SECREST WARDLE

Premises Liability Handbook 2022

Premises Liability Practice Group

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Open and Obvious Defense

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On July 28, 2023, in *Kandil-Elsayed v F & E Oil, Inc.*, ___ Mich ___ (2023), the Michigan Supreme Court reversed decades of precedent and upended the Open and Obvious Defense in Michigan. The Court ruled that it is no longer a Duty question (a question of law for the judge), but rather simply a comparative negligence issue (which could be for the judge or jury).

Secrest Wardle initially published the attached newsletter on the Court's newest pronouncement.

Secrest Wardle's webinar on this case can be found by clicking here.

The following Premises Liability Handbook Chapter on Open and Obvious will be updated in 2024, after some of the dust has settled. Nevertheless, the following Chapter gives guidance on how to build comparative negligence defenses based on what remains of the Open and Obvious Defense.

Please note the new ruling only impacts cases where the claimant is an invitee. If the claimant is a licensee, then the duty owed by a premises possessor is less (the duty is that the possessor only needs to warn of known, hidden dangers.) Therefore, if the claimant is a licensee and the alleged hazard is open and obvious, then the only duty owed to a plaintiff licensee is not breached and there is no liability.

Open and Obvious Defense

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I. General Background

To establish a *prima facie* (or "the necessary elements of a") case of negligence, the plaintiff must prove: (1) that the defendant owed a **duty** to the plaintiff, (2) that the defendant **breached that duty**, (3) that the defendant's breach of that duty was a **proximate cause** of the plaintiff's damages, and (4) that the plaintiff suffered **damages**. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).

Duty is any obligation the defendant owes to the plaintiff to avoid negligent conduct. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The existence of a duty is a question of law for the trial court to decide. *Id.*

In other words, we generally do not ask juries to decide the threshold question of the existence of a legal duty. We do not, for example, ask the jury to answer the question, "Did this defendant have any legal obligation to make his property safe for *trespassers*?" The question of the extent to which a property owner or possessor owes a duty to a trespasser is for the court to decide, and the answer is well known. A landowner or possessor is insulated from liability for injuries to a trespasser with the exception of those that arose from the landowner's "willful and wanton" misconduct. *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). See also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

In premises liability cases, the existence and scope of a property owner or possessor's duties of care depend on the extent of the owner's possession and control over the property. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Moreover, the specific duty owed by a landowner or possessor to those who enter the property depends on the status of the visitor - trespasser, licensee or invitee - at the time of the injury. *Stanley v Town Square Cooperative*, 203 Mich App 143; 146147; 512 NW2d 51 (1993).

The open and obvious hazard doctrine addresses the first element of negligence analysis; that is, whether an owner or possessor of land owes a legal obligation to a person injured on the property. The doctrine's scope is limited to invitees and licensees. Generally, there is no duty of care owed to trespassers for reasons unrelated to the open and obvious hazard rule.

In analyzing whether a condition on property is open and obvious, we will see that an **objective test** is applied by trial courts. That test is: whether a reasonably careful person, upon casual inspection, would be expected to discover and avoid the hazard. When no duty is found because the hazard was objectively obvious, the case is dismissed via summary disposition. If the court is unable answer the question due to a factual dispute, the case is submitted to the fact-finder for resolution.

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II. History of Rule in Michigan

The open and obvious hazard rule historically played a minor role in resolving premises liability cases. For decades it was a rule without a name. It was most frequently seen as the principle behind what was called the "natural accumulation doctrine" with respect to snow and ice cases.

Prior to the Supreme Court's decision in *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975), the general rule was that possessors of property were not liable for accidental injuries arising from the natural accumulation of ice and snow. See, for example, *Gillen v Martini*, 31 Mich App 685; 188 NW2d 43 (1971). The policy rationale for the rule was that naturally occurring snow and ice conditions are *obvious* and easily avoidable. *Quinlivan, supra*, at 260. The Supreme Court overturned the natural accumulation rule with respect to business invitees stating:

> To the extent pre-existing case law authority indicated that the natural accumulation rule applied in an invitor-invitee context, that authority is overruled. For reasons adequately stated by the Alaska Court, we reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability.

In other factual contexts the issue was addressed in light of the clear obviousness of a hazard which the plaintiff, by training or otherwise, could have easily avoided. In *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887), the plaintiff fell through an open hatch on a ship being docked for the winter. Because the danger was not hidden, the Supreme Court dismissed the case:

> The occupier of premises, no doubt, is bound, as to persons thereon by his express or implied invitation, to keep the premises free from, or give a warning of, danger known to him and unknown to the visitor. But this rule has no application to a case where a person who from his experience, through many years, in sailing a vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and whom observation teaches that they are liable to be open rather than closed, and are sources of danger which he must avoid at his peril. [*Id.* at 647.]

In *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992), the Supreme Court first addressed the issue of whether to incorporate into Michigan law the doctrine as described in the Restatement of Torts, Section 343:

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

The Restatement also provides in Comment (a) to section 343, that section 343A entitled "Known or Obvious Dangers," is to be read in conjunction with 343. Comment (a) states that 343A limits the liability stated in 343:

> (1) **A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.**
>
> (2) In determining whether the possessor should anticipate harm from a known or **obvious** danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

In *Riddle*, the plaintiff was severely injured while walking across a McLouth Steel plant floor where coils of wire were stored and where oil dripped regularly in a process called "pickling." Prior to walking across the plant floor, Mr. Riddle observed McLouth Steel employees cleaning the area. In his trial testimony the plaintiff denied knowing there was oil on the floor where he walked and it was undisputed that there were no warning signs in the area. While crossing the coil field, he lost his balance, fell backward, and hit his head on metal rails set in the floor to hold the coils of steel.

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The Supreme Court's majority and dissenting opinions acknowledged that Restatement of Torts 2d 343A applies to premises liability cases in Michigan. The Court's formal ruling was a narrow one, but this case opened the door to a later expansion of the doctrine. The Court in *Riddle* simply overturned the Court of Appeals decision that found that the doctrine had been implicitly eliminated by the doctrine of comparative negligence and ruled that the doctrine of open and obvious hazards remains a viable one in Michigan. The decision appears to limit the application of the doctrine to the issue of whether one must *warn* of a hazard where the hazard is an obvious one, although it is not clearly stated in the opinion.

In *Maurer v Oakland County Parks*, 449 Mich 606; 537 NW2d 185 (1995), the plaintiff fell on concrete steps at a county park. The restroom was located in a building that also housed a concession stand. There was a series of steps outside the doorway of the restroom. First, there was a six-to-eight-inch step down from the doorway to a concrete slab. About four feet beyond the first step, there was another six-and-one-half-inch to seven-inch step down to another concrete slab. This concrete area also extended about four feet. At her deposition, the plaintiff testified that she and her two children were leaving the rest room area at the defendant's park. The plaintiff saw the first step and turned around to make sure that her children also saw the step. She then tripped on the second step.

The Supreme Court introduced the concept of "special aspects" to a hazard analysis described as something especially dangerous or unusual that might be recognized as imposing liability on a landowner even though the hazard was claimed to be an obvious one. The Court, however, found nothing especially hazardous about the concept of negotiating a set of stairs, even though they were of irregular height.

> Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." . . .
>
> *However, where there is something unusual about the steps, because of their "character, location, or surrounding circumstances, then the duty of the possessor of land to exercise reasonable care remains."* (Citations omitted.) If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide.

In the companion case, *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), the Supreme Court reaffirmed that there is no duty to warn of open and obvious dangers, and if "no reasonable juror would find that the danger was not open and obvious," summary judgment against the plaintiff is proper on the failure to warn theory.

The Court acknowledged that there are other grounds to consider concerning breach of duty, such as negligent maintenance and dangerous construction. However, the Court did not expressly decide whether the open and obvious doctrine would be applicable to theories other than a duty to warn.

The Michigan Court of Appeals resolved the question in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999). There, the plaintiff tripped over a supporting wire behind her mobile home while she was washing windows. The trial court determined that any danger presented by the wire was open and obvious and granted defendant summary disposition. The plaintiff argued on appeal that "the doctrine [was] inapplicable because she did not allege a failure to warn but, instead, alleged that [the] defendant had failed to *maintain* the premises in a reasonably safe condition by placing the support wire where it did." The Court of Appeals held that the doctrine was applicable and that the plaintiff's argument was contrary to Michigan law.

The Court of Appeals cited for support the *Riddle* decision and the Second Restatement of Torts, 343 and 343A. The Court reasoned that the *Riddle* case actually involved both "duty to warn" and "duty to maintain" claims. The Court then concluded that the doctrine would apply to failure to warn cases *and* to claims that the defendant breached a duty in allowing the dangerous condition to exist in the first place. Additionally, the Court stated that the *Bertrand* decision did not limit the doctrine to "duty to warn" cases, while mentioning the other theories that premises liability cases are usually based upon. The Court noted that if the plaintiff's argument was adopted, the "doctrine could be avoided in most, if not all, cases in which it would otherwise apply, simply through . . . artful pleading."

III. Objective Standard

In 1993 the Court of Appeals established the analysis to be used by trial courts in deciding cases brought on this issue, and since that time the basic inquiry has remained unchanged. In *Novotney v Burger King* (*On Remand*), 198 Mich App 470; 499 NW2d 379 (1993), the Court of Appeals held that an **objective standard** is to be used. The question to be answered in deciding the merits of a case under a legal challenge is: **Would an average user with ordinary intelligence have been able to discover the danger and the risk presented, upon casual inspection?** That is, is it reasonable to expect that the invitee

would discover the danger? With respect to an inclined handicap access ramp on which Mrs. Novotney fell, the Court determined that it was.

Consequently, it is not relevant to the disposition of a given case whether plaintiff actually saw the hazard. Rather, it is necessary for plaintiffs, to have their claim survive a motion for summary disposition, to come forward with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of the hazard.

A. What about cases involving a physically disabled plaintiff?

As to persons with disabilities, it must be remembered that the open and obvious hazard rule is measured against an objective standard of whether a reasonably careful person would have been able to see and avoid the hazard. Whether the individual plaintiff actually saw—or was even *capable* of seeing the hazard is, to date, irrelevant. Consequently, in *Sidorowicz v Chicken Shack, Inc*, unpublished opinion of the Court of Appeals, issued Jan. 17, 2003 (Docket No. 239627), the Court of Appeals rejected the claim of a blind restaurant patron who slipped on water on the restroom floor, holding:

> Plaintiff was unable to see this condition**…**because of his blindness, but this condition would have been open and obvious to an ordinarily prudent person. No evidence has been presented indicating that the "special aspects" of the unsafe condition would remove the case from the open and obvious doctrine.

The Michigan Supreme Court denied leave to appeal. In *Sidorowicz v Chicken Shack, Inc*, 469 Mich 919; 673 NW2d 106 (2003), Justice Cavanaugh dissented to the denial of leave stating:

> "My fellow justices**…**have clearly stumbled over what is so plain in this case—what is open to the sighted is *not necessarily open and obvious to the blind."* (Emphasis in the original.)

Based on this ruling, persons with disabilities are owed no special preference with respect to the application of the open and obvious hazard doctrine. Whether this proves true with respect to a *mental* disability remains to be seen given the discussion below regarding the special consideration given to minors.

B. What about persons with diminished mental capacity due to alcohol?

In *Mann v Shusteric Enterprises*, 470 Mich 320; 683 NW2d 573 (2004), the Supreme Court refused to soften the impact of the open and obvious hazard rule where the plaintiff became intoxicated in the defendant's tavern then fell in defendant's poorly maintained parking lot following a blizzard.

In premises liability cases the fact-finder is to consider "the condition of the premises" and not the condition of the plaintiff. The objective test requires trial courts to disregard the particular plaintiff's level of impairment. An intoxicated person is held to the same standard as a sober person.

C. What about persons with diminished mental capacity due to age?

There is a saying in the profession, "Bad facts make bad law." One such set of facts was described in *Bragan v Symanzik's Berry Farms*, 263 Mich App 324; 687 NW2d 881 (2004). In *Bragan*, the Court of Appeals considered the case of 11 year-old Valentine Bragan who fractured both wrists in a fall at the defendant's facility. The defendant set up a "Jacob's Ladder" in its barn. This is a rope ladder tied off approximately 10 feet above the ground. It is designed to be difficult to climb and, in fact, 90% of climbers fall. *The child admitted knowing that it was common to fall off the ladder. The child also admitted seeing that there was barely enough straw below the ladder to cover the barn floor.*

The Court of Appeals acknowledged that the logic of the *Lugo* case (see discussion below) excludes from special consideration persons with disabilities under the objective test for liability. For example, the Court noted that a blind plaintiff was barred from any remedy because a reasonably careful (sighted) person would have seen a hazard on a bathroom floor.

However, where the disability is one of *age*, as opposed to physical abilities, the Court created a special exception on the theory that children, due to their reduced mental capacity, are given special consideration because they are less able than adults to *appreciate* the consequences of hazards in plain view:

> Only a jury can determine whether the Jacob's Ladder and lack of straw amounted to open and obvious dangerous conditions in the eyes of a child, and, if open and obvious, whether the condition was unreasonably dangerous in light of the targeted youthful audience.

This case opens for consideration whether other persons of limited mental capacity will be allowed to submit their case to the jury for a determination of whether they were sufficiently competent to appreciate and avoid the hazard that led to their injury.

IV. The *Lugo v Ameritech* Decision

In *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001), the plaintiff was walking through a parking lot toward defendant's building to pay a telephone bill. She stepped in a pothole and fell. In her deposition, Ms. Lugo testified that she was not watching the ground when she fell. She was concentrating on a truck in the parking lot at the time; however, she agreed that nothing would have prevented her from seeing the pothole had she looked down.

Ameritech moved for summary disposition, claiming that the pothole constituted an open and obvious danger. The trial court agreed. The Michigan Court of Appeals reversed the circuit court in a two-to-one decision. The majority concluded that the circuit court erred in holding that plaintiff's legal duty to look where she was walking barred her claim and decided the issue as one of comparative fault only. The Court also determined that the open and obvious danger rule did not apply because there was a genuine issue of material fact regarding whether defendant should have expected that a pedestrian might be distracted by the need to avoid a moving vehicle, or might even reasonably step into the pothole to avoid such a vehicle.

The Michigan Supreme Court reversed the Court of Appeals and dismissed the case.

The Court agreed that property owners and possessors have a general obligation to maintain their property in a reasonably safe condition. However, this duty does not generally encompass the removal of open and obvious hazards:

> "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, *an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."*

The rule fashioned by the Supreme Court is a modification of Second Restatement of Torts 343A. The current version states that **a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.**

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According to the Court, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspects" of the condition should prevail in imposing liability on the defendant or the openness and obviousness of the condition should prevail in barring liability.

The Court provided two now-famous examples of situations where "special aspects" of the open and obvious condition would create an unreasonable risk of harm notwithstanding the obvious nature of a hazard. The Court described a hypothetical commercial building with only one exit for the general public where the floor is covered with standing water. The Court reasoned that although the condition was open and obvious, "a customer [who] wish[ed] to exit the store must leave . . . through the water. The open and obvious condition is . . . unavoidable." Therefore, the doctrine should not bar liability.

The second example offered by the Court was an open and obvious condition that imposes a high risk of severe harm, such as an unguarded thirty-foot-deep pit in the middle of a parking lot. The Court explained that although the condition may be open and obvious, and likely avoidable, the "situation would present such a substantial risk of death or severe injury . . . that it would be unreasonably dangerous to maintain the condition . . . absent reasonable warnings or other remedial measures."

The special aspects exception was summarized in this way: "**only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine**. Typical **open and obvious** dangers . . . [would] not give rise to these special aspects." The Court pointed out that a fall from a standing height would not meet this exception.

The Court found that, based on the evidence submitted to the trial court, there was no genuine issue of material fact with respect to whether Ms. Lugo's claim was barred by the open and obvious danger doctrine. It stated that the case simply involved a fall in a common pothole in a parking lot. Concerning the plaintiff's argument that the moving vehicles in the parking lot were a distraction, the Court ruled there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine.

In contrast, in the unpublished case of *Ehrler v Frankenmuth Motel, Inc*, unpublished opinion of the Court of Appeals, issued Aug. 2, 2011 (Docket No. 296908), the Michigan Court of Appeals held that the "special aspect" exception to the open and obvious rule was

present when early morning freezing rain transformed into a thin layer of ice that covered the defendant's entire motel premises. The "blanket of ice" was determined to be "effectively" unavoidable because motel guests were "effectively" required to walk on the ice to get to their vehicles, check-out, and/or sample the hotel's complimentary breakfast. In other words, hotel guests had to encounter the ice if they wanted to leave their rooms for any purpose. Therefore, the Court held that a genuine issue of material fact existed, and a jury should have been able to decide if the motel breached the duty it owed to its guests.

In *Hoffner v Lanctoe*, 492 Mich 450 (2012), the Court held that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." In order for a plaintiff to make an "effectively unavoidable" argument, she must first demonstrate that the condition at issue "give[s] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards." Thus, even an unavoidable condition will not be a "special aspect" – and the open and obvious defense will apply – if it does not pose a risk that differs from "ordinary conditions." Under *Hoffner*, naturally occurring snow and ice, during a Michigan winter, is not out of the ordinary, nor does it present a uniquely high likelihood of severe harm.

In the matter of the *Estate of Nelson E. Hall*, a November 27, 2012 unpublished per curiam opinion from the Michigan Court of Appeals (Docket No. 308071) shows that the special aspects exceptions to the Open and Obvious Doctrine are narrow. Nelson Hall was walking into defendants' business to deliver a car payment when he fell while stepping into a puddle of water near the business entrance. He struck his head on the concrete sidewalk and later died as a result of the injury. The trial court granted defendants' motion for summary disposition and ruled that the puddle was open and obvious as a matter of law. Therefore, plaintiffs' case was dismissed.

The Court of Appeals affirmed and opined that the open and obvious doctrine applied because the puddle did not have "special aspects." Where a condition has special aspects, the open and obvious doctrine does not apply. There are two instances where a condition is found to have special aspects: (1) where the danger is unreasonably dangerous; or (2) where the danger is effectively unavoidable. The Court held that Nelson Hall could have entered the business without walking through the puddle therefore, it was not unavoidable. Even further, the Court held that even though Hall was under a contractual obligation to make his car payment he could have chosen not to enter the business at all. He did not "demonstrate that he was unavoidably compelled to confront the dangerous condition." Moreover, the puddle was not unreasonably dangerous although Hall died as a result of the injury. In fact,

the Court held that an ordinary puddle of water in a parking lot does not present a uniquely high likelihood of harm and, in general, does not constitute a hazard at all. In reaching this conclusion, the Court of Appeals relied heavily on the *Hoffner, supra*, decision.

Against this backdrop, the Court of Appeals decided the case of *Sabatos v Cherrywood Lodge, Inc,* unpublished opinion per curiam of the Court of Appeals, issued July 9, 2013 (Docket No. 302644). The Court considered (for a second time) whether a defense motion for summary disposition was properly granted regarding an "effectively unavoidable" argument. In *Sabatos*, the plaintiff was an employee of the defendant lodge. She began her shift between 3:00 and 4:00 p.m. on a March afternoon. Her shift ended between 10:30 and 11:00 p.m. She decided not to leave immediately after her shift ended but, rather, stayed and socialized with co-workers for around two hours. While walking back to her car, she slipped and fell on ice, breaking her leg and ankle. The lodge moved for summary disposition based on the open and obvious doctrine. The trial court granted the motion, but the Court of Appeals reversed in an August 9, 2012 opinion, finding that the icy condition of the parking lot was unavoidable.

However, around the same time, the Michigan Supreme Court released *Hoffner, supra*. The *Sabatos* panel had not considered *Hoffner*. Ultimately, the Supreme Court remanded the case to the Court of Appeals, with instructions to reconsider its August 9, 2012 opinion in light of *Hoffner*. On remand, the Court of Appeals again held that the icy parking lot was unavoidable under the facts of this case, and therefore the open and obvious defense did not apply. The panel explained:

> [T]the evidence showed that Sabatos was effectively trapped within the Lodge's premises, which was the precise circumstance given by . . . *Hoffner* . . . as an example of an effectively unavoidable condition. . . . Moreover, we again reject the notion that Sabatos could have avoided the icy condition by clearing it herself or arranging for alternative transportation. . . . *Hoffner* . . did not state that whenever an invitee has a choice to encounter a hazard, however extreme the options might be, the existence of that choice renders the hazard avoidable as a matter of law. Instead, it stated that the hazard must be unavoidable for all practical purposes. . . . In this case, the evidence showed there was no practical way for a visitor to leave [the lodge] without encountering the icy parking lot.

The *Sabatos* panel's opinion on remand, however, does not appear to be entirely consistent with *Hoffner*. The Supreme Court was asked to review the case a second time, but declined.

In *Moses v All Seasons of West Bloomfield* (unpublished), issued 1/24/17 (Docket No. 329635), the plaintiff slipped on ice on a sidewalk outside defendant's assisted living facility. The plaintiff faced a difficult hurdle with her lawsuit in that she admitted knowing the weather outside was freezing, she saw snow and also observed frost on the windshields of cars nearby. She claimed, however, that the sidewalk was effectively unavoidable, thereby creating an unreasonable risk of harm. She acknowledged in her deposition she could have walked on the adjoining grass, but did not do so because the grass was wet. She did not express concern in her deposition that the grass was slippery or created any other hazard, and this was her downfall. The Court distinguished *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016) by noting the plaintiff here offered no proofs that the grass was a hazardous alternative. As a result, her claim failed as a matter of law.

V. Classes of Plaintiffs for Whom the Rule Applies

At the outset, the rule by its definition applies to "possessors" having the right or authority to control the premises. Liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily on the one who has control and possession of the property. Liability for negligence does not depend on who is the titled owner of the property; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner. See *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942); see also *Kubczak v Chem Bank & Tr Co*, 456 Mich 653, 575 NW2d 745 (1998).

VI. Classes of Plaintiffs for Whom the Rule Does Not Apply

Regarding classes of plaintiffs for whom the rule does <u>not</u> apply, we know of the following to date:

- Vendors (e.g., snow removal contractors)
- Municipalities sued for public building liability
- Tenants in a residential lease setting
- Any non-owner/possessor

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A. Vendors/Sub-contractors

Given that the rule is limited to possessors of property it is unlikely that a vendor or supplier will have sufficient control over property to be considered a "possessor." For example, where a snow removal contractor plowed a commercial parking lot in an allegedly careless manner, it was prevented from contending that the resulting ice patches were open and obvious because it was not an owner of possessor of the property. See *Gratopp v Tanger Props*, unpublished opinion of the Court of Appeals, issued Feb. 28, 2003 (Docket No. 237663):

> The circuit court granted summary disposition in favor of Hodgins on the ground that the condition of which plaintiffs complained was open and obvious. Hodgins was not the owner of the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Hodgins performed negligently under its contract was erroneous.

In *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 68 (2005), the Michigan Supreme Court considered whether to extend the rule outside the traditional premises owner setting. In a case involving a construction worker's trip and fall on pipes left on the floor of a storage area by another subcontractor, the Court was asked to rule that the doctrine was equally applicable to a construction site setting as anywhere else. The Court declined to extend the doctrine to non-possessors of the premises.

A general contractor owes certain duties to employees of sub-contractors. One of these is to maintain common work areas on the construction site. As part of that duty they must affirmatively correct or warn against "readily observable" hazards. Requiring contractors to resolve problems on work sites that are readily observable is incompatible with a rule that shields contractors from liability for open and obvious hazards. They are mutually exclusive. The Supreme Court declined to re-write the law with respect to construction accidents.

B. Municipalities

In *Jones v Enertel, Inc*, 467 Mich 266, 267, 269; 650 NW2d 334 (2002), the Supreme Court held that the common law open and obvious hazard rule is inapplicable to a claim that a municipality violated its statutory duty to maintain a sidewalk on a public highway in reasonable repair. See also *Haas v Ionia*, 214 Mich App 361; 543 NW2d 21 (1995). The reason is that municipalities are statutorily obliged to keep all public roads, including sidewalks, in reasonably good repair. They cannot exclude some of the roadways (the ones with obvious hazards) from this broad statutory mandate.

In the case of *Pierce v City of Lansing*, 265 Mich App 174; 694 NW2d 65 (2005), the Court of Appeals extended the holding in *Jones* to the public building exception to governmental immunity. The Court found no policy distinction between the treatment of public roadways and public buildings.

It should be noted that MCL 691.1402a was amended, effective 1/4/17 to allow municipalities to assert as a defense the open and obvious hazard rule in sidewalk defect case.

C. Landlord/Tenant

By statute, every residential lease is deemed to include a covenant that the landlord will maintain the premises in a reasonably safe condition. MCL 554.139 states in part:

> In every lease or license of residential premises, the lessor or licensor covenants: (a) that the premises and all common areas are fit for the use intended by the parties. (b) *to keep the premises in reasonable repair during the term of the lease or license*, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused the tenants [sic] willful or irresponsible conduct or lack of conduct. * * * (3) The provisions of this section *shall be liberally construed*.

