or should have known at the time of the accident that the timber was rotten.

The court ultimately excluded the proffered evidence in a ruling that spanned nearly 10 transcript pages. The court first analyzed the admissibility of the evidence under MRE 407, which provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court noted that plaintiff's counsel had not made an offer of proof that he was presenting the evidence "for another purpose," so the evidence was not admissible under the second sentence of the evidentiary rule. Rather, plaintiff's counsel focused on the fact that the remedial measure was

made by a nonparty. The court then proceeded to analyze the caselaw cited by Novotny-Moore.

In *Denolf*, 395 Mich. at 663, the Supreme Court granted leave to determine "whether the rule of evidence excluding proof of post occurrence modifications is applicable where the subsequent modification is made by a third person not a party to the litigation." The Court noted that the exclusionary rule "is primarily grounded in the policy that owners would be discouraged from attempting repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them." *Id.* at 667. However, "[t]his policy consideration is absent in a case, such as this, where imposition of liability is not sought against the person taking the remedial action." *Id.* Evidence of subsequent repairs made by a third party is admissible, the Supreme Court held,

confined to the context where (1) evidence of subsequent remedial action is otherwise relevant, (2) admission of the evidence would not offend policy considerations favoring encouragement of repairs, and (3) the remedial action is not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party. [*Id.* at 669-670.]

This standard was followed in *Hadley*.

Here, the second and third factors permitting admission were met: O'Dell did not direct the remediation of the dangerous condition and its admission would not discourage such repairs. But the evidence was not "otherwise relevant." *Id.* at 669. To be *otherwise* relevant, the evidence may "not directly compel an inference of negligence from the mere fact that a subsequent modification occurred." *Hadley*, 143 Mich. App. at 328. The trial court found that plaintiff's counsel in this case had not made

*6 any additional offer of proof that [the proffered] evidence is somehow ... relevant to anything other than the issue of negligence. In other words, if allowed, that type of evidence would directly compel - - could only be offered for that purpose. It would directly compel an inference of negligence from the fact that it was removed, from the fact that there was a subsequent modification.

The trial court in this case proceeded to discuss evidentiary relevancy. To be relevant, evidence must be probative and material, the court stated. The probity and materiality of the timber replacement only compelled a finding of negligence, the inference forbidden by *Denolf*. This, standing alone, was sufficient reason to exclude the evidence—the evidence was relevant only to establish negligence.

To strengthen its analysis, however, the trial continued to determine whether the danger of unfair prejudice arising from the proffered evidence substantially outweighed its probative value, mandating exclusion under [MRE 403](#). The danger of unfair prejudice was too high in this case, the court found, because the only conclusion that could be reached from LaDuke's subsequent remedial measure was that O'Dell was negligent in not making the repair earlier. We discern no error in the court's analysis. The trial court acted well within its discretion in excluding LaDuke's testimony about his replacement of the timber.

Finally, the court addressed the “offer of proof related to the condition of the wood some 40 days after” the accident. The court found irrelevant evidence regarding “the condition of the property following the accident” and therefore precluded plaintiff's counsel from asking LaDuke to describe the condition of the timber more than a month after Novotny-Moore's fall. “[S]everal independent things could have happened in between,” the court noted. However, the court reflected, the jury already heard from Novotny-Moore that the subsequent owner found the timber defective and replaced it, and that record evidence was not stricken. The court later sustained an objection raised by defense counsel when plaintiff's counsel again tried to elicit testimony that the

timber had been replaced, reminding counsel, “You can ask about the condition of the wood at the time” of the accident, but cannot “suggest” that subsequent remedial measures were taken.

Although the trial court did not separately address the admissibility of the photographic evidence, its reasoning covered this evidence as well. A defendant can only be liable for negligence in a premises liability action if he had “actual or constructive notice of the condition.” *Banks v. Exxon Mobil Corp.*, 477 Mich. 983, 983; 725 N.W.2d 455 (2007). An owner is deemed to have constructive notice if the condition “has existed a sufficient length of time” and the defect was discoverable. *Id.* at 983-984. Photographic evidence of the timber's condition more than a year after the accident would be completely irrelevant to establishing its condition at the time of Novotny-Moore's fall. Accordingly, the trial court properly excluded that evidence.

We affirm. Defendant, as the prevailing party, may tax his costs pursuant to [MCR 7.219](#).

All Citations

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Footnotes

- 1 This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J. App. Pract. & Process 143 (2017).
- 2 Counsel's record statement contradicts Novotny-Moore's later assertions that this picture was taken only months after her fall in the summer of 2016.