The Michigan Supreme Court previously held that the open and obvious danger doctrine is not available where a claim is based on a specific statutory duty. See *Jones, supra*. Therefore, whether the defense is available in a landlord/tenant situation depends, in part, on whether ice and snow removal is required as part of the general obligation of "reasonable repair." In *Allison v AEW Capital Mgt, LLP*, 274 Mich App 663; 736 NW2d 307 (2007), the Court of Appeals held that the landlord's statutory obligations include a duty to keep common areas reasonably free from snow and ice, and therefore, the open and obvious hazard defense does not apply in cases of claims by residential tenants against a landlord.

A year later, *Allison* was reversed by the Michigan Supreme Court in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008). In *Allison*, the plaintiff was a tenant of an apartment building when he slipped and fell on a two-inch accumulation of snow and ice as he attempted to reach his car in the parking lot. Plaintiff alleged that the parking lot was not fit for its intended use because it was covered with two inches of snow and because he fell. The Michigan Supreme Court overruled the Michigan Court of Appeals decision that any ice in the parking lot was a breach of the statutory duty. The Michigan Supreme

Court found that the plaintiff failed to establish that the tenants were not able to use the parking lot for its intended purpose and that his claim failed as a matter of law. The Michigan Supreme Court reasoned that:

> MCL 554.139(1)(a) provides that the lessor has a contractual duty to keep the common areas (parking lot) "fit for the use intended." A parking lot is constructed for the primary purpose of storing vehicles on the lot. A lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. The parking lot is generally considered suitable as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. The landlord's duty in this regard concerning the accumulation of snow and ice is to keep the entrance to and the exit from the lot clear, to make sure that the vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles; and
>
> MCL 554.139(1)(b) is concerning damage to the property and the landlord's requirement to repair the damage. "The accumulation of snow and ice does not constitute a defect in the property, and, therefore, the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice, except to the extent that such snow and ice caused damage to the property." The Court held, ". . . the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and therefore, does not apply to parking lots. In addition, MCL 554.139(1)(b) requires the lessor to repair defects in the premises, and the accumulation of snow and ice is not a defect. A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice."

Note that the duty owed to a tenant extends only to the tenant, however. In *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), the Michigan Supreme Court summarily overturned the Court of Appeals on the issue of whether the statutory duties of MCL 554.139 are limited to the tenant or extend to *guests* of the tenant as well.

The Court ruled that the statutory obligations of a landlord are owed only to its tenant and do not extend to a social guest of the tenant. Consequently, the open and obvious hazard defense may not be applied in a claim brought by a tenant but may be asserted in a case brought by a social guest of that tenant.

This statutory provision has been the subject of several appellate cases in the last several years, mostly resulting in a decision for the landlord/property manager. In analyzing these cases, the key for the defense is to distinguish the case of *Hadden v McDermitt Apartments LLC*, 287 Mich App 124 (2010) from *Allison supra*. In *Hadden*, the Court found a question

of fact where the stairs from plaintiff's apartment were dark, snow covered, with black ice on them. The key is the distinction between the primary purpose of the location where the fall occurred. The purpose of a parking lot is to accommodate cars; the purpose of stairs and sidewalks is to accommodate pedestrians. Greater care is required on sidewalks and stairs, according to *Hadden.*

In *Ferguson v Coach House Apartments*, unpublished opinion per curiam from the Court of Appeals, issued Dec. 7, 2017 (Docket No. 334435), the Court reviewed a tenant's suit following a fall as plaintiff walked out the back entrance of her apartment building. She stepped out onto a landing, stepped down onto the sidewalk, then slipped on a patch of ice. Her boyfriend ran to assist her and noticed a patch of ice behind where she fell. The parties conceded the area was a common area under MCL 554.139(1). In finding that the sidewalk was not unfit for the purpose intended the Court noted, "In this case, the sidewalk was not unfit simply because there was a patch of ice." The plaintiff did not establish that the condition of the sidewalk prevented her from accessing it. She did not produce evidence of the size of the patch of ice or whether it was black ice. In deciding against the plaintiff, the Court concluded that while the condition of the sidewalk was not the most accessible, it was not so severe as to render it unfit for its intended purpose of walking. (Accord, *Sandifer v McKinley Inc*., unpublished, rel'd 9/14/17; but see *Battle v Anderson Villas LLC*, unpublished, rel'd 6/13/17.)

In *Schuster v River Oaks Garden Apartments LLC* unpublished opinion per curiam from the Court of Appeals, issued Nov. 30, 2017 (Docket No. 335246), the plaintiff fell at 6:35 am as she took her first steps onto the sidewalk surrounding her apartment complex's mailbox kiosk. In this rare win for the plaintiffs' side, the Court noted that the fall occurred on a sidewalk, whose intended purpose is to provide a dedicated walking path. At the time of her fall, the entire region was covered in ice following an ice storm. The property manager testified that "*everything was coated that morning.*" There had been no salting during the prior seven days. Against these facts the Court found a question of fact as to whether the condition was fit for its intended purpose. *Estate of Trueblood v P&G Apartments* 327 Mich App 275; 933 NW 2d 732 (2019).

In *York v Berger Realty Group, Inc.* unpublished opinion per curiam from the Court of Appeals, issued April 23, 2019, (Docket No. 341603), the plaintiff fell in her apartment complex when she stepped from the sidewalk into the handicapped access area of the parking lot. She asserted that the area where she fell was designed for walking because cars were not permitted to park in the area where she fell. The defendant argued that the location of the fall was a part of the parking lot—designed for parking vehicles. The Court of Appeals sided with the defendant. It ruled that since the location of the fall was in the parking lot, there was no more to be said. Walking in a parking lot is secondary to the *primary* use of the parking lot which is to park cars. It does not matter whether a particular area of the lot is intended to remain free of parked cars.

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VII. Premises Liability v. General Negligence Claim

The Court of Appeals limited the scope of the rule to premises liability claims, but not those sounding in simple negligence. *Laier v Kitchen,* 266 Mich App 482; 702 NW2d 199 (2005). However, this distinction between premises claims and general liability claims may not be as clear-cut as it sounds, given a recent decision of the Michigan Supreme Court, discussed below.

The distinction between a premises theory and a simple negligence theory is often difficult to make since accidents occurring on someone's property frequently involve a confluence of factors dealing with the condition of the land and activities upon it. For this reason, presumably, the Restatement of Torts 343A(1) (and the Michigan Supreme Court in *Lugo)* apply the open and obvious hazard rule to "*any activity or condition* on the land." After all, the policy of holding plaintiffs responsible for their own actions should not be determined by how one drafts the complaint allegations, but instead, on whether a given hazard was obvious and readily avoidable.

Nonetheless, in *Laier* the decedent was killed while assisting the defendant with hydraulic hose repairs on the front-end loader of a tractor. The plaintiff alleged that the defendant's *conduct* caused the accident-and not any defect in the premises. The decedent knew the hydraulic system on the tractor was broken and was assisting the defendant in repairing it. The defendant raised the bucket 4-5 feet off the ground and the decedent crawled beneath it to work on it. The bucket fell and he was fatally injured. The Court ruled that, as to those claims suggesting the defendant's negligent *conduct* caused the accident, the open and obvious hazard rule did not apply. As to those claims seeking to hold the defendant liable as the premises owner, the rule did apply.

The *Laier* analysis has now been blessed by the Michigan Supreme Court. In *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008), the Supreme Court summarily reversed the Court of Appeals and reinstated the plaintiff's case by adopting the dissenting opinion in the Court of Appeals. The plaintiff was a tenant in a mobile home park. The plaintiff approached the trailer of the landlord. The defendant opened the door outward. It struck the plaintiff in the face and chest knocking him backward. The dissent argued that the plaintiff's claim was not a premises liability claim as there were no defects in the premises. Instead, the plaintiff's claim was for simple negligence in the failure of the defendant to take reasonable care in the way in which he opened his door. The Supreme Court agreed and, as a result, the open and obvious hazard defense did not apply.

This decision demonstrates that not every fall on land involves a premises liability case. We expect plaintiffs to try to allege general negligence theories wherever possible in an attempt to avoid the application of the open and obvious hazard doctrine. The appellate courts apparently are no longer concerned that "artful pleading" will be used to avoid the

application of the doctrine as the Court of Appeals cautioned in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999).

In *Compau v Whittemore Inn,* (unpublished) (reversed in part the judgment and reinstating defendants' motion for summary disposition by *Compau v Pioneer Res Co, LLC*, 498 Mich. 928; 871 NW2d 210 (2015) (finding the hazard sufficiently open and obvious thus barring recovery)), rel'd 4/16/15 (Docket No. 320615), the plaintiff was a spectator at a lawnmower race sponsored by the defendant. During a race several mowers collided and broke through a flimsy fence headed toward where the plaintiff was standing. She was alarmed, and backed out of the way of the mowers. In doing so she tripped over a railroad tie, which she had previously seen on her way to her viewing location.

The plaintiff brought suit on two theories, premises liability and general negligence, the latter involving a claim that the racetrack had been negligently designed. Here, the Court of Appeals did not attempt to look to the gravamen of the plaintiff's claim, but simply noted that the general liability theory was contained in a distinct count of the complaint, and found this was sufficient to avoid the open and obvious hazard defense. In doing so, the Court made no mention of published case law stating, "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, *and by looking beyond mere procedural labels to determine the exact nature of the claim.*" *Adams v Adams (On Reconsideration)*, 276 Mich App 704 (2007).

The plaintiff fared better in *Thomas v Woodward Detroit CVS, LLC*, unpublished, rel'd 10/24/17, in which the plaintiff suffered a brain injury after obtaining the assistance of the store manager to reach for some stacked chairs for sale. The employee attempted to manipulate the chairs on the shelf and this caused them to fall. The defense attempted to assert, in part, that the plaintiff's claim was solely one of premises liability. The Court disagreed and affirmed the adverse jury verdict. The Court noted that no evidence was presented at trial that the chairs would have fallen but for the actions of the store employee. The Court concluded that the chairs alone did not create a hazard. They became a hazard only due to the negligence of the store employee.

By contrast, the plaintiff fared less well in another design case. In *Krupinski v Costco,* (unpublished), rel'd 12/17/15, the plaintiff was injured at a self-service filling station operated by Costco. The design of the facility was allegedly dangerous in that it caused cars to wait in queues near lines of customers on foot. The plaintiff was pinched between two vehicles as one moved forward in the queue. In reviewing the plaintiff's complaint as a whole, the Court determined that the plaintiff's theory of liability was not based on any claim that Costco did something to set in motion the chain reaction of automobile collisions that caused plaintiff's injury (general negligence). Instead the Court found that the complaint had to do with the claim that the gas station was maintained in a dangerous manner that caused plaintiff's injuries (premises claim). As a result, the Court affirmed the trial court's dismissal of the case.

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Other recent failed attempts to plead around the open and obvious hazard rule include: *Eaton v Frontier Communications,* (unpublished) rel'd 2/9/16 (fall on uneven sidewalk) and *England v Meijer Inc.,* (unpublished) rel'd 10/20/15 (slip and fall on laundry detergent in grocery store), *Zimmer v Harbour Cove on the Lake Condominium Community,* unpublished, rel'd 3/14/17 (slip and fall due to placement of gutters and piled snow), *Livadic v Wal-Mart Stores Inc.*, unpublished, rel'd 10/17/17 (fall in department store allegedly due to hangers on floor from overstuffed racks); *Mendrysa v VHS Children's Hospital of Michigan* unpublished, rel'd 5/16/19 (fall on water in an operating room where water had leaked from a hose).

A recent trend in slip and fall cases is for plaintiff attorneys to allege the negligent installation or maintenance of gutters and the like as the cause of an accumulation of ice in a given area. The claim is that this theory is one of general negligence, not premises liability, for which the open and obvious hazard defense does not apply.

The Supreme Court laid to rest this distinction on May 21, 2010, in *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913; 781 NW2d 806 (2010):

> The Court of Appeals erred by reversing the circuit court's ruling on the basis that the plaintiff's claim sounded in ordinary negligence. ***The plaintiff, who was allegedly injured by slipping on the icy surface of the defendant's premises, claimed that he was injured by a condition of the land, and as such, the claim was one for premises liability***, as the circuit court correctly recognized. Although an injured person may pursue a claim in ordinary negligence for the overt acts of a premises owner on his or her premises, ***the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability.***

In other words, once water finds its way onto the ground and freezes, the law now deems the ice patch to be a condition of the land, and consequently, a premises liability issue on which the open and obvious hazard rule applies.

This case makes for good common sense. Attorneys now are no longer required to engage in a rather silly exercise of attempting to determine the source of the water composing the offending ice patch in order to evaluate whether the open and obvious hazard rule applies: Did the water come from the clogged gutter? If so, the rule could not be asserted. Did the water come from run-off from melting snow from nearby grass? If so, the plaintiff has no case at all. Did it come from a combination of sources? Well, then it is a jury question left to them to sort out. We no longer need to engage in this type of exercise. The only question is whether the ice was obvious and avoidable.

The underlying policy of the law, however, is that persons who act with reasonable care and caution are able to see and avoid obvious hazardous conditions on property. It shouldn't matter where the condition had its initial source, and this decision by the Supreme Court should serve to re-focus slip and fall accidents on the key bright-line issue: Would the hazard, as it existed at the time of the accident, have been able to be seen and avoided by a reasonably careful person upon casual inspection, or not?

VIII. Common Plaintiff Strategies to Overcome Rule

A. "I didn't see it!"

The claim of "I didn't see the hazard therefore it wasn't obvious" was one of the initial responses to the *Riddle* decision in 1992. In fact, Mr. Riddle claimed, to no avail, that he didn't see the oil on the floor of the pickling room. By the time the Court of Appeals adopted the objective "reasonably careful person" test along with the "casual inspection" requirement in *Novotney, supra,* this assertion of not seeing the hazard could not carry the day alone.

There is one *caveat* to consider. In the event additional persons come forward who also claim they could not see the hazard, there may be a question of fact created regarding the "obviousness" of the hazard. This was discussed in *Chapman v National City Bank of Michigan/Illinois*, (unpublished) rel'd 3/1/05. While the plaintiff's claim was ultimately rejected by the Court of Appeals, the Court considered the plaintiff's argument that others had difficulty seeing the ice on which she fell to be a valid one.

More recently in *Estate of Macaskill v Kroger,* (unpublished), rel'd 3/5/15, the Court of Appeals, in a 2-1 decision, found a question of fact arising out of plaintiff's fall just after alighting from a vehicle at the front of a Kroger grocery store. A hose was laid across the entrance to the store, then a mat was placed over approximately 80% of the hose. The trial court granted Kroger its dispositive motion because the hose where plaintiff fell was partially visible. Aided by a video of the event (which did not apparently impress the trial judge), the Court of Appeals noted that the plaintiff was taking her second step out of the car when she fell. Noting "the unusual circumstances presented here," the court majority found there was a question of fact as to whether a reasonably careful person would have been able to see and avoid the hose.

The dissent took issue with the majority's interpretation of the video evidence, claiming it actually showed about 1/3 of the hose visible, perhaps more. Judge Donofrio also counted 22 people successfully walking over the hose during the six minute video. He stated most succinctly, "The majority has identified no reason why a person in Karen's position would not have been able to notice the hose."

B. "I didn't see it because I was distracted!"

Plaintiffs then attempted to offer some legitimate *excuse* for not seeing a hazard, with limited success.

For example, in *Lugo*, the plaintiff claimed she didn't see the pothole in the parking lot because she was doing a legitimate thing - watching for vehicles turning into the parking lot in order to avoid being run over. The Supreme Court rejected this argument and dismissed the case.

In *Maurer, supra*, the plaintiff was tending to her small children when she fell on the steps leading from the rest room. The Supreme Court rejected suggestions that the circumstances surrounding the fall were sufficient to call into question the application of the rule. It appears that the simpler the circumstances, the more difficult it is to avoid the rule's reach.

In general, defendants should ordinarily win this type of claim, given the objective test for liability and the requirement of some level of inspection of the area ahead by plaintiffs. The *Hanna* case appears to be a poorly considered decision.

C. "I didn't see it because your display distracted me!"

Section 343A of the Second Restatement of Torts states that if the possessor of land should anticipate the harm despite such knowledge or obviousness, the possessor of land is liable to his invitees. Comment (f) to this section provides an illustration of this situation. The Restatement states, "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's *attention may be distracted*, so that he will not discover what is obvious**,** or will forget what he has discovered, or fail to protect himself against it."

Michigan courts have alluded to the "distracted customer" doctrine in several cases without specifically adopting it. For example, in the unpublished decision, *Drake v K-Mart Corp*, (unpublished) rel'd 12/20/96, the plaintiff fell on grape residue in defendant's grocery store. The plaintiff acknowledged in her deposition that the grape material was conspicuous against the light-colored tile floor. She argued, however, that she was distracted by the food displays which the grocer placed to catch the attention of shoppers.

The Court of Appeals put the issue to rest in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007). There the Court distinguished prior case precedent and held there is nothing unusual about grapes on the floor of a grocery produce department and, as such, the condition is open and obvious and easily avoidable. A more recent attempt to assert a similar claim of distraction by a store end-cap sign met a similar result in *Freeman v Kmart Corporation*, unpublished, rel'd 6/6/17.

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D. "I didn't see it because it was invisible!"

The argument that the hazard was not easily seen has met with greater success, as it should. After all, it is the open and OBVIOUS hazard rule and sometimes things simply would not be apparent even to a reasonably careful person who makes a casual inspection.

In *Pippin v Atallah*, 245 Mich App 136; 626 NW2d 911 (2001), 12-year-old Joshua Pippin was riding his bicycle and collided with a four-foot high chain strung that morning across the defendant's parking lot. Testimony from the plaintiff, an eyewitness and plaintiff's liability expert suggested the silver chain was not visible in the sunlight. The Court of Appeals concluded that the obviousness of the hazard was an issue for the jury.

In *Mickens v Dexter Chevrolet Co*, (unpublished) rel'd 7/31/03, the plaintiff slipped and fell on water on a set of interior stairs in defendant's building. The evidence indicated that the water could not be seen even upon casual inspection. The Court of Appeals ruled that it was irrelevant that the plaintiff knew it was raining outside at the time of the accident. "We refuse to declare as a matter of law that this plaintiff should have anticipated dangerously wet stairs, located inside of a building, simply because it was raining outside the building, especially since there was a rug positioned in the entryway of the doorway."

But in *Arvidson v Polly's Food Services*, unpublished, rel'd 12/3/19, the plaintiff fell on a puddle of water in an aisle near a cooler selling bags of ice. He described the puddle as being six to eight feet in length. He testified that he did not watch where he walked. He admitted that the lighting in the store was adequate. A store employee testified that he could see the puddle from four to five feet away. The Court of Appeals rejected the plaintiff's claim that the condition was not open and obvious, based on plaintiff's failure to make a casual inspection as he walked.

Without question, for every case in which the plaintiff succeeds on this theory the defense can cite many more holding that the hazard was or should have been readily observable. The key unresolved area of dispute centers on the extent to which the lessons of everyday experiences of life should be imputed to Michigan residents. For example, if one sees it snowing outside, should it be equally understood that ice may accompany it? If one sees corn husks on an aisle way in a grocery store, should it be understood that kernels of slippery corn may be intermingled with them?

We began to receive answers to the question from the Supreme Court in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005). The plaintiff in *Kenny*, a lifelong Michigan resident, observed a dusting of snow in a parking lot, but she did not see the ice underneath the snow. The plaintiff also observed her three companions holding onto their vehicle for balance in the parking lot. The Supreme Court ruled in this fact-specific opinion that an ordinary observer would have had sufficient knowledge available to know

the parking lot posed a hazard. In doing so, the Court acknowledged that every patch of ice is not open and obvious. The totality of the circumstances must be considered to evaluate facts on a case by case basis.

In *Ververis v Hartfield Lanes*, 271 Mich App 61; 718 NW2d 382 (2006), the Court of Appeals held "as a matter of law, that by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability it may be slippery." The plaintiff argued that the snow masked ice beneath it which the plaintiff could not see or anticipate. The Court held that persons familiar with Michigan winters should know that where there is snow, there may be ice. Absent some other defect in the premises, falls on snow-covered surfaces are not recoverable: "*. . . as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."*

In *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007), the Supreme Court summarily reversed the Court of Appeals in a case involving "black ice" in the context of the open and obvious hazard doctrine. One characteristic of black ice is that, by its nature, it is either difficult or impossible to see. There, the plaintiff was a real estate agent who went to the defendant's home to execute a contract on the sale of a piece of real estate. Here there was no snow-covered surface as in *Ververis*. Instead, there was a single patch of ice on the driveway. The plaintiff claimed she did not see the ice because it was dark out, the ice was "black ice" and the defendant did not have his porch light on. There was no evidence to suggest that upon casual observation anyone could have seen the black ice. The Court of Appeals held there was a question of fact on the issues of whether the condition was open and obvious as well as the defendant's purported negligence.

The Supreme Court simply reversed the decision of the Court of Appeals with limited discussion. It adopted the dissent in the Court of Appeals which found there was ample circumstantial evidence that would have put an ordinary observer on notice of possible ice. For example, it had snowed earlier in the day, the temperature had been above freezing then dropped below it during the evening, etc.

More recently, the Supreme Court has addressed the situation where a plaintiff slips and falls on "black ice." In *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010), the Supreme Court reversed the judgment of the Court of Appeals and reinstated the circuit court's ruling, which granted summary disposition in the defendant's favor. The Court reasoned that the Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), which rendered alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall."

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Here, the plaintiff's slip and fall occurred in winter, with temperatures at all times below freezing, snow was present around the defendant's premises, mist and light freezing rain fell earlier in the day, and light snow fell during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Id*. at 935, citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). (More recently, see *Wheeler v Busch's Inc.* unpublished, 1119/19, WL6173680.)

Moreover, the Court held, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous. *Id*., citing *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002).

The same reasoning was applied more recently in *Kosinski v Crosswinds Condominium Ass'n*, (unpublished), rel'd 1/21/16. There the plaintiff walked in the dark from his condominium unit toward his car. As he walked, he saw snow and ice crystals being picked up by the wind. As he walked along the sidewalk he stepped on a large patch of ice and fell. He testified he did not see the ice and later estimated its size at 20-25 feet long. Both plaintiff's son and his girlfriend responded and in doing so walked on the grass to avoid the ice patch. The Court of Appeals affirmed the dismissal of the case. It held that there was sufficient indicia of winter weather conditions from the blowing snow and ice crystals that would have alerted a reasonably careful person to the possibility of ice in the area.

The Court also rejected the plaintiff's claim that his case met an exception to the open and obvious hazard rule because the area of his fall was *effectively unavoidable*. The Court noted that while the sidewalk on which plaintiff fell was the most convenient route to his car, it was not the only route. Further, the Court also pointed to the fact that both son and daughter were able to walk on the grass to avoid the hazard.

In *Kassed v Atikan*, (unpublished), rel'd 5/28/15, the Court of Appeals had little difficulty dispatching the plaintiff's claim that he fell on black ice. There, Mr. Kassed was a motorist who observed that a homeowner's vehicle had partially slid into the roadway from a steep driveway. The plaintiff walked up the snow-covered lawn to the homeowner's front door. After alerting the homeowner regarding his car, Kassed began walking down the steep driveway. He fell and testified it was "likely" due to black ice. He also allowed that there might have been snow on the bottom of his shoes from his walk across the lawn. The Court held there was sufficient indicia of the hazards of winter weather to alert a reasonably careful person of a slip hazard in the area.

The more interesting discussion in the appellate decision centered on whether the plaintiff was a trespasser to whom any duty of care was owed at all. The Court concluded that as a volunteer helper, the plaintiff gained the status of a licensee to whom a limited duty of care was owed, citing *Bredow v Land & Co*, 307 Mich App 579, 590 (2014). (The Court

in *Bredow v Land & Co*, 498 Mich 890; 869 NW2d 624 (2015) vacated the appellate court's discussion of whether plaintiff's status was that of an invitee or a licensee).

Recently the Court of Appeals continued a trend of holdings that **darkness alone** is an open and obvious condition of the premises. In *Pincomb v Diversified Investment Ventures LLC,* (unpublished), rel'd 2/16/16, the plaintiff was helping a friend move into a rental home. It was dark at the time of the accident. The plaintiff claimed he entered the front door carrying a box, and then exited a side door to return to his truck. It was generally dark outside, and allegedly made worse by an inoperable light fixture on the side of the house. He fell on uneven pavement on the driveway. In rejecting the plaintiff's claim, the Court held that inadequate lighting may constitute an open and obvious condition, in and of itself, that an invitee may reasonably be expected to discover it, citing *Singerman v Muni Serv Bureau, Inc*., 455 Mich 135, 141 (1997). The Court distinguishes a contrary result in *Abke v Vandenberg*, 239 Mich App 359 (2000).

In *Bachrouche v Halawi*, unpublished, rel'd 2/7/17, the Court of Appeals provided some insight into when darkness will be considered a factor in whether a condition is obvious or not, and when darkness itself is an open and obvious condition to be avoided. There the plaintiff fell on ice on a driveway of a residential home. The weather was cold and snowy. The driveway was unlit and the plaintiff claimed he could not see the ice. The Court rejected this assertion saying:

> "…if the condition was of the type and nature one would expect to find in the location where the injury occurred, darkness would not serve to raise a question of fact as to whether the condition was open and obvious because one would be on notice of the potential existence of the condition despite the darkness. For example, desks are expected to be in a classroom. If one enters a classroom, but the classroom is dark and one trips and falls over a desk, incurring injuries, the darkness does not abrogate application of the open and obvious doctrine because desks are something one would expect to find in a classroom…"

In this case, the Court found that winter conditions were such that the plaintiff was put on notice from the winter conditions that ice might be present, despite the dark conditions. (See also, *Basacchi v Fawzi Simon Inc.*, unpublished, rel'd 1/17/17, *Lloyd-Lee v Westborn Fruit Market Inc*., unpublished, rel'd 1/17/17 and *Deas v Hartman and Tyner, Inc.*, unpublished, rel'd 4/25/19).

E. "I didn't see it and my expert agrees!"

Plaintiffs have had mixed success utilizing a "visibility" expert to support their claim that the hazard would not have been obvious to a reasonably careful person. In *Pippin*, *supra*, (see discussion above), the Court of Appeals relied in part on plaintiff's expert to find

that a question of fact existed as to the obviousness of the condition at the time of the accident:

> Plaintiffs also tendered the affidavit of an expert in human perception and performance, who stressed two points. First, the chains were inherently difficult to see because they were silver, relatively small in width, and were stretched across an open setting where one's visual attention would be necessarily fixed on objects further in the distance. Second, human perception of objects is based largely on expectations regarding whether such objects would be present. According to the expert, there was nothing, besides the chains themselves, "to create the expectation of such an obstacle." On these bases, the expert opined that the chains represented an extreme hazard. We conclude that the question whether the chains were open and obvious was one for the jury, and, consequently, the Court's error in holding that Joshua was a trespasser requires reversal and remand to the trial court.

In *Titko v Boden*, (unpublished) rel'd 12/15/00, the plaintiff fell on interior stairs at defendant's home. Plaintiff proffered an affidavit from her expert, Karl Greimel, a licensed architect, to support her claim that defendant's stairway involved an unreasonable risk of harm. Greimel's affidavit stated that he inspected defendant's stairway in January 1998 (several years after plaintiff's fall), and found six violations of the Building Officials & Code Administrators International, Inc. (BOCA), building code. The affidavit states that defendant's stairway was also unsafe because it was covered with deep pile carpeting which failed to distinguish the stair nosings, creating soft and unsure footing. Greimel's affidavit also stated that these violations directly led to plaintiff's fall.

The Court of Appeals rejected the evidence provided by the expert's affidavit—not because such affidavits have no value—but because Mr. Greimel's particular affidavit failed to create an issue of fact establishing that at the time of plaintiff's fall defendants knew, by the stairway's character, location or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it.

In *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), the Court of Appeals considered whether evidence of BOCA violations alone (presumably through an expert) was sufficient to overcome the application of the open and obvious hazard rule:

> Not all BOCA code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine. The critical inquiry is whether there is something unusual about the stairs, stairway, and loft because of their character, location, or surrounding conditions that gives rise to an unreasonable risk of harm . . . . 'If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as

> breach become questions for the jury to decide.' [Quoting *Bertrand*, *supra*, at 617.]

Similarly, in *Dorsey v Taubman Auburn Hills Associates*, unpublished, rel'd 4/13/17, the Court of Appeals rejected a case in which plaintiff's proofs were supported by a report from Steven Ziemba, a purported safety expert. The plaintiff's heel caught in a soft strip of sealant that had been placed in a seam of the concrete sidewalk. She fell, then sued. The expert's report mentioned nothing about whether the caulking would have been readily seen and avoided by a patron, but focused solely on the claim that the condition created an unreasonable risk of harm. The Court observed that confronting such caulking strips was a normal everyday occurrence, and easily avoided, much like potholes in a parking lot. The Court affirmed the trial court's dismissal of the claim.

In *White v Mirhar Realty, LLC*, unpublished, rel'd 10/17/17, the Court of Appeals decided another case in which an affidavit by Steven Ziemba attempted to establish a *prima facie* case of liability. There, the plaintiff fell on a height differential between two slabs of concrete. This height differential ranged from 5/16 to 7/16 inches. In rejecting the affidavit of plaintiff's safety expert, the Court found that any reliance on the safety expert's views to be "misplaced." The Court concluded that where a case's fact pattern is unique or uncommon, an expert's opinion may be of assistance, but where the condition is commonplace, as here, the purported expert's testimony does not meet the minimum requirements of MRE 702, which mandates that the expert's scientific, technical or other specialized knowledge would be assistance to the trier of fact. Ziema's report was also criticized for being simply replete with conclusory statements.

In *Kelly v Grohowski*, unpublished, rel'd 6/13/19, Docket No. 344237 and 344714, the plaintiff fell down stairs after leaning on an unlatched, swinging door in defendant's home. The Court affirmed the trial court's summary disposition for the defendant, holding that an ordinary door does not involve a dangerous condition. It is reasonable to expect that that a person of ordinary intelligence will not lean against a door without a casual inspection. The fact that the construction of the door violated a building code did not alter the outcome. The presence of a building code violation is insufficient to impose a legal duty on a defendant.

F. "I didn't see it because there were special aspects."

The concept of "special aspects" has been applied on an inconsistent basis by the courts since it became a part of the formal analysis of the doctrine in the *Lugo* case. Intended as an exception to the application of the rule, the Supreme Court made clear that these exceptions would be expected to apply only rarely. After all, the two examples provided by the Court to illustrate the rule (the "pit in the parking lot" and the "no escape route") demonstrate how infrequently such circumstances arise in the ordinary course of daily life.

Open and Obvious Defense

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The general policy behind the rule is that "only those special aspects that give rise to a *uniquely high likelihood of harm or severity of harm* if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra*, at 519.

The Supreme Court ignored its own analysis of the exception in the very first case decided after *Lugo*. In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), a painting subcontractor slipped on ice and fell 20 feet from a roof of a partially constructed house. The Supreme Court found that "this case presents a *classic example* of an open and obvious danger in the premises liability setting." In making its finding it did not even mention the fact that the 20 foot height met squarely with one of its two illustrations in *Lugo* involving a condition that remained dangerous despite its obvious danger. Nor did it mention the likelihood that someone falling 20 feet would fall within its category of "uniquely high likelihood of harm or severity of harm." With little discussion as to why, the Court simply determined that there were no special aspects to the condition.

Plaintiffs have had an easier time of it in the Court of Appeals. See for example *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003); *Woodbury v Bruckner*, (*On Remand*) 248 Mich App 684; 650 NW2d 343 (2001), and *Hanna v Wal-Mart Stores*, unpublished opinion of the Court of Appeals, issued Apr. 13, 2001 (Docket No. 219477).

An example of appellate confusion regarding the nature of the exception is found in the case of *McKim v Forward Lodging, Inc*, 266 Mich App 373; 702 NW2d 181 (2005). There the plaintiff was a paramedic who responded to an emergency call involving a person injured in the parking lot as a result of a slip and fall on ice. In the course of attending to the injured person the plaintiff also slipped and fell on the icy parking lot. It appears that the defendant created the icy conditions the day before by spraying hot water onto the roof to break up an ice dam. The run-off from the roof created the icy conditions in the parking lot.

The decision of the Court of Appeals was subsequently reversed by the Michigan Supreme Court. *McKim v Forward Lodging, Inc*, 474 Mich 947; 706 NW2d 202 (2005). The Supreme Court stated:

> The Court of Appeals erred in finding plaintiff to be an invitee, because defendant did not derive a business or commercial benefit from plaintiff's provision of medical services on its property. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000). Moreover, as the dissenting [Court of Appeals] judge correctly recognized, the hazard giving

> rise to plaintiff's injuries was open and obvious, and there was no special aspect present. *Mann v Schusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004).

McKim v Forward Lodging, Inc, 474 Mich 947; 706 NW2d 202 (2005).

In one of the few cases supporting a plaintiff's claim of a "special aspect" the Court of Appeals managed to ignore the express limitations on the exceptions to the open and obvious hazard rule described by the *Lugo* Court in order to find a question of fact for the jury. In *Stimpson v GFI Management Services,* (unpublished), rel'd 2/24/15, the plaintiff fell in the snow-covered parking lot of her apartment building. The apartment building management designated two areas for tenants to walk their dogs. They were prohibited from walking dogs in the common areas. The plaintiff fell attempting to transport her elderly dog to one of the designated areas.

The Court first properly rejected plaintiff's claim that the parking lot was unfit for invitees to travel under the Landlord/Tenant Act, MCL 554.139. The Court rejected the plaintiff's claim that there was an *unnatural* accumulation of snow in the lot. It does not matter whether the accumulation of snow and ice in a parking lot is natural or unnatural, the presence of snow does not make a parking lot unfit for its purpose, even though it may have created a "mere inconvenience of access," citing *Allison v AEW Capital Management LLP*, 481 Mich 419 (2008).

The Court held, however, that there was a jury question regarding whether the plaintiff was "required" to confront the hazard because her dog was elderly and unable to walk the distance to the designated walk areas. To get to her truck, the plaintiff needed to cross the snow-covered parking lot to access her truck. In making its ruling the Court of Appeals does not reference the general policy behind the exceptions to the rule which is that "only those special aspects that give rise to a *uniquely high likelihood of harm or severity of harm* if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra*, at 519. In *Stimpson*, the plaintiff admitted she had previously reached her truck without falling and the Court made no mention of how these facts demonstrated a uniquely high likelihood of harm or severity of risk.

IX. What About Tomorrow?

It is no secret that our current Michigan Supreme Court has a pro-Plaintiff lean.

The open and obvious defense has a long history in Michigan as a complete defense. It has been under constant attack by plaintiffs for decades. It has remained a very strong defense for property owners. However, things may be about to change.

Open and Obvious Defense

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In *Becker v Enterprise,* Supreme Court Docket No. 163702, plaintiff claims that he tripped over this raised sidewalk in the darkness as he walked behind defendant's building.

Plaintiff testified he did not see the raised sidewalk and did not know if it was visible at the time, as were the poles and vehicles parked behind the building, because he was not looking down as he moved forward. The case was dismissed by the trial court, and the dismissal was upheld by the Court of Appeals.

On April 22, 2022, the Supreme Court issued an Order asking for supplemental briefing on the open and obvious issue. It is widely believed that the *Becker* Court will be addressing (1) whether or not the open and obvious issue will be reduced simply to a comparative negligence issue, and (2) if it will be ruled to always be a "jury question."

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Open and Obvious Defense

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I. General Background

To establish a *prima facie* (or "the necessary elements of a") case of negligence, the plaintiff must prove: (1) that the defendant owed a **duty** to the plaintiff, (2) that the defendant **breached that duty**, (3) that the defendant's breach of that duty was a **proximate cause** of the plaintiff's damages, and (4) that the plaintiff suffered **damages**. *Baker v Arbor Drugs, Inc,* 215 Mich App 198, 202; 544 NW2d 727 (1996).

Duty is any obligation the defendant owes to the plaintiff to avoid negligent conduct. *Simko v Blake,* 448 Mich 648, 655; 532 NW2d 842 (1995). The existence of a duty is a question of law for the trial court to decide. *Id.*

In other words, we generally do not ask juries to decide the threshold question of the existence of a legal duty. We do not, for example, ask the jury to answer the question, "Did this defendant have any legal obligation to make his property safe for *trespassers*?" The question of the extent to which a property owner or possessor owes a duty to a trespasser is for the court to decide, and the answer is well known. A landowner or possessor is insulated from liability for injuries to a trespasser with the exception of those that arose from the landowner's "willful and wanton" misconduct. *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). See also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

In premises liability cases, the existence and scope of a property owner or possessor's duties of care depend on the extent of the owner's possession and control over the property. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Moreover, the specific duty owed by a landowner or possessor to those who enter the property depends on the status of the visitor - trespasser, licensee or invitee - at the time of the injury. *Stanley v Town Square Cooperative*, 203 Mich App 143; 146147; 512 NW2d 51 (1993).

The open and obvious hazard doctrine addresses the first element of negligence analysis; that is, whether an owner or possessor of land owes a legal obligation to a person injured on the property. The doctrine's scope is limited to invitees and licensees. Generally, there is no duty of care owed to trespassers for reasons unrelated to the open and obvious hazard rule.

In analyzing whether a condition on property is open and obvious, we will see that an **objective test** is applied by trial courts. That test is: whether a reasonably careful person, upon casual inspection, would be expected to discover and avoid the hazard. When no duty is found because the hazard was objectively obvious, the case is dismissed via summary disposition. If the court is unable answer the question due to a factual dispute, the case is submitted to the fact-finder for resolution.

II. History of Rule in Michigan

The open and obvious hazard rule historically played a minor role in resolving premises liability cases. For decades it was a rule without a name. It was most frequently seen as the principle behind what was called the "natural accumulation doctrine" with respect to snow and ice cases.

Prior to the Supreme Court's decision in *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975), the general rule was that possessors of property were not liable for accidental injuries arising from the natural accumulation of ice and snow. See, for example, *Gillen v Martini,* 31 Mich App 685; 188 NW2d 43 (1971). The policy rationale for the rule was that naturally occurring snow and ice conditions are *obvious* and easily avoidable. *Quinlivan, supra*, at 260. The Supreme Court overturned the natural accumulation rule with respect to business invitees stating:

> To the extent pre-existing case law authority indicated that the natural accumulation rule applied in an invitor-invitee context, that authority is overruled. For reasons adequately stated by the Alaska Court, we reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability.

In other factual contexts the issue was addressed in light of the clear obviousness of a hazard which the plaintiff, by training or otherwise, could have easily avoided. In *Caniff v Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887), the plaintiff fell through an open hatch on a ship being docked for the winter. Because the danger was not hidden, the Supreme Court dismissed the case:

> The occupier of premises, no doubt, is bound, as to persons thereon by his express or implied invitation, to keep the premises free from, or give a warning of, danger known to him and unknown to the visitor. But this rule has no application to a case where a person who from his experience, through many years, in sailing a vessel, knows that it is customary to leave the hatchways of vessels open while lying in port, and whom observation teaches that they are liable to be open rather than closed, and are sources of danger which he must avoid at his peril. [*Id.* at 647.]

In *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992), the Supreme Court first addressed the issue of whether to incorporate into Michigan law the doctrine as described in the Restatement of Torts, Section 343:

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

The Restatement also provides in Comment (a) to section 343, that section 343A entitled "Known or Obvious Dangers," is to be read in conjunction with 343. Comment (a) states that 343A limits the liability stated in 343:

> (1) **A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.**
>
> (2) In determining whether the possessor should anticipate harm from a known or **obvious** danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

In *Riddle*, the plaintiff was severely injured while walking across a McLouth Steel plant floor where coils of wire were stored and where oil dripped regularly in a process called "pickling." Prior to walking across the plant floor, Mr. Riddle observed McLouth Steel employees cleaning the area. In his trial testimony the plaintiff denied knowing there was oil on the floor where he walked and it was undisputed that there were no warning signs in the area. While crossing the coil field, he lost his balance, fell backward, and hit his head on metal rails set in the floor to hold the coils of steel.

The Supreme Court's majority and dissenting opinions acknowledged that Restatement of Torts 2d 343A applies to premises liability cases in Michigan. The Court's formal ruling was a narrow one, but this case opened the door to a later expansion of the doctrine. The Court in *Riddle* simply overturned the Court of Appeals decision that found that the doctrine had been implicitly eliminated by the doctrine of comparative negligence and ruled that the doctrine of open and obvious hazards remains a viable one in Michigan. The decision appears to limit the application of the doctrine to the issue of whether one must *warn* of a hazard where the hazard is an obvious one, although it is not clearly stated in the opinion.

In *Maurer v Oakland County Parks*, 449 Mich 606; 537 NW2d 185 (1995), the plaintiff fell on concrete steps at a county park. The restroom was located in a building that also housed a concession stand. There was a series of steps outside the doorway of the restroom. First, there was a six-to-eight-inch step down from the doorway to a concrete slab. About four feet beyond the first step, there was another six-and-one-half-inch to seven-inch step down to another concrete slab. This concrete area also extended about four feet. At her deposition, the plaintiff testified that she and her two children were leaving the rest room area at the defendant's park. The plaintiff saw the first step and turned around to make sure that her children also saw the step. She then tripped on the second step.

The Supreme Court introduced the concept of "special aspects" to a hazard analysis described as something especially dangerous or unusual that might be recognized as imposing liability on a landowner even though the hazard was claimed to be an obvious one. The Court, however, found nothing especially hazardous about the concept of negotiating a set of stairs, even though they were of irregular height.

> Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." . . .
>
> *However, where there is something unusual about the steps, because of their "character, location, or surrounding circumstances, then the duty of the possessor of land to exercise reasonable care remains."* (Citations omitted.) If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide.

In the companion case, *Bertrand v Alan Ford, Inc,* 449 Mich 606; 537 NW2d 185 (1995), the Supreme Court reaffirmed that there is no duty to warn of open and obvious dangers, and if "no reasonable juror would find that the danger was not open and obvious," summary judgment against the plaintiff is proper on the failure to warn theory.

The Court acknowledged that there are other grounds to consider concerning breach of duty, such as negligent maintenance and dangerous construction. However, the Court did not expressly decide whether the open and obvious doctrine would be applicable to theories other than a duty to warn.

The Michigan Court of Appeals resolved the question in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999). There, the plaintiff tripped over a supporting wire behind her mobile home while she was washing windows. The trial court determined that any danger presented by the wire was open and obvious and granted defendant summary disposition. The plaintiff argued on appeal that "the doctrine [was] inapplicable because she did not allege a failure to warn but, instead, alleged that [the] defendant had failed to *maintain* the premises in a reasonably safe condition by placing the support wire where it did." The Court of Appeals held that the doctrine was applicable and that the plaintiff's argument was contrary to Michigan law.

The Court of Appeals cited for support the *Riddle* decision and the Second Restatement of Torts, 343 and 343A. The Court reasoned that the *Riddle* case actually involved both "duty to warn" and "duty to maintain" claims. The Court then concluded that the doctrine would apply to failure to warn cases *and* to claims that the defendant breached a duty in allowing the dangerous condition to exist in the first place. Additionally, the Court stated that the *Bertrand* decision did not limit the doctrine to "duty to warn" cases, while mentioning the other theories that premises liability cases are usually based upon. The Court noted that if the plaintiff's argument was adopted, the "doctrine could be avoided in most, if not all, cases in which it would otherwise apply, simply through . . . artful pleading."

III. Objective Standard

In 1993 the Court of Appeals established the analysis to be used by trial courts in deciding cases brought on this issue, and since that time the basic inquiry has remained unchanged. In *Novotney v Burger King* (*On Remand*), 198 Mich App 470; 499 NW2d 379 (1993), the Court of Appeals held that an **objective standard** is to be used. The question to be answered in deciding the merits of a case under a legal challenge is: **Would an average user with ordinary intelligence have been able to discover the danger and the risk presented, upon casual inspection?** That is, is it reasonable to expect that the invitee

would discover the danger? With respect to an inclined handicap access ramp on which Mrs. Novotney fell, the Court determined that it was.

Consequently, it is not relevant to the disposition of a given case whether plaintiff actually saw the hazard. Rather, it is necessary for plaintiffs, to have their claim survive a motion for summary disposition, to come forward with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of the hazard.

A. What about cases involving a physically disabled plaintiff?

As to persons with disabilities, it must be remembered that the open and obvious hazard rule is measured against an objective standard of whether a reasonably careful person would have been able to see and avoid the hazard. Whether the individual plaintiff actually saw—or was even *capable* of seeing the hazard is, to date, irrelevant. Consequently, in *Sidorowicz v Chicken Shack, Inc*, unpublished opinion of the Court of Appeals, issued Jan. 17, 2003 (Docket No. 239627), the Court of Appeals rejected the claim of a blind restaurant patron who slipped on water on the restroom floor, holding:

> Plaintiff was unable to see this condition…because of his blindness, but this condition would have been open and obvious to an ordinarily prudent person. No evidence has been presented indicating that the "special aspects" of the unsafe condition would remove the case from the open and obvious doctrine.

The Michigan Supreme Court denied leave to appeal. In *Sidorowicz v Chicken Shack, Inc*, 469 Mich 919; 673 NW2d 106 (2003), Justice Cavanaugh dissented to the denial of leave stating:

> "My fellow justices…have clearly stumbled over what is so plain in this case—what is open to the sighted is *not necessarily open and obvious to the blind."* (Emphasis in the original.)

Based on this ruling, persons with disabilities are owed no special preference with respect to the application of the open and obvious hazard doctrine. Whether this proves true with respect to a *mental* disability remains to be seen given the discussion below regarding the special consideration given to minors.

B. What about persons with diminished mental capacity due to alcohol?

In *Mann v Shusteric Enterprises*, 470 Mich 320; 683 NW2d 573 (2004), the Supreme Court refused to soften the impact of the open and obvious hazard rule where the plaintiff became intoxicated in the defendant's tavern then fell in defendant's poorly maintained parking lot following a blizzard.

In premises liability cases the fact-finder is to consider "the condition of the premises" and not the condition of the plaintiff. The objective test requires trial courts to disregard the particular plaintiff's level of impairment. An intoxicated person is held to the same standard as a sober person.

C. What about persons with diminished mental capacity due to age?

There is a saying in the profession, "Bad facts make bad law." One such set of facts was described in *Bragan v Symanzik's Berry Farms*, 263 Mich App 324; 687 NW2d 881 (2004). In *Bragan*, the Court of Appeals considered the case of 11 year-old Valentine Bragan who fractured both wrists in a fall at the defendant's facility. The defendant set up a "Jacob's Ladder" in its barn. This is a rope ladder tied off approximately 10 feet above the ground. It is designed to be difficult to climb and, in fact, 90% of climbers fall. *The child admitted knowing that it was common to fall off the ladder. The child also admitted seeing that there was barely enough straw below the ladder to cover the barn floor.*

The Court of Appeals acknowledged that the logic of the *Lugo* case (see discussion below) excludes from special consideration persons with disabilities under the objective test for liability. For example, the Court noted that a blind plaintiff was barred from any remedy because a reasonably careful (sighted) person would have seen a hazard on a bathroom floor.

However, where the disability is one of *age,* as opposed to physical abilities, the Court created a special exception on the theory that children, due to their reduced mental capacity, are given special consideration because they are less able than adults to *appreciate* the consequences of hazards in plain view:

> Only a jury can determine whether the Jacob's Ladder and lack of straw amounted to open and obvious dangerous conditions in the eyes of a child, and, if open and obvious, whether the condition was unreasonably dangerous in light of the targeted youthful audience.

This case opens for consideration whether other persons of limited mental capacity will be allowed to submit their case to the jury for a determination of whether they were sufficiently competent to appreciate and avoid the hazard that led to their injury.

IV. The *Lugo v Ameritech* Decision

In *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001), the plaintiff was walking through a parking lot toward defendant's building to pay a telephone bill. She stepped in a pothole and fell. In her deposition, Ms. Lugo testified that she was not watching the ground when she fell. She was concentrating on a truck in the parking lot at the time; however, she agreed that nothing would have prevented her from seeing the pothole had she looked down.

Ameritech moved for summary disposition, claiming that the pothole constituted an open and obvious danger. The trial court agreed. The Michigan Court of Appeals reversed the circuit court in a two-to-one decision. The majority concluded that the circuit court erred in holding that plaintiff's legal duty to look where she was walking barred her claim and decided the issue as one of comparative fault only. The Court also determined that the open and obvious danger rule did not apply because there was a genuine issue of material fact regarding whether defendant should have expected that a pedestrian might be distracted by the need to avoid a moving vehicle, or might even reasonably step into the pothole to avoid such a vehicle.

The Michigan Supreme Court reversed the Court of Appeals and dismissed the case.

The Court agreed that property owners and possessors have a general obligation to maintain their property in a reasonably safe condition. However, this duty does not generally encompass the removal of open and obvious hazards:

> "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, *an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."*

The rule fashioned by the Supreme Court is a modification of Second Restatement of Torts 343A. The current version states that **a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.**

According to the Court, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspects" of the condition should prevail in imposing liability on the defendant or the openness and obviousness of the condition should prevail in barring liability.

The Court provided two now-famous examples of situations where "special aspects" of the open and obvious condition would create an unreasonable risk of harm notwithstanding the obvious nature of a hazard. The Court described a hypothetical commercial building with only one exit for the general public where the floor is covered with standing water. The Court reasoned that although the condition was open and obvious, "a customer [who] wish[ed] to exit the store must leave . . . through the water. The open and obvious condition is . . . unavoidable." Therefore, the doctrine should not bar liability.

The second example offered by the Court was an open and obvious condition that imposes a high risk of severe harm, such as an unguarded thirty-foot-deep pit in the middle of a parking lot. The Court explained that although the condition may be open and obvious, and likely avoidable, the "situation would present such a substantial risk of death or severe injury . . . that it would be unreasonably dangerous to maintain the condition . . . absent reasonable warnings or other remedial measures."

The special aspects exception was summarized in this way: "**only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine**. Typical **open and obvious** dangers . . . [would] not give rise to these special aspects." The Court pointed out that a fall from a standing height would not meet this exception.

The Court found that, based on the evidence submitted to the trial court, there was no genuine issue of material fact with respect to whether Ms. Lugo's claim was barred by the open and obvious danger doctrine. It stated that the case simply involved a fall in a common pothole in a parking lot. Concerning the plaintiff's argument that the moving vehicles in the parking lot were a distraction, the Court ruled there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine.

In contrast, in the unpublished case of *Ehrler v Frankenmuth Motel, Inc*, unpublished opinion of the Court of Appeals, issued Aug. 2, 2011 (Docket No. 296908), the Michigan Court of Appeals held that the "special aspect" exception to the open and obvious rule was

present when early morning freezing rain transformed into a thin layer of ice that covered the defendant's entire motel premises. The "blanket of ice" was determined to be "effectively" unavoidable because motel guests were "effectively" required to walk on the ice to get to their vehicles, check-out, and/or sample the hotel's complimentary breakfast. In other words, hotel guests had to encounter the ice if they wanted to leave their rooms for any purpose. Therefore, the Court held that a genuine issue of material fact existed, and a jury should have been able to decide if the motel breached the duty it owed to its guests.

In *Hoffner v Lanctoe,* 492 Mich 450 (2012), the Court held that "an 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." In order for a plaintiff to make an "effectively unavoidable" argument, she must first demonstrate that the condition at issue "give[s] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards." Thus, even an unavoidable condition will not be a "special aspect" – and the open and obvious defense will apply – if it does not pose a risk that differs from "ordinary conditions." Under *Hoffner,* naturally occurring snow and ice, during a Michigan winter, is not out of the ordinary, nor does it present a uniquely high likelihood of severe harm.

In the matter of the *Estate of Nelson E. Hall,* a November 27, 2012 unpublished per curiam opinion from the Michigan Court of Appeals (Docket No. 308071) shows that the special aspects exceptions to the Open and Obvious Doctrine are narrow. Nelson Hall was walking into defendants' business to deliver a car payment when he fell while stepping into a puddle of water near the business entrance. He struck his head on the concrete sidewalk and later died as a result of the injury. The trial court granted defendants' motion for summary disposition and ruled that the puddle was open and obvious as a matter of law. Therefore, plaintiffs' case was dismissed.

The Court of Appeals affirmed and opined that the open and obvious doctrine applied because the puddle did not have "special aspects." Where a condition has special aspects, the open and obvious doctrine does not apply. There are two instances where a condition is found to have special aspects: (1) where the danger is unreasonably dangerous; or (2) where the danger is effectively unavoidable. The Court held that Nelson Hall could have entered the business without walking through the puddle therefore, it was not unavoidable. Even further, the Court held that even though Hall was under a contractual obligation to make his car payment he could have chosen not to enter the business at all. He did not "demonstrate that he was unavoidably compelled to confront the dangerous condition." Moreover, the puddle was not unreasonably dangerous although Hall died as a result of the injury. In fact,

the Court held that an ordinary puddle of water in a parking lot does not present a uniquely high likelihood of harm and, in general, does not constitute a hazard at all. In reaching this conclusion, the Court of Appeals relied heavily on the *Hoffner, supra*, decision.

Against this backdrop, the Court of Appeals decided the case of *Sabatos v Cherrywood Lodge, Inc,* unpublished opinion per curiam of the Court of Appeals, issued July 9, 2013 (Docket No. 302644). The Court considered (for a second time) whether a defense motion for summary disposition was properly granted regarding an "effectively unavoidable" argument. In *Sabatos*, the plaintiff was an employee of the defendant lodge. She began her shift between 3:00 and 4:00 p.m. on a March afternoon. Her shift ended between 10:30 and 11:00 p.m. She decided not to leave immediately after her shift ended but, rather, stayed and socialized with co-workers for around two hours. While walking back to her car, she slipped and fell on ice, breaking her leg and ankle. The lodge moved for summary disposition based on the open and obvious doctrine. The trial court granted the motion, but the Court of Appeals reversed in an August 9, 2012 opinion, finding that the icy condition of the parking lot was unavoidable.

However, around the same time, the Michigan Supreme Court released *Hoffner, supra*. The *Sabatos* panel had not considered *Hoffner*. Ultimately, the Supreme Court remanded the case to the Court of Appeals, with instructions to reconsider its August 9, 2012 opinion in light of *Hoffner*. On remand, the Court of Appeals again held that the icy parking lot was unavoidable under the facts of this case, and therefore the open and obvious defense did not apply. The panel explained:

> [T]the evidence showed that Sabatos was effectively trapped within the Lodge's premises, which was the precise circumstance given by . . . *Hoffner* . . . as an example of an effectively unavoidable condition. . . . Moreover, we again reject the notion that Sabatos could have avoided the icy condition by clearing it herself or arranging for alternative transportation. . . . *Hoffner* . . did not state that whenever an invitee has a choice to encounter a hazard, however extreme the options might be, the existence of that choice renders the hazard avoidable as a matter of law. Instead, it stated that the hazard must be unavoidable for all practical purposes. . . . In this case, the evidence showed there was no practical way for a visitor to leave [the lodge] without encountering the icy parking lot.

The *Sabatos* panel's opinion on remand, however, does not appear to be entirely consistent with *Hoffner*. The Supreme Court was asked to review the case a second time, but declined.

In *Moses v All Seasons of West Bloomfield* (unpublished), issued 1/24/17 (Docket No. 329635), the plaintiff slipped on ice on a sidewalk outside defendant's assisted living facility. The plaintiff faced a difficult hurdle with her lawsuit in that she admitted knowing the weather outside was freezing, she saw snow and also observed frost on the windshields of cars nearby. She claimed, however, that the sidewalk was effectively unavoidable, thereby creating an unreasonable risk of harm. She acknowledged in her deposition she could have walked on the adjoining grass, but did not do so because the grass was wet. She did not express concern in her deposition that the grass was slippery or created any other hazard, and this was her downfall. The Court distinguished *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016) by noting the plaintiff here offered no proofs that the grass was a hazardous alternative. As a result, her claim failed as a matter of law.

V. Classes of Plaintiffs for Whom the Rule Applies

At the outset, the rule by its definition applies to "possessors" having the right or authority to control the premises. Liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily on the one who has control and possession of the property. Liability for negligence does not depend on who is the titled owner of the property; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner. See *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942); see also *Kubczak v Chem Bank & Tr Co*, 456 Mich 653, 575 NW2d 745 (1998).

VI. Classes of Plaintiffs for Whom the Rule Does Not Apply

Regarding classes of plaintiffs for whom the rule does not apply, we know of the following to date:

- Vendors (e.g., snow removal contractors)
- Municipalities sued for public building liability
- Tenants in a residential lease setting
- Any non-owner/possessor

A. Vendors/Sub-contractors

Given that the rule is limited to possessors of property it is unlikely that a vendor or supplier will have sufficient control over property to be considered a "possessor." For example, where a snow removal contractor plowed a commercial parking lot in an allegedly careless manner, it was prevented from contending that the resulting ice patches were open and obvious because it was not an owner of possessor of the property. See *Gratopp v Tanger Props,* unpublished opinion of the Court of Appeals, issued Feb. 28, 2003 (Docket No. 237663):

> The circuit court granted summary disposition in favor of Hodgins on the ground that the condition of which plaintiffs complained was open and obvious. Hodgins was not the owner of the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Hodgins performed negligently under its contract was erroneous.

In *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 68 (2005), the Michigan Supreme Court considered whether to extend the rule outside the traditional premises owner setting. In a case involving a construction worker's trip and fall on pipes left on the floor of a storage area by another subcontractor, the Court was asked to rule that the doctrine was equally applicable to a construction site setting as anywhere else. The Court declined to extend the doctrine to non-possessors of the premises.

A general contractor owes certain duties to employees of sub-contractors. One of these is to maintain common work areas on the construction site. As part of that duty they must affirmatively correct or warn against "readily observable" hazards. Requiring contractors to resolve problems on work sites that are readily observable is incompatible with a rule that shields contractors from liability for open and obvious hazards. They are mutually exclusive. The Supreme Court declined to re-write the law with respect to construction accidents.

B. Municipalities

In *Jones v Enertel, Inc*, 467 Mich 266, 267, 269; 650 NW2d 334 (2002), the Supreme Court held that the common law open and obvious hazard rule is inapplicable to a claim that a municipality violated its statutory duty to maintain a sidewalk on a public highway in reasonable repair. See also *Haas v Ionia*, 214 Mich App 361; 543 NW2d 21 (1995). The reason is that municipalities are statutorily obliged to keep all public roads, including sidewalks, in reasonably good repair. They cannot exclude some of the roadways (the ones with obvious hazards) from this broad statutory mandate.

In the case of *Pierce v City of Lansing*, 265 Mich App 174; 694 NW2d 65 (2005), the Court of Appeals extended the holding in *Jones* to the public building exception to governmental immunity. The Court found no policy distinction between the treatment of public roadways and public buildings.

It should be noted that MCL 691.1402a was amended, effective 1/4/17 to allow municipalities to assert as a defense the open and obvious hazard rule in sidewalk defect case.

C. Landlord/Tenant

By statute, every residential lease is deemed to include a covenant that the landlord will maintain the premises in a reasonably safe condition. MCL 554.139 states in part:

> In every lease or license of residential premises, the lessor or licensor covenants: (a) that the premises and all common areas are fit for the use intended by the parties. (b) *to keep the premises in reasonable repair during the term of the lease or license*, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused the tenants [sic] willful or irresponsible conduct or lack of conduct. * * * (3) The provisions of this section *shall be liberally construed*.

The Michigan Supreme Court previously held that the open and obvious danger doctrine is not available where a claim is based on a specific statutory duty. See *Jones, supra*. Therefore, whether the defense is available in a landlord/tenant situation depends, in part, on whether ice and snow removal is required as part of the general obligation of "reasonable repair." In *Allison v AEW Capital Mgt, LLP*, 274 Mich App 663; 736 NW2d 307 (2007), the Court of Appeals held that the landlord's statutory obligations include a duty to keep common areas reasonably free from snow and ice, and therefore, the open and obvious hazard defense does not apply in cases of claims by residential tenants against a landlord.

A year later, *Allison* was reversed by the Michigan Supreme Court in *Allison v AEW Capital Mgt*, *LLP*, 481 Mich 419; 751 NW2d 8 (2008). In *Allison*, the plaintiff was a tenant of an apartment building when he slipped and fell on a two-inch accumulation of snow and ice as he attempted to reach his car in the parking lot. Plaintiff alleged that the parking lot was not fit for its intended use because it was covered with two inches of snow and because he fell. The Michigan Supreme Court overruled the Michigan Court of Appeals decision that any ice in the parking lot was a breach of the statutory duty. The Michigan Supreme

Court found that the plaintiff failed to establish that the tenants were not able to use the parking lot for its intended purpose and that his claim failed as a matter of law. The Michigan Supreme Court reasoned that:

> MCL 554.139(1)(a) provides that the lessor has a contractual duty to keep the common areas (parking lot) "fit for the use intended." A parking lot is constructed for the primary purpose of storing vehicles on the lot. A lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. The parking lot is generally considered suitable as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. The landlord's duty in this regard concerning the accumulation of snow and ice is to keep the entrance to and the exit from the lot clear, to make sure that the vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles; and
>
> MCL 554.139(1)(b) is concerning damage to the property and the landlord's requirement to repair the damage. "The accumulation of snow and ice does not constitute a defect in the property, and, therefore, the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice, except to the extent that such snow and ice caused damage to the property." The Court held, ". . . the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and therefore, does not apply to parking lots. In addition, MCL 554.139(1)(b) requires the lessor to repair defects in the premises, and the accumulation of snow and ice is not a defect. A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice."

Note that the duty owed to a tenant extends only to the tenant, however. In *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), the Michigan Supreme Court summarily overturned the Court of Appeals on the issue of whether the statutory duties of MCL 554.139 are limited to the tenant or extend to *guests* of the tenant as well.

The Court ruled that the statutory obligations of a landlord are owed only to its tenant and do not extend to a social guest of the tenant. Consequently, the open and obvious hazard defense may not be applied in a claim brought by a tenant but may be asserted in a case brought by a social guest of that tenant.

This statutory provision has been the subject of several appellate cases in the last several years, mostly resulting in a decision for the landlord/property manager. In analyzing these cases, the key for the defense is to distinguish the case of *Hadden v McDermitt Apartments LLC,* 287 Mich App 124 (2010) from *Allison supra*. In *Hadden,* the Court found a question

of fact where the stairs from plaintiff's apartment were dark, snow covered, with black ice on them. The key is the distinction between the primary purpose of the location where the fall occurred. The purpose of a parking lot is to accommodate cars; the purpose of stairs and sidewalks is to accommodate pedestrians. Greater care is required on sidewalks and stairs, according to *Hadden.*

In *Ferguson v Coach House Apartments*, unpublished opinion per curiam from the Court of Appeals, issued Dec. 7, 2017 (Docket No. 334435), the Court reviewed a tenant's suit following a fall as plaintiff walked out the back entrance of her apartment building. She stepped out onto a landing, stepped down onto the sidewalk, then slipped on a patch of ice. Her boyfriend ran to assist her and noticed a patch of ice behind where she fell. The parties conceded the area was a common area under MCL 554.139(1). In finding that the sidewalk was not unfit for the purpose intended the Court noted, "In this case, the sidewalk was not unfit simply because there was a patch of ice." The plaintiff did not establish that the condition of the sidewalk prevented her from accessing it. She did not produce evidence of the size of the patch of ice or whether it was black ice. In deciding against the plaintiff, the Court concluded that while the condition of the sidewalk was not the most accessible, it was not so severe as to render it unfit for its intended purpose of walking. (Accord, *Sandifer v McKinley Inc*., unpublished, rel'd 9/14/17; but see *Battle v Anderson Villas LLC*, unpublished, rel'd 6/13/17.)

In *Schuster v River Oaks Garden Apartments LLC* unpublished opinion per curiam from the Court of Appeals, issued Nov. 30, 2017 (Docket No. 335246), the plaintiff fell at 6:35 am as she took her first steps onto the sidewalk surrounding her apartment complex's mailbox kiosk. In this rare win for the plaintiffs' side, the Court noted that the fall occurred on a sidewalk, whose intended purpose is to provide a dedicated walking path. At the time of her fall, the entire region was covered in ice following an ice storm. The property manager testified that "*everything was coated that morning.*" There had been no salting during the prior seven days. Against these facts the Court found a question of fact as to whether the condition was fit for its intended purpose. *Estate of Trueblood v P&G Apartments* 327 Mich App 275; 933 NW 2d 732 (2019).

In *York v Berger Realty Group, Inc.* unpublished opinion per curiam from the Court of Appeals, issued April 23, 2019, (Docket No. 341603), the plaintiff fell in her apartment complex when she stepped from the sidewalk into the handicapped access area of the parking lot. She asserted that the area where she fell was designed for walking because cars were not permitted to park in the area where she fell. The defendant argued that the location of the fall was a part of the parking lot—designed for parking vehicles. The Court of Appeals sided with the defendant. It ruled that since the location of the fall was in the parking lot, there was no more to be said. Walking in a parking lot is secondary to the *primary* use of the parking lot which is to park cars. It does not matter whether a particular area of the lot is intended to remain free of parked cars.

VII. Premises Liability v. General Negligence Claim

The Court of Appeals limited the scope of the rule to premises liability claims, but not those sounding in simple negligence. *Laier v Kitchen,* 266 Mich App 482; 702 NW2d 199 (2005). However, this distinction between premises claims and general liability claims may not be as clear-cut as it sounds, given a recent decision of the Michigan Supreme Court, discussed below.

The distinction between a premises theory and a simple negligence theory is often difficult to make since accidents occurring on someone's property frequently involve a confluence of factors dealing with the condition of the land and activities upon it. For this reason, presumably, the Restatement of Torts 343A(1) (and the Michigan Supreme Court in *Lugo)* apply the open and obvious hazard rule to "*any activity or condition* on the land." After all, the policy of holding plaintiffs responsible for their own actions should not be determined by how one drafts the complaint allegations, but instead, on whether a given hazard was obvious and readily avoidable.

Nonetheless, in *Laier* the decedent was killed while assisting the defendant with hydraulic hose repairs on the front-end loader of a tractor. The plaintiff alleged that the defendant's *conduct* caused the accident-and not any defect in the premises. The decedent knew the hydraulic system on the tractor was broken and was assisting the defendant in repairing it. The defendant raised the bucket 4-5 feet off the ground and the decedent crawled beneath it to work on it. The bucket fell and he was fatally injured. The Court ruled that, as to those claims suggesting the defendant's negligent *conduct* caused the accident, the open and obvious hazard rule did not apply. As to those claims seeking to hold the defendant liable as the premises owner, the rule did apply.

The *Laier* analysis has now been blessed by the Michigan Supreme Court. In *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008), the Supreme Court summarily reversed the Court of Appeals and reinstated the plaintiff's case by adopting the dissenting opinion in the Court of Appeals. The plaintiff was a tenant in a mobile home park. The plaintiff approached the trailer of the landlord. The defendant opened the door outward. It struck the plaintiff in the face and chest knocking him backward. The dissent argued that the plaintiff's claim was not a premises liability claim as there were no defects in the premises. Instead, the plaintiff's claim was for simple negligence in the failure of the defendant to take reasonable care in the way in which he opened his door. The Supreme Court agreed and, as a result, the open and obvious hazard defense did not apply.

This decision demonstrates that not every fall on land involves a premises liability case. We expect plaintiffs to try to allege general negligence theories wherever possible in an attempt to avoid the application of the open and obvious hazard doctrine. The appellate courts apparently are no longer concerned that "artful pleading" will be used to avoid the

application of the doctrine as the Court of Appeals cautioned in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999).

In *Compau v Whittemore Inn,* (unpublished) (reversed in part the judgment and reinstating defendants' motion for summary disposition by *Compau v Pioneer Res Co, LLC*, 498 Mich. 928; 871 NW2d 210 (2015) (finding the hazard sufficiently open and obvious thus barring recovery)), rel'd 4/16/15 (Docket No. 320615), the plaintiff was a spectator at a lawnmower race sponsored by the defendant. During a race several mowers collided and broke through a flimsy fence headed toward where the plaintiff was standing. She was alarmed, and backed out of the way of the mowers. In doing so she tripped over a railroad tie, which she had previously seen on her way to her viewing location.

The plaintiff brought suit on two theories, premises liability and general negligence, the latter involving a claim that the racetrack had been negligently designed. Here, the Court of Appeals did not attempt to look to the gravamen of the plaintiff's claim, but simply noted that the general liability theory was contained in a distinct count of the complaint, and found this was sufficient to avoid the open and obvious hazard defense. In doing so, the Court made no mention of published case law stating, "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, *and by looking beyond mere procedural labels to determine the exact nature of the claim.*" *Adams v Adams (On Reconsideration)*, 276 Mich App 704 (2007).

The plaintiff fared better in *Thomas v Woodward Detroit CVS, LLC*, unpublished, rel'd 10/24/17, in which the plaintiff suffered a brain injury after obtaining the assistance of the store manager to reach for some stacked chairs for sale. The employee attempted to manipulate the chairs on the shelf and this caused them to fall. The defense attempted to assert, in part, that the plaintiff's claim was solely one of premises liability. The Court disagreed and affirmed the adverse jury verdict. The Court noted that no evidence was presented at trial that the chairs would have fallen but for the actions of the store employee. The Court concluded that the chairs alone did not create a hazard. They became a hazard only due to the negligence of the store employee.

By contrast, the plaintiff fared less well in another design case. In *Krupinski v Costco,* (unpublished), rel'd 12/17/15, the plaintiff was injured at a self-service filling station operated by Costco. The design of the facility was allegedly dangerous in that it caused cars to wait in queues near lines of customers on foot. The plaintiff was pinched between two vehicles as one moved forward in the queue. In reviewing the plaintiff's complaint as a whole, the Court determined that the plaintiff's theory of liability was not based on any claim that Costco did something to set in motion the chain reaction of automobile collisions that caused plaintiff's injury (general negligence). Instead the Court found that the complaint had to do with the claim that the gas station was maintained in a dangerous manner that caused plaintiff's injuries (premises claim). As a result, the Court affirmed the trial court's dismissal of the case.

Other recent failed attempts to plead around the open and obvious hazard rule include: *Eaton v Frontier Communications,* (unpublished) rel'd 2/9/16 (fall on uneven sidewalk) and *England v Meijer Inc.,* (unpublished) rel'd 10/20/15 (slip and fall on laundry detergent in grocery store), *Zimmer v Harbour Cove on the Lake Condominium Community*, unpublished, rel'd 3/14/17 (slip and fall due to placement of gutters and piled snow), *Livadic v Wal-Mart Stores Inc*., unpublished, rel'd 10/17/17 (fall in department store allegedly due to hangers on floor from overstuffed racks); *Mendrysa v VHS Children's Hospital of Michigan* unpublished, rel'd 5/16/19 (fall on water in an operating room where water had leaked from a hose).

A recent trend in slip and fall cases is for plaintiff attorneys to allege the negligent installation or maintenance of gutters and the like as the cause of an accumulation of ice in a given area. The claim is that this theory is one of general negligence, not premises liability, for which the open and obvious hazard defense does not apply.

The Supreme Court laid to rest this distinction on May 21, 2010, in *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913; 781 NW2d 806 (2010):

> The Court of Appeals erred by reversing the circuit court's ruling on the basis that the plaintiff's claim sounded in ordinary negligence. ***The plaintiff, who was allegedly injured by slipping on the icy surface of the defendant's premises, claimed that he was injured by a condition of the land, and as such, the claim was one for premises liability***, as the circuit court correctly recognized. Although an injured person may pursue a claim in ordinary negligence for the overt acts of a premises owner on his or her premises, ***the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability.***

In other words, once water finds its way onto the ground and freezes, the law now deems the ice patch to be a condition of the land, and consequently, a premises liability issue on which the open and obvious hazard rule applies.

This case makes for good common sense. Attorneys now are no longer required to engage in a rather silly exercise of attempting to determine the source of the water composing the offending ice patch in order to evaluate whether the open and obvious hazard rule applies: Did the water come from the clogged gutter? If so, the rule could not be asserted. Did the water come from run-off from melting snow from nearby grass? If so, the plaintiff has no case at all. Did it come from a combination of sources? Well, then it is a jury question left to them to sort out. We no longer need to engage in this type of exercise. The only question is whether the ice was obvious and avoidable.

The underlying policy of the law, however, is that persons who act with reasonable care and caution are able to see and avoid obvious hazardous conditions on property. It shouldn't matter where the condition had its initial source, and this decision by the Supreme Court should serve to re-focus slip and fall accidents on the key bright-line issue: Would the hazard, as it existed at the time of the accident, have been able to be seen and avoided by a reasonably careful person upon casual inspection, or not?

VIII. Common Plaintiff Strategies to Overcome Rule

A. "I didn't see it!"

The claim of "I didn't see the hazard therefore it wasn't obvious" was one of the initial responses to the *Riddle* decision in 1992. In fact, Mr. Riddle claimed, to no avail, that he didn't see the oil on the floor of the pickling room. By the time the Court of Appeals adopted the objective "reasonably careful person" test along with the "casual inspection" requirement in *Novotney, supra,* this assertion of not seeing the hazard could not carry the day alone.

There is one *caveat* to consider. In the event additional persons come forward who also claim they could not see the hazard, there may be a question of fact created regarding the "obviousness" of the hazard. This was discussed in *Chapman v National City Bank of Michigan/Illinois*, (unpublished) rel'd 3/1/05. While the plaintiff's claim was ultimately rejected by the Court of Appeals, the Court considered the plaintiff's argument that others had difficulty seeing the ice on which she fell to be a valid one.

More recently in *Estate of Macaskill v Kroger,* (unpublished), rel'd 3/5/15, the Court of Appeals, in a 2-1 decision, found a question of fact arising out of plaintiff's fall just after alighting from a vehicle at the front of a Kroger grocery store. A hose was laid across the entrance to the store, then a mat was placed over approximately 80% of the hose. The trial court granted Kroger its dispositive motion because the hose where plaintiff fell was partially visible. Aided by a video of the event (which did not apparently impress the trial judge), the Court of Appeals noted that the plaintiff was taking her second step out of the car when she fell. Noting "the unusual circumstances presented here," the court majority found there was a question of fact as to whether a reasonably careful person would have been able to see and avoid the hose.

The dissent took issue with the majority's interpretation of the video evidence, claiming it actually showed about 1/3 of the hose visible, perhaps more. Judge Donofrio also counted 22 people successfully walking over the hose during the six minute video. He stated most succinctly, "The majority has identified no reason why a person in Karen's position would not have been able to notice the hose."

B. "I didn't see it because I was distracted!"

Plaintiffs then attempted to offer some legitimate *excuse* for not seeing a hazard, with limited success.

For example, in *Lugo,* the plaintiff claimed she didn't see the pothole in the parking lot because she was doing a legitimate thing - watching for vehicles turning into the parking lot in order to avoid being run over. The Supreme Court rejected this argument and dismissed the case.

In *Maurer, supra*, the plaintiff was tending to her small children when she fell on the steps leading from the rest room. The Supreme Court rejected suggestions that the circumstances surrounding the fall were sufficient to call into question the application of the rule. It appears that the simpler the circumstances, the more difficult it is to avoid the rule's reach.

In general, defendants should ordinarily win this type of claim, given the objective test for liability and the requirement of some level of inspection of the area ahead by plaintiffs. The *Hanna* case appears to be a poorly considered decision.

C. "I didn't see it because your display distracted me!"

Section 343A of the Second Restatement of Torts states that if the possessor of land should anticipate the harm despite such knowledge or obviousness, the possessor of land is liable to his invitees. Comment (f) to this section provides an illustration of this situation. The Restatement states, "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's *attention may be distracted*, so that he will not discover what is obvious**,** or will forget what he has discovered, or fail to protect himself against it."

Michigan courts have alluded to the "distracted customer" doctrine in several cases without specifically adopting it. For example, in the unpublished decision, *Drake v K-Mart Corp*, (unpublished) rel'd 12/20/96, the plaintiff fell on grape residue in defendant's grocery store. The plaintiff acknowledged in her deposition that the grape material was conspicuous against the light-colored tile floor. She argued, however, that she was distracted by the food displays which the grocer placed to catch the attention of shoppers.

The Court of Appeals put the issue to rest in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007). There the Court distinguished prior case precedent and held there is nothing unusual about grapes on the floor of a grocery produce department and, as such, the condition is open and obvious and easily avoidable. A more recent attempt to assert a similar claim of distraction by a store end-cap sign met a similar result in *Freeman v Kmart Corporation*, unpublished, rel'd 6/6/17.

D. "I didn't see it because it was invisible!"

The argument that the hazard was not easily seen has met with greater success, as it should. After all, it is the open and OBVIOUS hazard rule and sometimes things simply would not be apparent even to a reasonably careful person who makes a casual inspection.

In *Pippin v Atallah*, 245 Mich App 136; 626 NW2d 911 (2001), 12-year-old Joshua Pippin was riding his bicycle and collided with a four-foot high chain strung that morning across the defendant's parking lot. Testimony from the plaintiff, an eyewitness and plaintiff's liability expert suggested the silver chain was not visible in the sunlight. The Court of Appeals concluded that the obviousness of the hazard was an issue for the jury.

In *Mickens v Dexter Chevrolet Co*, (unpublished) rel'd 7/31/03, the plaintiff slipped and fell on water on a set of interior stairs in defendant's building. The evidence indicated that the water could not be seen even upon casual inspection. The Court of Appeals ruled that it was irrelevant that the plaintiff knew it was raining outside at the time of the accident. "We refuse to declare as a matter of law that this plaintiff should have anticipated dangerously wet stairs, located inside of a building, simply because it was raining outside the building, especially since there was a rug positioned in the entryway of the doorway."

But in *Arvidson v Polly's Food Services*, unpublished, rel'd 12/3/19, the plaintiff fell on a puddle of water in an aisle near a cooler selling bags of ice. He described the puddle as being six to eight feet in length. He testified that he did not watch where he walked. He admitted that the lighting in the store was adequate. A store employee testified that he could see the puddle from four to five feet away. The Court of Appeals rejected the plaintiff's claim that the condition was not open and obvious, based on plaintiff's failure to make a casual inspection as he walked.

Without question, for every case in which the plaintiff succeeds on this theory the defense can cite many more holding that the hazard was or should have been readily observable. The key unresolved area of dispute centers on the extent to which the lessons of everyday experiences of life should be imputed to Michigan residents. For example, if one sees it snowing outside, should it be equally understood that ice may accompany it? If one sees corn husks on an aisle way in a grocery store, should it be understood that kernels of slippery corn may be intermingled with them?

We began to receive answers to the question from the Supreme Court in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005). The plaintiff in *Kenny*, a lifelong Michigan resident, observed a dusting of snow in a parking lot, but she did not see the ice underneath the snow. The plaintiff also observed her three companions holding onto their vehicle for balance in the parking lot. The Supreme Court ruled in this fact-specific opinion that an ordinary observer would have had sufficient knowledge available to know

the parking lot posed a hazard. In doing so, the Court acknowledged that every patch of ice is not open and obvious. The totality of the circumstances must be considered to evaluate facts on a case by case basis.

In *Ververis v Hartfield Lanes*, 271 Mich App 61; 718 NW2d 382 (2006), the Court of Appeals held "as a matter of law, that by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability it may be slippery." The plaintiff argued that the snow masked ice beneath it which the plaintiff could not see or anticipate. The Court held that persons familiar with Michigan winters should know that where there is snow, there may be ice. Absent some other defect in the premises, falls on snow-covered surfaces are not recoverable: ". . . *as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."*

In *Kaseta v Binkowski,* 480 Mich 939; 741 NW2d 15 (2007), the Supreme Court summarily reversed the Court of Appeals in a case involving "black ice" in the context of the open and obvious hazard doctrine. One characteristic of black ice is that, by its nature, it is either difficult or impossible to see. There, the plaintiff was a real estate agent who went to the defendant's home to execute a contract on the sale of a piece of real estate. Here there was no snow-covered surface as in *Ververis*. Instead, there was a single patch of ice on the driveway. The plaintiff claimed she did not see the ice because it was dark out, the ice was "black ice" and the defendant did not have his porch light on. There was no evidence to suggest that upon casual observation anyone could have seen the black ice. The Court of Appeals held there was a question of fact on the issues of whether the condition was open and obvious as well as the defendant's purported negligence.

The Supreme Court simply reversed the decision of the Court of Appeals with limited discussion. It adopted the dissent in the Court of Appeals which found there was ample circumstantial evidence that would have put an ordinary observer on notice of possible ice. For example, it had snowed earlier in the day, the temperature had been above freezing then dropped below it during the evening, etc.

More recently, the Supreme Court has addressed the situation where a plaintiff slips and falls on "black ice." In *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010), the Supreme Court reversed the judgment of the Court of Appeals and reinstated the circuit court's ruling, which granted summary disposition in the defendant's favor. The Court reasoned that the Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), which rendered alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall."

Here, the plaintiff's slip and fall occurred in winter, with temperatures at all times below freezing, snow was present around the defendant's premises, mist and light freezing rain fell earlier in the day, and light snow fell during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Id*. at 935, citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). (More recently, see *Wheeler v Busch's Inc.* unpublished, 1119/19, WL6173680.)

Moreover, the Court held, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous. *Id*., citing *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002).

The same reasoning was applied more recently in *Kosinski v Crosswinds Condominium Ass'n,* (unpublished), rel'd 1/21/16. There the plaintiff walked in the dark from his condominium unit toward his car. As he walked, he saw snow and ice crystals being picked up by the wind. As he walked along the sidewalk he stepped on a large patch of ice and fell. He testified he did not see the ice and later estimated its size at 20-25 feet long. Both plaintiff's son and his girlfriend responded and in doing so walked on the grass to avoid the ice patch. The Court of Appeals affirmed the dismissal of the case. It held that there was sufficient indicia of winter weather conditions from the blowing snow and ice crystals that would have alerted a reasonably careful person to the possibility of ice in the area.

The Court also rejected the plaintiff's claim that his case met an exception to the open and obvious hazard rule because the area of his fall was *effectively unavoidable*. The Court noted that while the sidewalk on which plaintiff fell was the most convenient route to his car, it was not the only route. Further, the Court also pointed to the fact that both son and daughter were able to walk on the grass to avoid the hazard.

In *Kassed v Atikan,* (unpublished), rel'd 5/28/15, the Court of Appeals had little difficulty dispatching the plaintiff's claim that he fell on black ice. There, Mr. Kassed was a motorist who observed that a homeowner's vehicle had partially slid into the roadway from a steep driveway. The plaintiff walked up the snow-covered lawn to the homeowner's front door. After alerting the homeowner regarding his car, Kassed began walking down the steep driveway. He fell and testified it was "likely" due to black ice. He also allowed that there might have been snow on the bottom of his shoes from his walk across the lawn. The Court held there was sufficient indicia of the hazards of winter weather to alert a reasonably careful person of a slip hazard in the area.

The more interesting discussion in the appellate decision centered on whether the plaintiff was a trespasser to whom any duty of care was owed at all. The Court concluded that as a volunteer helper, the plaintiff gained the status of a licensee to whom a limited duty of care was owed, citing *Bredow v Land & Co*, 307 Mich App 579, 590 (2014). (The Court

in *Bredow v Land & Co*, 498 Mich 890; 869 NW2d 624 (2015) vacated the appellate court's discussion of whether plaintiff's status was that of an invitee or a licensee).

Recently the Court of Appeals continued a trend of holdings that **darkness alone** is an open and obvious condition of the premises. In *Pincomb v Diversified Investment Ventures LLC,* (unpublished), rel'd 2/16/16, the plaintiff was helping a friend move into a rental home. It was dark at the time of the accident. The plaintiff claimed he entered the front door carrying a box, and then exited a side door to return to his truck. It was generally dark outside, and allegedly made worse by an inoperable light fixture on the side of the house. He fell on uneven pavement on the driveway. In rejecting the plaintiff's claim, the Court held that inadequate lighting may constitute an open and obvious condition, in and of itself, that an invitee may reasonably be expected to discover it, citing *Singerman v Muni Serv Bureau, Inc*., 455 Mich 135, 141 (1997). The Court distinguishes a contrary result in *Abke v Vandenberg*, 239 Mich App 359 (2000).

In *Bachrouche v Halawi*, unpublished, rel'd 2/7/17, the Court of Appeals provided some insight into when darkness will be considered a factor in whether a condition is obvious or not, and when darkness itself is an open and obvious condition to be avoided. There the plaintiff fell on ice on a driveway of a residential home. The weather was cold and snowy. The driveway was unlit and the plaintiff claimed he could not see the ice. The Court rejected this assertion saying:

> "…if the condition was of the type and nature one would expect to find in the location where the injury occurred, darkness would not serve to raise a question of fact as to whether the condition was open and obvious because one would be on notice of the potential existence of the condition despite the darkness. For example, desks are expected to be in a classroom. If one enters a classroom, but the classroom is dark and one trips and falls over a desk, incurring injuries, the darkness does not abrogate application of the open and obvious doctrine because desks are something one would expect to find in a classroom…"

In this case, the Court found that winter conditions were such that the plaintiff was put on notice from the winter conditions that ice might be present, despite the dark conditions. (See also, *Basacchi v Fawzi Simon Inc.,* unpublished, rel'd 1/17/17, *Lloyd-Lee v Westborn Fruit Market Inc*., unpublished, rel'd 1/17/17 and *Deas v Hartman and Tyner, Inc.,* unpublished, rel'd 4/25/19).

E. "I didn't see it and my expert agrees!"

Plaintiffs have had mixed success utilizing a "visibility" expert to support their claim that the hazard would not have been obvious to a reasonably careful person. In *Pippin, supra*, (see discussion above), the Court of Appeals relied in part on plaintiff's expert to find

that a question of fact existed as to the obviousness of the condition at the time of the accident:

> Plaintiffs also tendered the affidavit of an expert in human perception and performance, who stressed two points. First, the chains were inherently difficult to see because they were silver, relatively small in width, and were stretched across an open setting where one's visual attention would be necessarily fixed on objects further in the distance. Second, human perception of objects is based largely on expectations regarding whether such objects would be present. According to the expert, there was nothing, besides the chains themselves, "to create the expectation of such an obstacle." On these bases, the expert opined that the chains represented an extreme hazard. We conclude that the question whether the chains were open and obvious was one for the jury, and, consequently, the Court's error in holding that Joshua was a trespasser requires reversal and remand to the trial court.

In *Titko v Boden*, (unpublished) rel'd 12/15/00, the plaintiff fell on interior stairs at defendant's home. Plaintiff proffered an affidavit from her expert, Karl Greimel, a licensed architect, to support her claim that defendant's stairway involved an unreasonable risk of harm. Greimel's affidavit stated that he inspected defendant's stairway in January 1998 (several years after plaintiff's fall), and found six violations of the Building Officials & Code Administrators International, Inc. (BOCA), building code. The affidavit states that defendant's stairway was also unsafe because it was covered with deep pile carpeting which failed to distinguish the stair nosings, creating soft and unsure footing. Greimel's affidavit also stated that these violations directly led to plaintiff's fall.

The Court of Appeals rejected the evidence provided by the expert's affidavit—not because such affidavits have no value—but because Mr. Greimel's particular affidavit failed to create an issue of fact establishing that at the time of plaintiff's fall defendants knew, by the stairway's character, location or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it.

In *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), the Court of Appeals considered whether evidence of BOCA violations alone (presumably through an expert) was sufficient to overcome the application of the open and obvious hazard rule:

> Not all BOCA code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine. The critical inquiry is whether there is something unusual about the stairs, stairway, and loft because of their character, location, or surrounding conditions that gives rise to an unreasonable risk of harm . . . . 'If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as

> breach become questions for the jury to decide.' [Quoting *Bertrand*, *supra*, at 617.]

Similarly, in *Dorsey v Taubman Auburn Hills Associates*, unpublished, rel'd 4/13/17, the Court of Appeals rejected a case in which plaintiff's proofs were supported by a report from Steven Ziemba, a purported safety expert. The plaintiff's heel caught in a soft strip of sealant that had been placed in a seam of the concrete sidewalk. She fell, then sued. The expert's report mentioned nothing about whether the caulking would have been readily seen and avoided by a patron, but focused solely on the claim that the condition created an unreasonable risk of harm. The Court observed that confronting such caulking strips was a normal everyday occurrence, and easily avoided, much like potholes in a parking lot. The Court affirmed the trial court's dismissal of the claim.

In *White v Mirhar Realty, LLC,* unpublished, rel'd 10/17/17, the Court of Appeals decided another case in which an affidavit by Steven Ziemba attempted to establish a *prima facie* case of liability. There, the plaintiff fell on a height differential between two slabs of concrete. This height differential ranged from 5/16 to 7/16 inches. In rejecting the affidavit of plaintiff's safety expert, the Court found that any reliance on the safety expert's views to be "misplaced." The Court concluded that where a case's fact pattern is unique or uncommon, an expert's opinion may be of assistance, but where the condition is commonplace, as here, the purported expert's testimony does not meet the minimum requirements of MRE 702, which mandates that the expert's scientific, technical or other specialized knowledge would be assistance to the trier of fact. Ziema's report was also criticized for being simply replete with conclusory statements.

In *Kelly v Grohowski*, unpublished, rel'd 6/13/19, Docket No. 344237 and 344714, the plaintiff fell down stairs after leaning on an unlatched, swinging door in defendant's home. The Court affirmed the trial court's summary disposition for the defendant, holding that an ordinary door does not involve a dangerous condition. It is reasonable to expect that that a person of ordinary intelligence will not lean against a door without a casual inspection. The fact that the construction of the door violated a building code did not alter the outcome. The presence of a building code violation is insufficient to impose a legal duty on a defendant.

F. "I didn't see it because there were special aspects."

The concept of "special aspects" has been applied on an inconsistent basis by the courts since it became a part of the formal analysis of the doctrine in the *Lugo* case. Intended as an exception to the application of the rule, the Supreme Court made clear that these exceptions would be expected to apply only rarely. After all, the two examples provided by the Court to illustrate the rule (the "pit in the parking lot" and the "no escape route") demonstrate how infrequently such circumstances arise in the ordinary course of daily life.

The general policy behind the rule is that "only those special aspects that give rise to a *uniquely high likelihood of harm or severity of harm* if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra*, at 519.

The Supreme Court ignored its own analysis of the exception in the very first case decided after *Lugo*. In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), a painting subcontractor slipped on ice and fell 20 feet from a roof of a partially constructed house. The Supreme Court found that "this case presents a *classic example* of an open and obvious danger in the premises liability setting." In making its finding it did not even mention the fact that the 20 foot height met squarely with one of its two illustrations in *Lugo* involving a condition that remained dangerous despite its obvious danger. Nor did it mention the likelihood that someone falling 20 feet would fall within its category of "uniquely high likelihood of harm or severity of harm." With little discussion as to why, the Court simply determined that there were no special aspects to the condition.

Plaintiffs have had an easier time of it in the Court of Appeals. See for example *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003); *Woodbury v Bruckner,* (*On Remand*) 248 Mich App 684; 650 NW2d 343 (2001), and *Hanna v Wal-Mart Stores*, unpublished opinion of the Court of Appeals, issued Apr. 13, 2001 (Docket No. 219477).

An example of appellate confusion regarding the nature of the exception is found in the case of *McKim v Forward Lodging, Inc*, 266 Mich App 373; 702 NW2d 181 (2005). There the plaintiff was a paramedic who responded to an emergency call involving a person injured in the parking lot as a result of a slip and fall on ice. In the course of attending to the injured person the plaintiff also slipped and fell on the icy parking lot. It appears that the defendant created the icy conditions the day before by spraying hot water onto the roof to break up an ice dam. The run-off from the roof created the icy conditions in the parking lot.

The decision of the Court of Appeals was subsequently reversed by the Michigan Supreme Court. *McKim v Forward Lodging, Inc*, 474 Mich 947; 706 NW2d 202 (2005). The Supreme Court stated:

> The Court of Appeals erred in finding plaintiff to be an invitee, because defendant did not derive a business or commercial benefit from plaintiff's provision of medical services on its property. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000). Moreover, as the dissenting [Court of Appeals] judge correctly recognized, the hazard giving

> rise to plaintiff's injuries was open and obvious, and there was no special aspect present. *Mann v Schusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004).

McKim v Forward Lodging, Inc, 474 Mich 947; 706 NW2d 202 (2005).

In one of the few cases supporting a plaintiff's claim of a "special aspect" the Court of Appeals managed to ignore the express limitations on the exceptions to the open and obvious hazard rule described by the *Lugo* Court in order to find a question of fact for the jury. In *Stimpson v GFI Management Services,* (unpublished), rel'd 2/24/15, the plaintiff fell in the snow-covered parking lot of her apartment building. The apartment building management designated two areas for tenants to walk their dogs. They were prohibited from walking dogs in the common areas. The plaintiff fell attempting to transport her elderly dog to one of the designated areas.

The Court first properly rejected plaintiff's claim that the parking lot was unfit for invitees to travel under the Landlord/Tenant Act, MCL 554.139. The Court rejected the plaintiff's claim that there was an *unnatural* accumulation of snow in the lot. It does not matter whether the accumulation of snow and ice in a parking lot is natural or unnatural, the presence of snow does not make a parking lot unfit for its purpose, even though it may have created a "mere inconvenience of access," citing *Allison v AEW Capital Management LLP*, 481 Mich 419 (2008).

The Court held, however, that there was a jury question regarding whether the plaintiff was "required" to confront the hazard because her dog was elderly and unable to walk the distance to the designated walk areas. To get to her truck, the plaintiff needed to cross the snow-covered parking lot to access her truck. In making its ruling the Court of Appeals does not reference the general policy behind the exceptions to the rule which is that "only those special aspects that give rise to a *uniquely high likelihood of harm or severity of harm* if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra*, at 519. In *Stimpson*, the plaintiff admitted she had previously reached her truck without falling and the Court made no mention of how these facts demonstrated a uniquely high likelihood of harm or severity of risk.

IX. What About Tomorrow?

It is no secret that our current Michigan Supreme Court has a pro-Plaintiff lean.

The open and obvious defense has a long history in Michigan as a complete defense. It has been under constant attack by plaintiffs for decades. It has remained a very strong defense for property owners. However, things may be about to change.

Open and Obvious Defense

Mark F. Masters, Senior Partner
Secrest Wardle, Troy

In *Becker v Enterprise,* Supreme Court Docket No. 163702, plaintiff claims that he tripped over this raised sidewalk in the darkness as he walked behind defendant's building.

Plaintiff testified he did not see the raised sidewalk and did not know if it was visible at the time, as were the poles and vehicles parked behind the building, because he was not looking down as he moved forward. The case was dismissed by the trial court, and the dismissal was upheld by the Court of Appeals.

On April 22, 2022, the Supreme Court issued an Order asking for supplemental briefing on the open and obvious issue. It is widely believed that the *Becker* Court will be addressing (1) whether or not the open and obvious issue will be reduced simply to a comparative negligence issue, and (2) if it will be ruled to always be a "jury question."

Michigan has an elected judiciary. Make sure you vote!

Special Considerations for Landlords

Kenneth Horjus, Partner
Secrest Wardle, Grand Rapids

Possession and Control

- Normally, the only proper defendant in a premises liability case is the person or entity that had possession and control over the property.
    - Ownership is not dispositive.
    - Legal title is not dispositive.
    - Depends on the actual exercise and control over the property.
- **Residential landlords:**
    - Ownership of the land keeps you liable, even if you have relinquished possession and control to another party (such as a management company).
    - The entity currently in possession and control also has duties to the plaintiff.
    - What about the grassy area between sidewalk and the street adjacent to the rental property?
- **What about berm areas and driveway approaches?**
    - A homeowner (or landlord) does not possess or control the grassy area between the sidewalk and street adjacent to the homeowner's land when the city has an easement over that portion of the land.
        - This is true even when there is a local ordinance that requires the homeowner to maintain and clear the easement of overgrowth.
        - This is also true where a city has an easement over a driveway approach and the homeowner has a duty to clear snow and ice on the approach.

Special Considerations for Landlords

Kenneth Horjus, Partner
Secrest Wardle, Grand Rapids

Statutory Duties

- The Landlord Tenant Act – MCL 554.139 *et seq.*:

  The plain language of MCL 554.139 states that a landlord has a duty to keep the **"premises and all common areas fit for the use intended by the parties" and** "**to keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located. . . ."**

  The covenants under MCL 554.139 provide:

  (1) **In every lease or license of residential premises, the lessor or licensor covenants:**

  (a) **That the premises and all common areas are fit for the use intended by the parties**.

  (b) To keep the premises in **reasonable repair** during the term of the lease or license, and to **comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located**, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant's willful or irresponsible conduct or lack of conduct.

  (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least one (1) year.

  (3) The provisions of this section shall be **liberally construed**, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

- The open and obvious defense **does not** apply to:
  - Statutory duties to keep sidewalks in good repair;
  - A municipality's duty to maintain highways;

- A landlord's duty to keep its premises in reasonable repair;
- A landlord's duty to keep the premises fit for its intended use; or
- A landlord's duty to follow local ordinances.

- Dispositive motions are being denied when plaintiffs (tenants) rely on MCL 554.139 to defeat motions for summary disposition even for snow and ice cases. Courts are relying on the statutory language to create a non-delegable duty which defeats the common law defense of the open and obvious doctrine.

- ***Woodbury v Bruckner* – The Beginning of the Statutory Duty Argument**

  Woodbury v Bruckner was a significant victory for plaintiffs. In *Woodbury*, the second-story rooftop porch of Plaintiff's apartment was completely unguarded. Plaintiff was on the porch shaking out rugs when she lost her balance and fell to the ground suffering severe injuries. The Court of Appeals initially found that in view of the absence of guardrails, the height of the roof-top porch, and the inherent dangerousness of the condition, a genuine issue of fact existed as to whether the risk of Plaintiff falling from the roof was unreasonable. The Court found that under the facts of this case, the open and obvious doctrine is not applicable because a question of fact existed as to whether the unguarded rooftop porch was unreasonably dangerous despite being open and obvious. However, the Supreme Court remanded this decision for the lower court to consider if the Defendants had violated the reasonable repair statute.

  The Supreme Court Speaks:

  On appeal, the Supreme Court's entire holding in *Woodbury*, 467 Mich 922 (2003) is as follows:

  > **OPINION:** On order of the Court, the application for leave to appeal from the December 14, 2001 decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals for a determination whether the Defendants violated the "reasonable repair" requirement of MCL 554.139(1)(b). **The open and obvious doctrine cannot be used to avoid a specific statutory duty.** *Jones v Enertel, Inc*, 467 Mich 266, 270 (2002). If necessary, the Court of Appeals may, while retaining jurisdiction, remand the case to the trial court for resolution of any factual dispute regarding the applicability of MCL 554.139(1)(b).

With the above ruling, the open and obvious defense is no longer applicable to cases where plaintiffs are claiming breach of a statutory duty, such as those imposed in the Landlord Tenant Act.

- **Decisions Post-*Woodbury*:**

  - *Lunsford v Williamsburg Village Apartments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2007 (Docket No. 273115). FACTS: Plaintiff, a tenant, tripped and fell on a mound of dirt located at the edge of a parking lot. She testified that she did not see what caused her to fall, but that her cousin believed it was the mound of dirt. Plaintiff believed the reason she did not see the pile was because of the lighting; however, because she did not see it, her opinion regarding its visibility was mere speculation. The trial court dismissed the case finding that the dirt was an open and obvious condition. HOLDING: The Court of Appeals upheld the lower court's decision finding that the Plaintiff failed to show a violation of the statutory duty that the lawn was not fit for its intended use. Therefore, the matter was properly dismissed because the condition was open and obvious and not unavoidable.

  - *Cornell v ERP Operating Limited Partnership*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 269331). FACTS: Plaintiff tripped over an elevation disparity between the parking lot and the sidewalk to her apartment. Plaintiff claimed that the exterior lighting fixtures had been inoperative for weeks and had been so on the night of her fall, making the condition pitch black. Plaintiff presented evidence that she repeatedly informed Defendants of the defects weeks prior to her injury, though no action was taken. The Court found that the failure to maintain the parking lot lights was a violation of its statutory duty. HOLDING: The failure of one or more lighting fixtures at an apartment complex would render the parking area inadequately illuminated and therefore the parking lot unfit for its intended use, which is a violation of the statutory duty.

  - *Rice v The Trowbridge*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 266050). FACTS: Plaintiff, a 94-year-old tenant at a senior citizen/assisted living facility, tripped and fell over a lamp cord located in an aisle between an end table and a sofa in the lobby. Plaintiff alleged that the cord blended in with the carpeting and created an unreasonable hazard in an area with high traffic. Defendant raised the open and obvious defense and the trial court agreed. The Court of Appeals reversed. HOLDING: The testimony presented a material question of fact as to whether the cord was open and obvious. The Court reasoned that it would be impossible to determine by looking at

photographs eight months later when it was not clear whether the cord and furniture placement were the same on the date of the fall. The Court further held that because a statutory duty exception or avoidance of the open and obvious danger doctrine requires both factual and legal development, the case was remanded for the trial court to make that determination.

- *Monroy v Sween*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2005 (Docket No. 251544). FACTS: Plaintiff allegedly slipped on a defective loose board threshold and fell after the threshold in the front steps collapsed. Plaintiff was aware that the threshold was unstable. Plaintiff argued a statutory duty at the appellate level, however, did not raise that issue in his complaint nor did he present any argument in response to the Motion for Summary Disposition. HOLDING: Because he failed to raise the issue, it is not addressed. There was no duty to warn or protect because Plaintiff was aware that the threshold would move. There were no special aspects. The likelihood of severe harm from a loose threshold is not akin to that posed by a thirty-foot pit.

- *McMahan v Auker,* unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 241123). FACTS: Plaintiff rented space in the home of Defendants. Her belongings were stored in the basement and the attic. Defendants had placed sheets of plywood over the support beams in the attic to create a makeshift floor and the plywood did not cover the entire attic area. Defendants requested that Plaintiff repack her belongings in boxes of uniform size. When she went to the attic, she did not carry a flashlight or turn on the electric light. However, the light coming through the trap door was sufficient to illuminate the attic. She noted the presence of plywood in the attic. As she walked toward the packing boxes, she stepped off the plywood flooring and into the insulation between the support beams. She fell through the ceiling and down into the room below, sustaining injuries. HOLDING: Plaintiff's claims for premises liability and nuisance were dismissed. However, the case was remanded for determination of whether the Defendants violated the reasonable repair requirement.

- *O'Donnell v Garasic*, 259 Mich App 569 (2003). FACTS: Plaintiff was injured when she fell down a flight of stairs as she attempted to traverse them in the dark while spending the night at Defendants' inn. The loft where Plaintiff slept was partially unguarded. There was an open unguarded area between the last guardrail and the edge of the steps; the stairway was unguarded on the open side opposite the wall; the stair treads were irregularly narrow; the stairs were unusually steep and the risers were of insufficient height; the handrail was an uneven tree branch that did not extend the length of the stairs; the loft had a low ceiling that forced adults to walk in an unusual manner; and the stairway lacked a light switch at the top of

the stairs. HOLDING: Owners of leased residential property **are obligated by statute** to maintain their premises in reasonable repair and in compliance with health and safety laws of the state and local government for the protection of invitees or licensees. *The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws.*

- *Barnes v Stanley*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2003 (Docket No. 237291). FACTS: Plaintiff, a lessor, was injured when she fell down a seven-step stairwell after catching her foot in a bent noser strip. There was no handrail and the stairwell was in violation of the Grand Rapids housing code. HOLDING: The open and obvious doctrine cannot be used to avoid a specific statutory duty.

Social Guests

- *Mullen v Zerfas*, 480 Mich 989 (2007). MCL 554.139(1) does not apply to social guests of a lessee. HOLDING: The covenants created by the statute establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant. By the terms of the statute, the duties exist between the contracting parties. The Defendant landlord did not have a duty under MCL 554.139(1) to the Plaintiff, a social guest of the tenant.

- *VanBuren v Woodstock Apartments,* unpublished opinion per curiam of the Court of Appeals, issued January 29, 2009 (Docket No. 282642). FACTS: Plaintiff sustained injuries when she fell while visiting her sister who was a tenant at the Defendant's apartment building. Plaintiff lost her balance while walking in a hallway inside the apartment because the floor under the carpet was uneven and in disrepair. Plaintiff admitted she was aware of the uneven condition of the floor before she fell. HOLDING: In this case, the trial court found that Plaintiff was a licensee not an invitee; however, the Court of Appeals held that the evidence was that she was a social guest. This case was remanded back to the lower court for further proceedings.

- *Russel v Northfield Pines Apartments,* unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No. 276773). FACTS: Plaintiff, a social guest, went to her son's apartment. When she arrived, she saw an inch or two of snow on the ground. The question was whether the condition was open and obvious. HOLDING: Because the injured party was a social guest, common law principles applied and the condition was open and obvious.

- *Daher v Abdo*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2006 (Docket No. 259091). FACTS: Plaintiff was injured while visiting Defendant's wife at their residence when one of the wooden steps leading to the back door of the house broke, causing Plaintiff to fall. Plaintiff argued that Defendant should have known about the step because he admitted that he regularly inspected and maintained the stairway and had previously replaced deteriorating steps. Defendant argued he had no statutory duty to maintain the steps to his private residence. HOLDING: As a licensee on Defendant's property, Defendant had a duty to warn Plaintiff of any hidden dangers he knew about or had reason to know about if Plaintiff did not know or have reason to know about the danger. Defendant did not have a duty to inspect or make the premises safe for Plaintiff's visit and, therefore, did not have a statutory duty to maintain the steps.

- *Lotharp v Beal,* unpublished opinion per curiam of the Court of Appeals, issued August 9, 2005 (Docket No. 253291). FACTS: Plaintiff fell on the steps of a home that the Defendant owned after attending a baby shower thrown by the Defendant's tenant. When Plaintiff left the party and stepped down on the first step, she felt something under her foot and fell. She noticed that a small stone was on the first stair. The stairs did not have a railing. HOLDING: No duty owed to the social guest; therefore, Defendant's failure to install a railing was not addressed as a violation of the City Ordinance. Although it was dark outside at the time Plaintiff left, the porch light was on. Others left the premises without incident. Plaintiff, who had used the stairs on many occasions, could have discovered the danger upon casual inspection. There was nothing about the character, location or surrounding conditions of the steps that rendered them unreasonable. The dangers were open and obvious and no special aspect existed.

- *Walker v Hela Management, LLC,* unpublished opinion per curiam of the Court of Appeals, issued July 15, 2005 (Docket No. 354403). FACTS: Plaintiff and her finance had two children and wanted to move into an apartment owned by Defendant D Portfolio, LLC. The Plaintiff was the one who inquired about the rental. When the lease was signed, the Plaintiff was told that she did not need to be named to the lease because only her finance's income was used on the application. After moving in, the Plaintiff informed the property manager about a broken tile on

the basement staircase. The Plaintiff continued to use the basement staircase to access the washer and dryer. About a week after moving in, she stepped on a broken piece of tile and fell down the stairs. The Plaintiff sued alleging that the landlord breached its duty to keep the premises in reasonable repair in violation of MCL 554.139. The Defendants moved for summary disposition, arguing that the broken tile was open and obvious, and that they could not be held liable under MCL 554.139 because she was not a tenant or a party to the lease. The trial court dismissed the Plaintiff's claims, citing the open and obvious doctrine, and that the Defendants owed no duty to the Plaintiff under MCL 554.139 because she was not a party to the lease. The Defendant appealed. HOLDING: The Court of Appeals affirmed the dismissal holding that the statute only applies to "contracting parties" to the lease. The Plaintiff was not a party to the lease.

BUT WAIT!

On August 26, 2021, the Plaintiff filed an Application for Leave to Appeal. Before deciding whether or not grant leave, the Supreme Court ordered the parties to file supplemental briefing on three issues: 1) the definition of a licensee under MCL 554.139, 2) whether a licensee is required to enter a contract with he licensor under MCL 554.139 and what the requirements would be, and 3) whether the Plaintiff should be considered a licensee that is protected by MCL 554.139. It remains to be seen how the Court will resolve these issues, but it does suggest that the question of just who is a tenant and licensee is being closely examined.

- **Are there Statutory Duties for Fixtures on the Property?**

  - *Ellis v Yale Steel*, *Inc,* unpublished opinion per curiam of the Court of Appeals, issued May 19, 2005 (Docket No. 260513). FACTS: Plaintiff, a tenant, complained several times that the pilot light on his furnace had gone out. In response, Defendant sent service personnel to the residence to relight the furnace. After the last relighting, one of the repair persons advised Plaintiff that relighting the pilot light was a simple procedure that he could do himself. The pilot light went out again, and Plaintiff attempted to relight it, but in the process, there was an explosion causing injuries to Plaintiff's face and arm. Plaintiff alleged that Defendant negligently failed to keep the premises in reasonable repair and maintained a nuisance. HOLDING: The Court found that Defendant did not have any knowledge nor reasonably should have known of any defect with the furnace. Plaintiff failed to produce an expert who could testify to that effect. Because Plaintiff did not cite any authority for the proposition that encouraging a tenant to relight a pilot light himself, in the absence of a known dangerous condition was negligent, summary disposition was proper.

- **Is Giving Notice of Defect a Viable Defense?**

  - *Henley v Herschelman*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 280558). FACTS: Defendants purchased a home in 2003 with the intention of using it as rental property. Defendants made various improvements to the home, including installing new windows and doors. Defendants replaced the home's front door, but did not replace the exterior basement door or alter it in any way. In 2005, Marnie Henley leased the home from the Defendants. Marnie Henley signed a form residential lease that stated that the lessee, designated as Fred Herschelman, had examined the premises and that the premises were, at the time of the lease, "in good order, repair, and a safe, clear, and tenantable condition." On November 30, 2005, Plaintiff Britney Henley, the daughter of Marnie Henley and a resident of the leased home, went to the exterior basement door to let the family dog into the yard. Plaintiff attempted to close the door, but it would not close properly. Plaintiff pushed on the door with both hands in an attempt to close it completely; in doing so, Plaintiff's right hand slipped and went through the glass pane in the door. Plaintiff sustained severe and permanent injuries to her arm as a result of the incident. Plaintiff raised the statutory duties of MCL 554.139 and MCL 125.1383. HOLDING: The Court held that because Defendants were not on notice of the allegedly defective condition, neither statute applied.

  - *Anderson v Saddle Creek Apartments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2010 (Docket No. 289952). FACTS: Plaintiff and his wife lived in a second-floor apartment at Defendant's apartment complex. On December 27, 2005, at 5:30 a.m., Plaintiff was leaving his apartment to go to work when he slipped and fell on a step on the stairway that led to and from his apartment. The weather was cold and clear the day of his fall. Plaintiff testified that it was "pitch black outside" and that there was a light on the apartment door, but it was dull. Plaintiff did not see any snow or ice on the steps or landings and did not feel any snow or ice on the steps or landings. Plaintiff believed that ice on the step caused him to slip and fall because when he and his wife went to the doctor later in the morning the day of his fall, he saw ice on the step where he slipped. HOLDING: Summary disposition was properly granted based on Plaintiff's inability to establish a genuine issue of material fact regarding whether Defendants were on notice of the existence of ice on the step in question. The evidence did not show that Defendant had sufficient notice of the hazardous condition to trigger a duty to diminish the hazard.

- *Gotautas v The Marion Apartments of St Clair*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 270785). FACTS: After returning from work, Plaintiff, a tenant, slipped and fell on ice in the parking lot of her apartment building. She slipped and fell on the concrete portion of the driveway between the wall of the garage and the sewer drain. Nothing was obstructing her view and it was daylight hours. She did not see any snow or ice but claims she felt it after she fell and was on the ground. Plaintiff did not show any evidence of how the ice patch developed, the duration of time it existed, or that the Defendant had actual notice of the ice. There was no weather condition that would have put the Defendant on notice that ice could form in the parking lot area or that preventative measures were required. It was determined that Defendant did owe the Plaintiff a duty of care, however, Plaintiff failed to show that Defendant had actual or constructive notice of the existence of the alleged ice. The trial court granted a Motion for Summary Disposition and the Court of Appeals affirmed the decision. HOLDING: If Defendant did not create the condition, Plaintiff must show that the Defendant should have known about the condition and failed to take reasonable measures to prevent injury.

- *Henderson v Westwind Townhomes*, unpublished opinion per curiam of the Court of Appeals, issued June 6, 2006 (Docket No. 262972). FACTS: Plaintiff slipped and fell on ice-covered snow located on the sidewalk in front of a town home he leased from the Defendant. Defendant appealed from the trial court's decision to deny its Motion for Summary Disposition. Defendant argued that it lacked notice of the ice on the sidewalk and could not be liable under MCL 125.536. HOLDING: The Court found that Plaintiff established a genuine issue of material fact regarding whether Defendant had notice of the ice. Plaintiff presented a former next-door neighbor who testified that the maintenance people did not shovel or salt the sidewalk areas in front of their town homes and she complained many times. Another former neighbor testified that on the date that Plaintiff fell, she complained to management about the snow that had drifted onto the covered porch and steps. Both neighbors testified that the water from the gutters on the town homes would spill onto the sidewalk in front of the Plaintiff's garage making the area particularly icy. Furthermore, Defendant did not have any evidence to show preventative measures were taken.

- *Dover v Westchester,* unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258654). FACTS: Plaintiff tripped and fell over a garden hose on a sidewalk outside her apartment building. The issue in this case was whether the Defendant had notice of the lack of lighting and the location of the garden hose on the sidewalk at the time of the incident. Plaintiff did not provide any evidence indicating the Defendant owned the garden hose or how the garden

hose ended up on the sidewalk. Plaintiff also failed to produce evidence of the length of time the garden hose remained on the sidewalk prior to her tripping over it. Plaintiff testified she did not know where the garden hose came from. Defendant's employees testified that they did not know whom the garden hose belonged to and that they did not see a garden hose on the sidewalk at the location of Plaintiff's fall. HOLDING: A landlord does not have a duty to inspect the premises on a regular basis to determine if any defects exist. A garden hose on a sidewalk by itself is an open and obvious condition. Evidence showed that there were six (6) lights near the front entrance to the apartment complex where Plaintiff fell that illuminated the location in excess of the minimum required by the local building code. The case was properly dismissed on lack of notice.

- *Drake v JWG Investments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2005 (Docket No. 260786). FACTS: Plaintiff resided in Defendant's apartment building where she slipped and fell on a patch of ice located on a common walkway. Defendant argued lack of notice. HOLDING: The Court found that Plaintiff produced no evidence that the ice on the sidewalk had existed for any length of time. The weather data and her argument provided a basis for speculation but offered no evidence on when the ice patch at issue formed and provided nothing about Defendant's knowledge of the ice. The Court held that Plaintiff's statutory theory failed because she produced no evidence establishing that Defendant knew or should have known of any defect needing correction.

- *Mize v Village Enterprises, LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2005 (Docket No. 253473). FACTS: Plaintiff brought an action against her landlord after she was injured when falling down her basement stairs at the townhouse apartment she was leasing. Plaintiff alleged that the fall was due to a broken handrail and loose carpeting on the stairs. Prior to the fall, Plaintiff notified Defendant by letter of the broken handrail in the basement, and Defendant repaired the handrail prior to her fall. In that same letter, Plaintiff complained of poor carpet installation. The Defendant inspected the carpeting and believed the complaint was purely aesthetic. The Plaintiff was told there was nothing wrong with the installation of the carpet and no repair was performed. HOLDING: Because Plaintiff admitted that she did not know the carpeting on the basement stairs was separating until after the fall, there was no genuine issue of material fact that the Defendant did not have notice of the alleged condition before Plaintiff's fall. Summary disposition was properly granted to Defendant.

Special Considerations for Landlords

Kenneth Horjus, Partner
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Minors

- *Westfall v Commerce Meadows*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 2006 (Docket No. 255953). FACTS: Plaintiff claimed her son was injured while riding his scooter at the mobile home community where they lived. Plaintiff argued that the open and obvious doctrine did not apply to minor invitees. HOLDING: A reasonably careful minor would know that the concrete block in the driveway next door was not intended to be used as a ramp and that to do so would impose some danger. There were no special aspects as the concrete block was not unavoidable nor did it impose a severe risk of harm. The minor admitted that he purposely used the concrete block as a ramp. The minor's use of the block was purely recreational and purposeful. Therefore, the open and obvious doctrine did apply in this case and will apply to minors.

- *Estate of Skylar Wheeler v Sheets*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 303804) involved a minor Plaintiff who drowned in Defendants' pond. The Court of Appeals upheld the trial court's dismissal of Plaintiff's case based on the application of the "reasonably prudent person" objective standard of the open and obvious doctrine. FACTS: Defendants, who were the child's paternal grandparents, were not home when she drowned. At the time of her death, the minor and her father were visiting Defendants' home. The minor was a toddler. The trial court granted Defendants' motion to dismiss for the reason that the pond was an open and obvious danger. Furthermore, the trial court held that the minor was a social guest (licensee) who was only owed a duty to warn and no duty to render the pond inaccessible. HOLDING: The Court of Appeals upheld the trial court in dismissing the case. The Court stated that the minor was a licensee (a social guest as opposed to an invitee who is owed a higher duty of care) and that a landowner only owes a duty to warn a licensee of known hidden dangers. Moreover, a landowner does not owe a licensee a duty to inspect or make the property safe. The Court held that the claim was barred under the open and obvious doctrine, which applied to the minor regardless of her age. Under the open and obvious doctrine, courts must examine whether a danger is open and obvious from the perspective of "a reasonably prudent person." Whether a dangerous condition is open and obvious is considered under an *objective* rather than *subjective* standard. Thus, characteristics of a particular claimant such as age, disability, etc., are irrelevant. Therefore, Defendants had no duty to take affirmative steps to bar the exits from their home, nor to make the pond inaccessible.

Special Considerations for Landlords

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Common Law – Negligence – Black Ice

- *Robbins v Village Crest Condominium Assoc,* unpublished opinion per curiam of the Court of Appeals, issued February 7, 2012 (Docket No. 300842). FACTS: Plaintiff slipped and fell on the Defendant's premises. There is some evidence that the weather conditions were wintry. Plaintiff did not see any ice before slipping and falling, but recalled that it had snowed two days prior to her fall. On the day of the incident, Plaintiff recalled that the porch and sidewalks were not snowy or icy. The meteorological records indicate that before the incident, the temperature was below freezing. The facts of the case established that merely because there were wintry weather conditions days prior to Plaintiff's fall, "each day can bring dramatically different weather conditions" and these facts are not enough to render any weather-related situation open and obvious. HOLDING: The Court found the trial court erred in granting summary disposition to the Defendant because there was a question of fact regarding whether there were indicia of a potentially hazardous condition whereby making the condition on the premises open and obvious.

- **Supreme Court vacates and remands *Robbins* in light of *Hoffner*:**

  On appeal, the Supreme Court vacated the decision in *Robbins*, and remanded the case for reconsideration in light of the holding in *Hoffner v Lanctoe*, 492 Mich 450 (2012).

  In *Hoffner*, a customer was injured when she slipped and fell on ice on a sidewalk when she was attempting to enter a fitness center located on the Defendant's property. The Court held that the trial court erred by failing to grant the property owners summary judgment in the customer's premises liability action because there was no dispute that the ice constituted an open and obvious danger, as the customer saw the ice and admitted that she knew it posed a danger, and she failed to prove that the ice patch had any special aspects.

  The Court held that the danger was not unavoidable, as the customer was not forced to confront the risk and she presented no evidence that the risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable. The fact that the customer had a business interest in entering the premises due to her membership with the fitness club did not make the hazard effectively unavoidable. 493 Mich 945 (2013). The case was remanded for entry of summary disposition in favor of the property owner.

On remand, the Court of Appeals in *Robbins* came to the same conclusion that it reached in its original holding: that the trial court erred in granting summary disposition to the Defendant because there was a question of fact regarding whether there were indicia of a potentially hazardous condition whereby making the condition on the premises open and obvious.

- **Post-*Hoffner* Cases**

  - *Parker-Dupree v Raleigh,* unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013) addressed the "effectively unavoidable" issue post-*Hoffner*. FACTS: In *Parker-Dupree,* the Plaintiff was a mail carrier, who was delivering mail to the Defendant's residence, when she slipped and fell. Plaintiff was aware that it had snowed periodically that day and that snow had accumulated. Weather records showed that ice had formed two days before Plaintiff's fall, and it was later covered with snow. When Plaintiff arrived at Defendant's residence, she parked her mail truck, walked up to the house, and delivered the mail. Using the same pathway she used on her way to deliver the mail, Plaintiff was leaving when she slipped and fell on the snow covered pathway leading away from the front door. Plaintiff acknowledged that if she had noticed the slippery condition, she could have stepped off of the path, although the snow would have been deep. She also acknowledged that she could have taken an alternative route, her usual route up the driveway, which she generally used when there was no snow. HOLDING: Based upon this record, the *Parker-Dupree* panel affirmed, holding that the condition was open and obvious, and did not present any special aspects. The panel explained that the touchstone of the "special aspects" analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an "unreasonably dangerous" hazard must be just that – not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an "effectively unavoidable" condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances…[P]laintiff argues that the trial court erred in granting … summary disposition because the snow and ice on the sidewalk was effectively unavoidable. The evidence presented in the lower court contradicts such an assertion. Plaintiff knew that there was snow on the ground and that it could be covering ice. She also navigated the pathway safely when she delivered the mail, avoiding any slippery areas that would cause a person to fall. Moreover, if Plaintiff felt that the pathway she used was too dangerous, she could have notified her supervisor or simply stepped off the pathway. Even more significant is that Plaintiff admitted that she could have taken an alternate route, using the walkway leading to the driveway. Thus, Plaintiff has not established a genuine issue of material fact that the snowy condition on the walkway was effectively unavoidable.

- *Broughton v Tel-Ex Shopping Center*, unpublished opinion per curiam of the Court of Appeals, rel'd 11/29/12 (Docket No. 306360), addressed the issue of constructive notice, in the context of a slip and fall on snow/ice.

  FACTS: In *Broughton*, Plaintiff slipped and fell on what she described as "black ice" near a shopping center owned by Defendant. Defendant moved for summary disposition, based on the open and obvious doctrine as well as the lack of notice. Defendant's motion was granted. Plaintiff appealed, arguing that summary disposition was inappropriate because "defendant Tel-Ex neglected its duty to inspect its parking lot and concedes that there were other indicia that made the alleged 'black ice' in question open and obvious, and thus, defendant may not claim a lack of notice. Plaintiff further assert[ed] that there was evidence that the 'black ice' existed for at least 13 hours before this incident."

  HOLDING: The Court of Appeals affirmed, and offered the following explanation: "There is no evidence that defendant had actual knowledge of the 'black ice' in its parking lot. Thus, the question is whether there is a genuine issue of material fact regarding whether the 'black ice' existed for a sufficient length of time that defendant should have had knowledge of it." The panel found no evidence supportive of constructive notice, despite the fact that Plaintiff had offered an affidavit from a meteorologist who opined that the ice had been present for about 13 hours. The panel disregarded the meteorologist's affidavit as follows: First, [the meteorologist's] opinion in his affidavit that the ice developed no later than 13 hours before Plaintiff's accident is mere speculation, and thus, is insufficient to create a genuine issue of material fact regarding whether the 'black ice' existed for a sufficient period of time that Defendant Tel-Ex should have had knowledge of it. … Next, [the meteorologist's] opinion in his affidavit that the conditions before the incident were conducive to the formation of ice, the fact that the temperature was at freezing at some point during the day, and the fact that there was some snow left on the ground from a prior snow fall were insufficient to impose a duty on Defendant Tel-Ex to inspect its parking lot for ice. Furthermore, [the meteorologist's] general assertion regarding the weather being conducive to the formation of ice was circumstantial evidence that does not allow a reasonable inference that Defendant Tel-Ex had constructive notice of the 'black ice.' … In sum, Plaintiff did not present any evidence that Defendant Tel-Ex caused, knew, or should have known of the 'black ice.' The evidence only suggests that Plaintiff was the victim of a combination of innocent circumstances, not of Defendant Tel-Ex's negligence.

Lloyd v Millbrook Apartments, LLC, unpublished per curiam opinion of the Court of Appeals, rel'd 2/2/22 (No. 356055). FACTS: Plaintiff slipped and fell on the sidewalk of her apartment complex while walking to her car, and asserted that she slipped on "black ice." The Plaintiff acknowledged that she had observed snow on the grass as she was walking to her car as well as salt near where she fell. It was also noted the Plaintiff had over 45 years of familiarity with Michigan's wintery weather. HOLDING: The Court of Appeals held that the condition of the sidewalk, even the presence of black ice, would have been apparent to a person of ordinary intelligence as the indicia of ice on the sidewalk effectively put the Plaintiff on notice of a potentially hazardous condition.

When Ice is Effectively Unavoidable

- *Sabatos v Cherrywood Lodge, Inc,* unpublished opinion per curiam of the Court of Appeals, rel'd 7/9/13 (No. 302644) required the Michigan Court of Appeals to once again apply the open and obvious doctrine in a slip and fall case involving snow and ice. FACTS: In *Sabatos,* the Plaintiff was an employee of the Defendant lodge. She began her shift between 3:00 and 4:00 p.m. on a March afternoon. Her shift ended between 10:30 and 11:00 p.m. She decided not to leave immediately after her shift ended but rather, stayed and socialized with co-workers for around two hours. While walking back to her car, she slipped and fell on ice, breaking her leg and ankle. The lodge moved for summary disposition based on the open and obvious doctrine. The trial court granted the motion, but the Court of Appeals reversed in an August 9, 2012 opinion, finding that the icy condition of the parking lot was unavoidable. However, around the same time, the Michigan Supreme Court released *Hoffner*. The *Sabatos* panel had not considered *Hoffner.* Ultimately the Supreme Court remanded the case to the Court of Appeals, with instructions to reconsider its August 9, 2012 opinion in light of *Hoffner.*

  HOLDING: On remand, the Court of Appeals again held that the icy parking lot was unavoidable under the facts of this case, and therefore the open and obvious defense did not apply. The panel explained: …[T]the evidence showed that Sabatos was effectively trapped within the lodge's premises, which was the precise circumstance given by … *Hoffner* … as an example of an effectively unavoidable condition. … Moreover, we again reject the notion that Sabatos could have avoided the icy condition by clearing it herself or arranging for alternative transportation. … *Hoffner* … did not state that whenever an invitee has a choice to encounter a hazard, however extreme the options might be, the existence of that choice renders the hazard avoidable as a matter of law. Instead, it stated that the hazard must be

> unavoidable for all *practical purposes*. … In this case, the evidence showed there was no practical way for a visitor to leave [the lodge] without encountering the icy parking lot.
>
> The key fact, which seems to have distinguished *Sabatos* from other snow and ice cases that did not survive summary disposition, is that the icy condition apparently formed during the Plaintiff's shift. In other words, she did not confront the condition when she arrived at work 8-9 hours before her fall. Once she was in the lodge, the landowner had a duty to make sure she could safely leave. Had there been evidence that the snow and ice was present when Plaintiff first arrived at her shift, it likely would have changed the outcome.
>
> *Estate of Trueblood v P&G Apartments, LLC,* 327 Mich 275 (2019). FACTS: A tenant slipped and fell on a sidewalk that was located on the premises of the Defendant's apartment complex. The Plaintiff testified that as he was leaving his apartment, he noted the sidewalk was covered with a dusting of snow ice underneath. The Plaintiff could not conclusively say that the ice was the cause of his fall, just that he assumed it was given how slippery it was. The Plaintiff testified that the sidewalk was completely covered with snow. A witness also testified that the sidewalk was essentially a "sheet of snow." Finally, expert testimony from a meteorologist confirmed that the prevailing weather conditions would have covered the entire region with a coating of ice and snow. The trial court granted summary disposition on the premises liability claim holding that the condition was open and obvious. On appeal, the Plaintiff argued that even if the condition was open and obvious, it was effectively unavoidable. HOLDING: The ice was not effectively unavoidable. The Plaintiff had more than one door he could have exited the building from, which gave him a choice whether to confront the hazard or not. Situations in which a person has a choice whether to confront a hazard are not truly unavoidable.

<u>Providing Reasonable Access to Parking Spots</u>

- *Coppola v Edward Rose & Sons, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 28, 2019 (Docket No. 341033). FACTS: Plaintiff, who was handicapped, sustained injury after slipping on ice and snow located in her assigned parking spot. Approximately a week before she fell, there was a snowstorm that required Defendant, Plaintiff's landlord, to remove snow from the premises. Defendant plowed the center of the parking lot, but some snow and ice remained present in Plaintiff's parking spot on the date of her fall. Following her slip and fall accident, Plaintiff filed suit. She argued that Defendant breached its statutory duty to maintain the parking lot under MCL 554.139, which provides that a landlord must maintain all common areas in a manner "fit for the use intended by

the parties." In support of her argument, Plaintiff provided photographs of the parking spot taken after the fall. However, Plaintiff failed to specify the amount of snow and ice in the parking spot on the date of the fall. Although the precise amount of snow and ice is scarcely discussed in *Coppola*, it appears there was not much more than one or two inches of snow depicted in Plaintiff's photographs. The trial court granted Defendant's Motion for Summary Disposition on this issue, and an appeal followed.

The Court of Appeals first recognized that, under the Michigan Supreme Court's precedent, a parking lot is "fit for the use intended by the parties" as long as the landlord "ensure[s] that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 (2008) (emphasis supplied). The Court further reinforced Michigan precedent, explaining that "MCL 554.139 does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot."

HOLDING: Having set forth the applicable duty owed by landlords, the Court of Appeals addressed the proper standard to be applied when determining whether a landlord provided "reasonable access." In particular, the Court observed that neither the statute nor case law indicate whether "reasonable access" is to be assessed under an objective or subjective standard. Because MCL 554.139 is silent on this issue, the Court held that the common law should apply. Accordingly, the Court adopted an objective reasonable person standard, and held that Defendant did not owe Plaintiff a higher duty of care because she was a handicapped person walking through a handicapped parking spot. Under the facts presented above, and the objective reasonable person standard, the Court held that summary disposition was properly granted for Defendant, as the evidence did not establish that Plaintiff was deprived of reasonable access to her parking spot.

- **Providing a Clear Means of Ingress and Egress**

  - *Buhalis v Trinity Continuing Care Services,* 296 Mich App 685 (2012). FACTS: Plaintiff, an 86-year-old woman, parked her tricycle in an unsalted and uncleared patio area adjacent to the main entrance walkway to Defendant's nursing home, with the intention of donating a bag of clothing. As she walked toward the building carrying the bag of clothing, she slipped and fell on ice in the patio area. The Court concluded that, even if the ice was clear, it could be fairly characterized as open and obvious because Plaintiff knew of the danger of ice and "other indicia of a potentially icy condition would have alerted an average user of ordinary

intelligence to discover the danger upon casual inspection." Specifically, it had rained and snowed the day before Plaintiff's fall. She knew that water could drip off of the awning covering the walkway onto the patio and ice could develop from a "freeze-thaw cycle." She was aware of a sign advising that common areas could be wet, snow-covered, and slippery. Under these circumstances, the majority held, "the danger of ice was actually known to [Plaintiff] and a reasonably prudent person in [her] position would have foreseen the danger of slipping on ice."

HOLDING: The Court held that "as a matter of law, if a premises possessor provides a clear means of ingress and egress and an invitee strays off the normal pathway onto an area that is obviously not reserved for that purpose, the landowner has not breached its duty of 'reasonable care.'" The majority further held that Defendant had exercised reasonable care to protect invitees from the dangers of ice and snow. Its duty was not to guarantee that ice would never form on its premises, "but to ensure that invitees are not unnecessarily exposed to an unreasonable danger." The majority noted that Defendant provided a "sizeable, fully cleared walkway to its main entrance, covered by a large awning to protect the walkway from the elements" and that "all sidewalks surrounding the building were clear and free of ice and snow." The majority instructed that "during the winter, a premises possessor cannot be expected to remove snow and ice from every portion of its premises, including areas adjacent to a cleared walkway..." Such measures, the majority reasoned, would be "extraordinary" and are not required by Michigan law. The fact that Plaintiff "chose to stray from the safe means of ingress and egress to the building" did not impose liability on Defendant.

- *Amin v Village Park Preservation Ltd*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2020 (Docket No. 346752). FACTS: Plaintiff fell in the parking lot of his apartment complex, Village Park, at about 9:30 a.m. on December 13, 2016. In the time since he parked the vehicle about a day and half earlier, "it had snowed a significant amount." Village Park's snow removal contractor (which was also sued but not involved in the appeal) "plowed and salted the parking lot each day." When Plaintiff walked to his vehicle on the morning in question, it was no longer snowing. The snow had been cleared off of the sidewalks and the parking lot, but there was still snow between the parked vehicles.

  When the Plaintiff reached his van, he opened the driver's door, got in, and started the van. Id. He then exited the van to clean the snow off of it. He cleared some of snow from the van but, while brushing the snow off of the rear window of the van, he slipped, fell, and broke his ankle. Plaintiff sued Village Park under a common-law premises liability theory, and under MCL 554.139(1). Village Park moved for summary disposition, arguing that the premises liability claim failed because the

snow and ice were open and obvious, and presented no special aspects. *Amin*, unpub op at 2. As to the statutory claim, Village Park argued that the "parking lot was fit for its intended use as evidenced by the fact that Amin was able to access his vehicle, get in it, and start the engine" – in other words, "tenants were able to enter, exit, and park their vehicles in the parking lot as intended." The trial court was persuaded by these arguments and granted Village Park's motion.

HOLDING: The *Amin* panel found no jury-submissible evidence that this subpart was violated. The panel took note of the Plaintiff's testimony "that after it snowed Village Park cleared the snow from the walkways and parking lots." Also, the owner of the snow removal contractor testified that they had "plowed and salted the Village Park parking lot each day between December 10 and December 13, 2016." Although this left snow and ice "immediately surrounding the cars" and "snow piled up on the sides of the sidewalk," the problem did not rise to a level that would render the parking lot unfit for its intended use. Vehicles could enter and exit the parking lot, and tenants had reasonable access to their cars. Also, the Plaintiff had been able to "safely walk across the parking lot to his van, enter and start his van, and clean some of it off prior to falling." "Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes."

SNOW AND ICE AND THE STATUTORY DUTY

Common Areas

MCL 554.139 provides:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant's willful or irresponsible conduct or lack of conduct.

Special Considerations for Landlords

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- ***Teufel* is overruled in *Allison v AEW Capital Management, LLP*, 481 Mich 419 (2008)**

  On June 25, 2008, the Michigan Supreme Court clarified how the Michigan housing statutory provision applies to apartment complexes' sidewalks and parking lots and if snow and ice in those areas was a breach of the statutory duty. The Michigan Supreme Court held:

  (1) Parking lots in leased residential areas are "common areas" under MCL 554.139(1)(a);

  (2) The natural accumulation of snow and ice is subject to the lessor's duty, **but** a plaintiff must show that the area was not fit for the intended use; and

  (3) The natural accumulation of snow and ice is not subject to the lessor's duty established in MCL 554.139(1)(b).

  - FACTS: Plaintiff was a tenant of an apartment building when he slipped and fell on a two-inch accumulation of snow and ice as he attempted to reach his car in the parking lot. Plaintiff alleged that the parking lot was not fit for its intended use because it was covered with two inches of snow and because he fell. HOLDING: The Michigan Supreme Court overruled the Michigan Court of Appeals' decision that any ice in the parking lot was a breach of the statutory duty. The Michigan Supreme Court found that the Plaintiff failed to establish that the tenants were not able to use the parking lot for its intended purpose and that his claim failed as a matter of law. The Michigan Supreme Court reasoned that:

    - MCL 554.139(1)(a) provides that the lessor has a contractual duty to keep the common areas (parking lot) "fit for the use intended." A parking lot is constructed for the primary purpose of storing vehicles on the lot. A lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. The parking lot is generally considered suitable as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. The landlord's duty in this regard concerning the accumulation of snow and ice is to keep the entrance to and the exit from the lot clear, to make sure that the vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles; and

- MCL 554.139(1)(b) is concerning damage to the property and the landlord's requirement to repair the damage. "The accumulation of snow and ice does not constitute a defect in the property, and, therefore, the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice, except to the extent that such snow and ice caused damage to the property." The Court held, ". . . the lessor's duty to repair under MCL 554.139(1)(b) does not apply to common areas and therefore, does not apply to parking lots. In addition, MCL 554.139(1)(b) requires the lessor to repair defects in the premises, and the accumulation of snow and ice is not a defect. A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice."

Application of MCL 554.139(1)(a) to Sidewalks

MCL 554.139(1)(a) applies to apartment **sidewalks** and parking lots because they are common areas located within the parameters of the apartment structure, are constructed and maintained by the landlord, and all tenants who own and park their vehicles rely on the sidewalks to access their vehicles and apartment buildings.

- *Benton v Dart Properties, Inc*, 270 Mich App 437 (2006). FACTS: Plaintiff slipped and fell on an icy sidewalk of his apartment complex, while walking from his apartment to a parking space. He testified that when he returned home from work that night at approximately 6:00 p.m., he noticed the sidewalks were covered with snow. Later that evening, he walked to a different vehicle than the one he had taken to work earlier in the day, and it was dark outside. Although there were lights in the complex, there were no lights along the sidewalk where he fell. Plaintiff walked cautiously because of the snow and did not have any problems when, all of a sudden, both legs shot to his right and he fell onto his left leg and ankle. When he looked down, he saw he was sitting on a patch of ice that was about four to five feet long. Plaintiff alleged that the apartment complex violated the statutory duty to maintain common areas in a manner fit for the use intended under MCL 554.139.

  HOLDING: A landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. The intended use of a sidewalk is to walk on it. A sidewalk covered with ice is not fit for this purpose. In its reasoning, the Court stated that the sidewalks located within the apartment complex were "common areas" because they are located within the perimeters of the apartment structure and are constructed and maintained by the landlord. Furthermore, the sidewalks are common areas because all tenants who own and park their vehicles

in the spaces allotted to them by their landlord rely on them to access their vehicles and apartment buildings. The Court reasoned that any person who resides in an apartment complex must utilize the sidewalk provided by the landlord each time they wish to exit or leave their dwelling.

- *Royce v Chatwell Club Apartments*, 276 Mich App 389 (2007). FACTS: Plaintiff, a resident, slipped and fell on black ice and slid underneath her car as she stepped off the sidewalk into the parking lot. The trial court granted summary disposition, but the Court of Appeals reversed the decision relying on MCL 554.139. HOLDING: Although the condition was open and obvious, the defense cannot be used to escape a statutory duty. In light of the *Allison* decision, *Teufel* is not applicable.

- *Counterman v Converse Mgmt Co,* unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 303598). FACTS: Plaintiff resided in an apartment building where she slipped and fell on ice in the parking lot, incurring injuries. Plaintiff brought a premises liability action against Defendants, alleging that their negligence and violation of statutory duties were the cause of her injuries. HOLDING: The Court found that there was no question of material fact that the parking lot at issue was fit for its intended use. The Court stated that in its opinion, Plaintiff was able to enter and exit the parking lot, vehicles could be parked in the parking lot, and she had reasonable, not ideal, access to her car. The Court affirmed the trial court's grant of the Defendants' Motion for Summary Disposition.

- *Sasu v Village Park of Royal Oak, LLC,* unpublished opinion per curiam of the Court of Appeals, issued November 8, 2011 (Docket No. 299676). FACTS: Plaintiff resided in Defendant's apartment building where she slipped and fell on a patch of ice located in the parking lot. On the day before the accident, a storm occurred which resulted in four to six inches of snow. Plaintiff asserted that negligence arose from a breach of statutory common law duties, and that as a result of the negligence, black ice accrued in the parking lot and was not timely removed. Further, Plaintiff alleged that the ice she fell on was able to form and accumulate due to Defendant's failure to fix the building's leaky gutters. HOLDING: The Court found that the Plaintiff has adequately alleged that Defendant, by failing to repair and maintain its leaky gutter, violated its statutory duties. Although the Court agreed with the trial court that alleged the hazard was open and obvious, the Court reversed and remanded the case as a result of the existence of an applicable statutory duty.

- *Klasner v Harman & Tyner Inc,* unpublished opinion per curiam of the Court of Appeals, issued November 17, 2011 (Docket No. 300425). FACTS: Plaintiff resided in an apartment building owned and operated by the Defendant. While Plaintiff was descending a stairway and stepping into the tiled foyer of the building, she slipped and fell, incurring injuries. Plaintiff alleged that water, slush, ice and snow accumulated on the tile flooring. HOLDING: The Court found that because the condition causing Plaintiff's fall was open and obvious and subject to no exceptions, and because Defendant breached no statutory duty owed to Plaintiff, the trial court's order was affirmed. The Court stated that given the evidence that at least one other person traversed the well-lit foyer without incident minutes before Plaintiff's fall, and that efforts were not made to clear the area prior to her fall, the presence of slush is simply not enough to render the foyer unfit for its intended purpose of providing a passageway into which one enters the apartment building. The Court concluded that Plaintiff had failed to establish a breach of statutory duty under MCL 544.139.

- *Martin v Fourmidable Group, Inc,* unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 299701). FACTS: Plaintiff resided in an apartment building where she was injured by tripping over defective floor tiling at the top of a flight of stairs, causing her to fall down the stairs. She alleged that the Defendant was negligent and breached specific statutory duties owed to her under the Michigan Housing Law and MCL 554.139. Defendant was the company who was hired by the owners of the property, to maintain the property. HOLDING: The Court affirmed the trial court's grant of summary disposition because it found that the defective tile condition that Plaintiff alleged as the cause of her fall was open and obvious and possessed no "special aspects" that rendered it effectively unavoidable or unreasonably dangerous. Further, the Court held that the Defendant owed no statutory duty to Plaintiff. Plaintiff had admitted that she was aware of the broken tile on the top of the steps and decided to use the steps in any event. And the Court stated that although Plaintiff was required to traverse the steps several times a day, the hazard was not effectively unavoidable. Notably, the Court stated that a person who walks into a 30-foot deep pit would be virtually guaranteed to suffer severe injury, harm, or even death. However, the same cannot be said for someone that walks over the chipped-tile hazard. The Court reasoned that it would be conceivable that a person could walk over the chipped-tile area many times without tripping and falling at all, let alone trip down the stairs. Finally, the Court reasoned that falling down the stairs does not represent the same risk of death of injury that falling into a 30-foot deep pit does. Thus, no "special aspects" existed with respect to the chipped tile at the top of the staircase.

- *Hadden v McDermitt Apartments, LLC,* 287 Mich App 124 (2010). FACTS: Plaintiff lived in an upstairs apartment and slipped and fell on black ice when using an outside stairway attached to the building. HOLDING: The Court found that Plaintiff had produced enough evidence to create a material question of fact as to whether the stairway was fit for its intended use at the time of her fall. The primary purpose of the stairway was to provide pedestrians reasonable access to different levels of a building or structure. Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway, possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain, posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use. Thus, the Court determined that the trial court did not err in denying Defendant's Motion for Summary Disposition.

- In *Fletcher v Knollwood Village Associates,* unpublished opinion per curiam of the Court of Appeals, rel'd June 19, 2012, Case No. 304368. FACTS: Plaintiff fractured her ankle when she unsuccessfully attempted to pivot while her right foot was in a depression in a sidewalk. The sidewalk was located within Defendant's apartment complex, in which Plaintiff lived. Photographs of the sidewalk showed a dirt-covered depression, approximately half the width of the sidewalk at the base of a step. Plaintiff testified that this alleged hazard was avoidable if one used the other side of the sidewalk and step. Plaintiff sued her landlord under a common law premises liability theory. Perhaps anticipating the open and obvious defense, Plaintiff also claimed that her landlord had violated "its statutory duties to maintain the premises and all common areas in a condition fit for their intended use and to keep the premises in reasonable repair" under MCL 554.139(1)(a) and (b).

  The trial court granted Defendant's Motion for Summary Disposition, finding that the common law premises liability theory failed because the sidewalk depression was open and obvious, and did not present any special aspects (Plaintiff did not appeal from that holding). The trial court also dismissed the statutory claim, holding as a matter of law that the sidewalk depression was not a serious enough problem to render the sidewalk unfit for its intended purpose. Plaintiff appealed from the dismissal of her Landlord-Tenant Act claim only.

  HOLDING: The Court of Appeals affirmed the dismissal, highlighting the limited reach of the statute as follows: The lessor's duty to repair as set forth in MCL 554.139(1)(b) does not extend to common areas [per *Allison*, *supra* at 432-433]. Here, the allegedly defective condition involves a sidewalk. A sidewalk is a common area.… Therefore, the statutory duty in MCL 554.139(1)(b) is inapplicable. MCL 554.139(1)(a) applies to common areas, but it "does not require

a lessor to maintain [the area] in an ideal condition or in the most accessible condition possible[.]" [*Allison*, *supra* at 430]. When reviewing a trial court's summary-disposition decision concerning a claim based on this statutory duty, this Court must ascertain whether there could be reasonable differences of opinion regarding whether the [sidewalk] was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of Plaintiff's fall. … [T]he intended use of a sidewalk is walking on it…. The submitted photographs of the sidewalk show a dirt-covered depression, approximately half the width of the sidewalk, at the base of a step. Plaintiff's testimony indicates that the alleged hazard was avoidable if one used the other side of the sidewalk and step. Although the sidewalk was not in perfect condition, reasonable minds could not disagree that it was fit for the use intended by the parties.

- *Stimpson v GFI Management Services, Inc, et al,* 498 Mich 927 (2015). FACTS: This case involved a premises liability claim against a landlord for ice buildup in a parking lot, which allegedly caused the Plaintiff to fall and sustain injuries. Because Plaintiff admittedly knew of the icy condition of the parking lot, the Court of Appeals held that there was no genuine issue of material fact regarding whether the hazard was open and obvious. However, even an open and obvious hazard can give rise to landowner liability if it has "special aspects" that make the risk unreasonable. Special aspects are held to exist either when the danger is "unreasonably dangerous" or when it is "effectively unavoidable." *Hoffner v Lanctoe,* 492 Mich 450, 463 (2012). Finding the ice accumulation around Plaintiff's truck effectively unavoidable, the panel in *Stimpson* noted that to get to her truck, Plaintiff had to traverse the icy areas, and that she could not throw salt on the area because it might burn her dog's paws. In further support of its finding that a jury could find Plaintiff had no choice but to confront the hazard, the Court of Appeals suggested an exigency of circumstances, noting that the elderly and disabled dog had to be transported to the dog run area, and that Plaintiff had limited time because the dog needed to relieve itself. HOLDING: Under these facts, the Supreme Court was unpersuaded that there was a factual issue regarding effective unavoidability. In its peremptory Order of reversal, the Supreme Court noted that it was undisputed that Plaintiff selected the location where she parked the truck, opted to use that vehicle even though she had another parked under a carport, and did not attempt to use the salt that was available. The Supreme Court, citing *Hoffner, supra,* emphasized that for a hazard to be "effectively unavoidable," it must be essentially inescapable, characterized by "an inability to be avoided, an inescapable result, or the inevitability of a given outcome." The Supreme Court reversed that portion of the Court of Appeals decision holding that a reasonable jury could find Plaintiff had no choice but to confront the hazard posed by the snow and ice, and remanded for reinstatement of the judgment in favor of the Defendants.

Special Considerations for Landlords

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- In *Ferguson v Laturec, Ltd,* unpublished opinion per curiam of the Court of Appeals, rel'd December 7, 2017, Case No. 334435, two questions were presented that are familiar to anyone handling premises liability cases in Michigan: (1) whether ice on a sidewalk renders that sidewalk unfit for its intended use and purpose under the Michigan Landlord-Tenant Act, and (2) whether ice on the sidewalk was open and obvious without a special aspect under the circumstances. FACTS: Plaintiff and her boyfriend were preparing to depart the Plaintiff's apartment to make a flight to Florida at approximately 5:00 AM on January 22, 2015. The Plaintiff's boyfriend exited the back entrance of the apartment building to the parking lot where the Plaintiff's vehicle was located. He drove the vehicle to the front of the apartment to wait for the Plaintiff, who exited the apartment less than one minute later. The Plaintiff stepped onto the sidewalk and slipped on a patch of ice. The Plaintiff claims that she did not see the ice when she stepped onto the sidewalk, but noticed the ice after she fell. The Plaintiff cannot remember the size of the patch of ice or how long it may have been there.

  HOLDING: The Michigan Court of Appeals evaluated the Plaintiff's statutory claim under the Michigan Landlord-Tenant Act, specifically considering whether the ice covered sidewalk in this case was fit for the intended purpose of walking, as required by MCL 554.139 (1)(a). The Court applied the previous rulings in *Benton v Dart Props, Inc*, 270 Mich App 437 (2006) and *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), addressing snow and ice covered sidewalks and parking lots, respectively, for the principle that a lessor is not required to "maintain a (common area) in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit." *Id*. at 430.

  The Court concluded that the sidewalk in the present case was not unfit simply because there was a patch of ice present on it, and held that "more is required." Specifically, the Court found that the Plaintiff had not shown that the condition of the sidewalk precluded her from accessing it. The Court reasoned that, "(w)hen considering the entirety of the evidence in the record, the condition of the sidewalk, while inconvenient and not the 'most accessible,' was not so severe as to render it unfit for its intended purpose of walking." In coming to this conclusion, the Court noted that the Plaintiff had no problems accessing the sidewalk in the past, the area was illuminated with an outdoor light, temperatures remained below freezing in the days prior to the accident, and there was no evidence in the record as to the size and color of the ice patch.

The Court then evaluated the Plaintiff's theory of common law premises liability under *Buhalis v Trinity Continuing Care Servs*, 296 Mich App (2012), *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474 (2008), and *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403 (2014), to reach the conclusion that there was nothing inescapable or inevitable about the Plaintiff's accident. The Court specifically noted that, despite the Plaintiff's claims that the sidewalk at the back entrance was also icy, her boyfriend did not slip when he used that sidewalk just minutes before the accident. As such, there was no reason that the Plaintiff was "required to confront (the hazard) under the circumstances."

- *Foley v Oakland Development,* LLC, unpublished opinion per curiam of the Michigan Court of Appeals issued December 18, 2018 (Docket No. 340284). FACTS: Plaintiff fell while walking to his car when he slipped on the icy landing outside his apartment door. Plaintiff testified he believed water dripping off the roof froze on the landing, effectively covering it. Importantly, Plaintiff's expert testified the conditions were such that dripping water would have frozen into black ice on the landing by 6:00 p.m. the evening before the fall, however, Plaintiff admitted to walking across the landing at midnight – six hours before he fell – without incident. Plaintiff asserted there was a patch of invisible black ice covering a 3 foot by 3 foot portion of the landing rendering it unfit for its intended purpose pursuant to MCL 554.139. Defendant's assistant property manager testified she inspected the landing after Plaintiff fell and measured the icy patch at 2 ½ feet by 2 ½ feet – covering approximately half of the landing, allowing tenants to easily walk around the ice. HOLDING: In upholding the trial court's grant of summary disposition in favor of Defendant, and distinguishing *Benton*, the Court noted the landing was not completely covered with ice, citing to Defendant's assistant property manager's testimony that the landing was only half covered with ice and that a tenant could easily walk around the icy portion of the landing. Due to the lack of exigent circumstances, the Court held that the landing was fit for its intended use and Defendant had not breached its duty under MCL 554.139.

  Plaintiff also challenged the trial court's holding that the ice on the landing was open and obvious, but here, too, the Court of Appeals affirmed. Plaintiff asserted that Defendant owed him a duty to protect him from the unreasonable risk of harm caused by the black ice on the landing, and that it was not open and obvious because it was not visible upon casual inspection. Michigan courts have consistently recognized that while black ice is often invisible or nearly so, it may be open and obvious when there are other indicia of a potentially hazardous condition. The Court, in affirming the black ice was open and obvious, noted Plaintiff (63) had lived in Michigan for 50 years and was familiar with black ice. Plaintiff also admitted that in the days leading to up to the accident, nearly a foot of snow had fallen and it was generally cold. Plaintiff further admitted he had been cautious, watching where he was walking, when he walked to his

apartment hours earlier. The Court held that under these circumstances, a reasonable person could foresee the potential danger of black ice and therefore, the black ice on the landing was open and obvious.

The last issue that was addressed on appeal was whether the icy landing was effectively unavoidable, thereby negating the open and obvious defense. In order for an otherwise open and obvious condition to present special aspects rendering it effectively unavoidable, the individual, for all practical purposes, must be required or otherwise compelled to confront the dangerous hazard. *Hoffner v Lanctoe*, 492 Mich 450, 469 (2012). Per Plaintiff's own testimony, he had left his apartment to meet a co-worker to obtain keys to the building and was not compelled to leave at that time or otherwise trapped inside. There was no testimony to suggest that this was the only way out of the apartment. Again, Defendant's assistant property manager testified he could have simply walked around the icy patch on the landing. On this basis, the Court of Appeals affirmed the lower court's decision that the icy landing was not effectively unavoidable.

- *Trueblood v P & G Apartments, LLC*, unpublished opinion per curiam of the Michigan Court of Appeals issued March 12, 2019 (Docket No. 340642). FACTS: Plaintiff tenant slipped on January 11, 2016, at around 11:00 a.m., on a sidewalk located within the Defendant's apartment complex. About 3.4 inches of snow fell in the 24 hours before Plaintiff's fall, resulting "in a significant layer of ice (mostly refrozen slush) on the surface covered by a thin layer of drier, fluffy snow." It was "pretty clear" that there was "ice covering almost everything" at the time of the fall. The landlord testified that he performed his own snow removal and de-icing. More specifically, he testified that he had been in the area of the Plaintiff's apartment "the night before" Plaintiff fell, and "remembered that there was a light dusting of snow, and he went out there and ... threw some salt around the walkways, and he threw some in the parking lot." The landlord estimated that he threw "a couple bags" of salt that night because that was "pretty much the norm" to "cover the area." He further testified that he had been in the same area at around 9:00 a.m. on the day that Plaintiff fell, at which time he "salted the property" and "probably snow-blowed and maybe ran the plow over the parking lot a couple of times." But the landlord's testimony was disputed by "several tenants" who claimed that he had done no snow or ice removal in the days leading up to Plaintiff's fall. As to the statutory claim, Defendant argued "that plaintiff could not establish that the sidewalk was not fit for its intended use because he could not even verify he fell on ice and could not say for sure that the ice caused his fall." Defendant also pointed out that a tenant who came to the Plaintiff's aid "did not slip and fall on any ice, nor did the EMS workers, which established that other people were able to use the sidewalk for its intended purpose." Defendant also argued that the second portion of § 139(1) – the duty "[t]o keep the premises in reasonable repair" – did not apply to common areas such as the sidewalk where Plaintiff slipped. HOLDING: The Court of Appeals considered

those limitations and found – in a published opinion – that an otherwise open and obvious accumulation of snow and ice could still give rise to liability under the statute. Plaintiff sued under a common-law premises liability theory, and under MCL 554.139(1). The property owner moved for summary disposition, arguing that the premises liability claim failed because the snow and ice were open and obvious, and presented no special aspects. The Court of Appeals had little trouble affirming the trial court's determination that the snow and ice were open and obvious, and did not present "special aspects" (more specifically, the slippery condition was not "effectively unavoidable"). But the panel found that questions of fact precluded summary disposition of the Plaintiff's statutory claim.

There are two distinct subparts of the Landlord-Tenant Act that are relevant here, § 139(1)(a) and (1)(b). Section 139(1)(a) imposes a duty to ensure that "the premises and all common areas are fit for the use intended by the parties." Section 139(1)(b) imposes a duty to "keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws." The § 139(1)(b) duty of reasonable repair does not apply to common areas, *Allison*, 481 Mich at 429, such as sidewalks within apartment complexes, *Benton v Dart Properties, Inc*, 270 Mich App 437, 443 (2006). The panel found a question of fact as to whether § 139(1)(a) was violated because there was conflicting evidence as to "whether the sidewalk was completely covered with ice, making the ice more than a mere inconvenience." Although the Supreme Court suggested in *Allison* that snow and ice accumulations will rarely rise to the level of violating § 139(1)(a), the *Trueblood* panel noted that "*Allison* does not stand for the notion that evidence of ice cannot make a sidewalk unfit for its intended use." "Rather, *Allison* stands for the proposition that a plaintiff must present more evidence than simply the presence of ice or snow and someone falling. And here, plaintiff did ... [as] there is a question of fact whether the sidewalk was completely covered in ice." The panel also noted the other tenants' testimony that the landlord did not appear to be performing snow and ice removal. That others had been able to walk on the sidewalk that morning without falling was some evidence "that the sidewalk was fit for its intended use...." However, this did not "overcome the other evidence" proffered by the Plaintiff. So a jury would have to resolve the conflicting evidence as to whether § 139(1)(a) was violated. The panel further clarified that the Plaintiff may be able to impose liability under § 139(1)(b), which imposes a duty to "comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located...." The panel noted that although *Allison* discussed § 139(1)(b) – finding that the duty of reasonable repair did not apply to common areas like sidewalk– *Allison* did not address this specific language. Applying general principles of statutory construction, the *Trueblood* panel found that the duty to comply with health and safety laws is distinct from the duty "to make reasonable repairs," even though both are set forth in § 139(1)(b). The panel

found that the former, which *Allison* did not consider, applies to common areas. And under the facts of this case, the panel found that there was also a question of fact as to whether this duty was violated.

- **Is the Landlord Being Reasonable?**

  - *O'Sullivan v Greens at Gateway Association,* unpublished opinion per curiam of the Court of Appeals, issued August 12, 2010 (Docket No. 290126). FACTS: Plaintiff resided at the Greens of Gateway condominium complex where she slipped and fell on ice located at the base of the steps leading to her condominium. The ice had formed allegedly as a result of faulty drainage. Defendant was responsible for managing the Greens of Gateway complex. However, pursuant to the disclosure statement applicable to the condominium complex, the developer reserved the right to control Defendant's board of directors until 4.5 years after the first sale or 75% of the entire project. The developer relinquished control approximately a month prior to the subject incident. Defendant argued that Plaintiff merely speculated that the icy patch resulted from water that ran over the gutter and froze on the walkway. The Court disagreed. HOLDING: The Court found that questions of material fact existed regarding causation, thus precluding summary disposition. The Court reasoned that Plaintiff offered evidence of a recurring pattern of water from rain and melted snow running off the roof and onto the pavement below because the gutter could not handle to volume. She reported the problem to the condominium management before her fall. Thus, the Court determined that the evidence presented by the Plaintiff was sufficient to allow a trier of fact to infer that the ice patch on which Plaintiff fell formed as a result of this repeating process.

  - *Solomon v Blue Water Village East, LLC,* unpublished opinion per curiam of the Court of Appeals, issued July 29, 2010 (Docket No. 291780). FACTS: Plaintiff slipped and fell on a patch of ice located on the sidewalk of his apartment complex. Approximately five inches of snow had fallen five days prior to the incident. On the day of the snow fall, Defendants contracted for snow removal and salting of the premises. No further snow fell before or on the day of the incident. On the day of the incident, Plaintiff left his apartment early in the morning and observed snow and ice on the stairs and sidewalk, but did not inform the Defendants of the condition. Plaintiff contended that the downward sloping design of the sidewalk and concrete pad produced a concentrated accumulation of melted snow, which turned to ice. HOLDING: The Court found that the trial court erred in granting summary disposition for Defendants. The last measure to keep the sidewalks free

from ice and snow was taken five days prior to the incident. Thus, the Court determined that a genuine issue of material fact existed as to whether such inaction was reasonable in light of the weather conditions between the last measure and the time of the incident.

- **Is it a common area?**
    - *Allison v AEW Capital Management,* 481 Mich 419 (2008). FACTS: Plaintiff fractured his ankle during a fall when he was walking on one or two inches of accumulated snow in the parking lot of his apartment complex. He noticed ice on the ground where the snow had been displaced. HOLDING: The Court held that a parking lot within a leased residential property is a common area under MCL 554.139(1)(a). The next question was whether the covenant encompasses the duty to keep the lot free from the natural accumulation of snow and ice. The Court reasoned that the intended use of a parking lot includes parking of vehicles. A parking lot includes the parking of vehicles and is constructed for the primary purpose of storing vehicles. Therefore, a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. Therefore, the statutory duty is to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes.

- **Driveways are NOT parking lots, but what does that mean?**
    - *Hendrix v Lautrec, Ltd,* unpublished opinion per curiam of the Court of Appeals, issued October 27, 2016 (Docket No. 328191). FACTS: Plaintiff alleged that an icy patch on the driveway caused from the path of runoff from a downspout was a dangerous condition that rendered the driveway unfit for pedestrian use. A panel of the Court of Appeals considered a landlord's potential liability for an icy condition of a driveway on the landlord's premises allegedly resulting from downspout runoff. Plaintiff brought a claim of premises liability as well as a claim under the Landlord-Tenant Act for failure to keep a common area fit for the use intended by the parties. The trial court granted summary disposition for Defendant landlord with respect to both claims.

HOLDING: In an opinion signed by two of the judges on the panel, the Court of Appeals, considering the statutory claim for failure to keep the premises and all common areas fit for the use intended by the parties as required by MCL 554.139(1)(a), took note of the Supreme Court's decision in *Allison v AEW Capital Mgt, LLP,* 481 Mich 419; 751 NW2d 8 (2008), holding that the primary use of a parking lot is to park cars and "[t]he statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot." Notably, the Supreme Court in *Allison* held as a matter of law that a parking lot covered in snow which concealed ice was not unfit for its intended use. But, the *Hendrix* majority reasoned, a driveway is not a parking lot.

The majority noted that the driveways on the premises in question were used for pedestrian access to the garages and residential units. In these senses, the majority held, "the driveways are more akin to sidewalks." Sidewalks, the Court noted, "are intended for the use of pedestrians."

Where a substantial portion of the driveway abutting the Plaintiff's driveway was covered in ice, the majority held that "[t]his ice created a dangerous condition making the driveway unfit for pedestrian use." The appellate panel thus reversed the dismissal of Plaintiff's statutory claim and remanded for continued proceedings.

However, one year later, the Court of Appeals issued another decision which appears to be at odds with the decision set forth in *Hendrix*. These conflicting decisions indicate that the determination of whether a driveway is "fit for its intended use and purpose" may be fact-specific.

***Hendrix* is particularly baffling**: Following *Allison's* logic (holding that the primary purpose of a "parking lot" is parking, and the primary purpose of a "sidewalk" is walking), one would logically conclude that the primary purpose of a "driveway" is driving. Further, logic would dictate that one can use a driveway for its primary purpose of driving without ever having to walk on it, unlike a parking lot which requires walking to and from a parked car.

- *Duff v J Wellington Enterprises, Inc,* unpublished opinion per curiam of the Court of Appeals, issued October 24, 2017 (Docket No. 337421). FACTS: Plaintiff was injured when he slipped and fell on black ice while walking on an asphalt driveway at a campground where he lived and worked. Plaintiff sued the campground owner for negligence under theories of premises liability and violation of a landlord's statutory duty to keep common areas fit for their intended use, MCL 554.139. The trial court granted summary disposition for Defendant, finding that the condition

was open and obvious and that reasonable minds could not disagree with the conclusion that the area where Plaintiff allegedly slipped and fell was fit for its intended use as a roadway.

HOLDING: The Court rejected Plaintiff's statutory argument under MCL 554.139. Plaintiff argued that the area of asphalt that he slipped on, which was part of a driveway but also ran adjacent to a convenience store and may be used for foot travel into the store, was unfit for its intended use of pedestrian travel, given the slippery conditions. The dispute concerned the actual intended use of the area, and Plaintiff claimed that it was for walking, with the only evidence being that Plaintiff himself was walking in the area when the slip and fall occurred. The Court stated as follows:

> Plaintiff does not seriously dispute that the intended purpose of a driveway is to accommodate vehicular traffic; he merely asserts that the particular area where he fell was intended for walking.

As a result, the Court found that the primary intended use of the driveway was in fact to accommodate vehicular traffic, and further that there was no evidence that the roadway was unfit for vehicular use or accessing vehicles. The Court noted that Plaintiff's unsupported assertion that the subject area was intended primarily for walking does not create a question of fact sufficient to survive summary disposition.

The Court cited *Wilson v Taylor*, 457 Mich 232, 243 (1998), when it stated that "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." Here, the Plaintiff made claims that the area was intended for walking, yet when the Court pressed him to support those assertions, he was unable to do so, and summary disposition was upheld.

- *Lemon v Whittaker*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2010 (Docket No. 289653). FACTS: Plaintiff resided in a home near the campus of Michigan State University, and while walking across an asphalt area between the home and the residence's parking lot, he fell and injured himself. The area was used by tenants for various outdoor recreational activities, as well as accessing city-issued trashcans that were either in or next to the area. The issue was whether the area was fit for the use intended by the parties. HOLDING: The Court found that because a single primary purpose for the area

was not identified, the Court determined that a genuine issue of material fact existed on whether an outdoor common area used for social gatherings and accessing the tenant's trashcans is fit for its intended uses when it is covered in ice and snow.

- *Burlak v Lautrec*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2010 (Docket No. 290616). FACTS: Plaintiff tripped and fell over a concrete crack that raised the concrete slab approximately two inches off the roadway. Plaintiff admitted that he could see the uneven concrete crack, and he walked by this location at least one hundred times to get his mail from the apartment mailbox. This accident occurred in the middle of the afternoon, and Plaintiff stated nothing distracted him while he was walking to his mailbox. This was a typical uneven concrete crack in the middle of the roadway, and there was nothing unusual or different about this uneven crack that would cause a reasonable person not to expect it. Thus, the question is whether the roadway in this case was fit for the use intended by the parties. The intended use of a sidewalk is for walking, and, employing a similar logic, the intended use of a roadway is for driving a vehicle. HOLDING: The Court found that the roadway was suitable for both walking and driving. Because tenants are able to both walk and drive on the concrete slabs forming the roadway, it is fit for its intended use.

- *Marbly v McKinley Associates, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268580). FACTS: Plaintiff, a resident, slipped and fell on a patch of ice that was located on the ground under the overhang of the carport where her vehicle was located. The trial court dismissed the case on the open and obvious defense. HOLDING: Plaintiff appealed and the Court of Appeals relied on *Benton* and *Allison* and held that the area underneath the carport is a common area under MCL 554.139(1)(a). In doing so, the Court reasoned that the area is located within the parameters of the apartment complex and must be maintained by the landlord or someone in the landlord's employ. While the intended use of a carport is to park cars, it is impossible to access a car parked in a carport without walking on the area underneath the carport. Therefore, the second intended use of the area underneath the carport is to walk on it and such an area is not fit for its intended use if it is covered with ice. Because the area is a common area, "defendant had a duty to keep this area ***free*** from ice."

- *Taylor-Floyd v Consolidated Management, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274061). FACTS: Plaintiff, a resident, slipped and fell on "black ice" located on the sidewalk outside the front entrance of her building. The trial court dismissed the case relying on *Teufel*, finding that the ice was open and obvious. The Court of Appeals reversed the decision relying on *Benton* and *Allison* and reasoned that: "while inviters have no general duty to remove snow and ice, the Legislature has imposed a 'higher duty on landlords . . . given the enhanced rights afforded tenants . . . and the tenants' reliance on interior sidewalks to access their homes and parking structures." HOLDING: Defendant has a statutory duty to take reasonable, preventative measures to remove ice accumulations from the sidewalks. Defendant's evidence was that there was no weather condition that called for action but that it did place salt down. Plaintiff's testimony that she had not seen anyone salting the area and did not see any evidence of salt before she fell is a question of fact that is left for a jury to decide. In making its decision, the Court of Appeals relied on the *Allison* and *Benton* decisions.

- *Rincones v Kramer,* unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket No. 256706). FACTS**:** Plaintiff, a tenant of the Defendant, slipped and fell on an icy porch at the home he was renting. Plaintiff's theory was that the ice formed from water dripping from a leaky roof. HOLDING: The Court reversed on the grounds that the open and obvious doctrine did not shield Defendant from liability under MCL 554.139. The Court did not make any findings that any of the items Plaintiff alleged caused the ice to form nor did it render the property unfit for its intended use.

- *Smith v Wingate Management Corp*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2005 (Docket No. 255151). FACTS: Plaintiff, a tenant, slipped and fell on ice. Plaintiff testified that on the day of his fall it had been warm when he left for work at around 8:30 p.m. and the ground looked "gishy," meaning that the soil was "wet and saturated from the winter." Plaintiff testified that when he departed work at 2:00 a.m., the temperature had plunged below freezing and a light dusting of snow had fallen. Plaintiff further testified that he did not notice any ice or slick spots on his way home or on the sidewalk where he fell. HOLDING: Because Plaintiff was a long-term Michigan resident, he had the understanding that when the temperature drops below freezing and it begins snowing on a previously warm and wet day, ice is likely to be present on the ground. However, the Court's order was reversed in order to permit a finder of fact to decide if the sidewalk was not in reasonable repair for its intended use.

- **What about Black Ice?**

    - *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124 (2010). FACTS: Plaintiff was a tenant in an upstairs apartment of Defendant's building. Plaintiff slipped and fell on black ice on an outside stairway after calling the Defendant twice to complain about snow and ice. Plaintiff testified that on the day of the fall, before she had left her apartment, she called Defendant about the presence of snow and ice on the stairway. Plaintiff produced weather data indicating that preceding her fall, temperatures were at or below freezing, and the area experienced episodes of light freezing rain and at one point "ice pellets." At 1:00 p.m., Plaintiff left her apartment to check her mail. She noticed "lots of snow," that was "fresh," and that there was "more than a couple of inches" on the second floor as she walked toward the stairway. Plaintiff descended the stairway and checked her mailbox. On her way back up the stairway, she used the right side of the stairway. As she reached the second step, she slipped and fell on ice. She did not see the ice before her fall because it was black ice on the stairway and the stairway was dark. Plaintiff raised claims for common-law general liability and breach of Defendant's statutory duty under MCL 554.139(1)(a). HOLDING: A tenant uses a stairway for its intended use solely by walking up and down it. Thus, the primary purpose of a stairway is for walking and MLC 554.139 applies.

Notice of Defect

- *Billington v Laurel Wood Apt. North, et al*., unpublished opinion per curiam of the Court of Appeals, issued September 10, 2019 (Docket No. 344661). FACTS: Plaintiff was injured when a chair leg gave way as she began to stand up at a social gathering held in Defendants' apartment complex. During events, anyone who rents the clubhouse is responsible for setting up the tables and chairs, which are provided by Defendants and kept in a storage room. Specifically, Defendants provide both metal folding chairs and white resin chairs. The white resin chairs are primarily used at the complex's pool and brought inside when the pool closes for the season. Here, the white resin chairs were placed at the tables instead of the metal folding chairs. Plaintiff began to stand up out of one of the white resin chairs and put her arms on the armrest of the chair when one of the chair's legs gave way and Plaintiff fell. Plaintiff sued Defendants for negligence, gross negligence and breach of implied warranty. Within the trial court, the parties filed Cross-Motions for Summary Disposition. Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(9) mainly argued that Defendants breached their duty to Plaintiff, an invitee, by failing to properly inspect the chairs and failing to remove the defective chair from the premises so it could not be used by any clubhouse guests.

On the other hand, Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) and argued that Plaintiff could not provide any evidence that the chair was defective and, accordingly, there was no evidence that Defendants had notice of any defective condition of the chair. Thus, Defendants argued that Plaintiff could not establish that Defendants breached any duty owed to Plaintiff as an invitee and that her claims must fail. The trial court ultimately denied Plaintiff's motion and granted Defendants' motion. The trial court held that Plaintiff failed to produce any evidence that the chair was defective or in disrepair and that there was no evidence that Defendants had any notice (actual or constructive) of any defective chair. Plaintiff then appealed.

Plaintiff argued that a genuine issue of material fact regarding whether Defendants had actual or constructive notice of the chair defect exists. Plaintiff admitted in her brief on appeal that "there [was] no evidence that Defendants had actual notice of the defective or damaged condition of the chair prior to her fall." However, Plaintiff further argued that there was a genuine issue of material fact as to whether Defendants had constructive notice of the condition of the chair such that Defendants breached their duty to Plaintiff. A landowner has constructive notice of a defect if the condition "has existed a sufficient length of time," and the defect was discoverable. Here, Defendants' agent testified that he inspects the furniture before and after every event at the clubhouse and admitted that the last time the white resin chairs were inspected was four years ago when they were removed from the pool area for storage. The agent further testified that it can be inferred that there were no other events that occurred at the clubhouse between the time of storage and the time of Plaintiff's injury. Accordingly, Plaintiff argued that it should be assumed that the chair was defective or damaged at the time of her injury.

Ultimately, the Court held that although Plaintiff may be able to establish that any defect had existed for a "sufficient length of time," Plaintiff failed to present any evidence that the defect was discoverable by anyone who assisted with set up for the event or immediately before Plaintiff sat in the chair. Further, Defendants could not be held liable simply because the chair broke, as "the mere occurrence of an accident is not, in and of itself, evidence of negligence."

Special Considerations for Landlords

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<u>Other Issues</u>:

- **What about Spiders?**

  - *Redmann v Leete,* unpublished opinion per curiam of the Court of Appeals, issued July 30, 2009 (Docket No. 284381). FACTS: Plaintiff rented a house in August 2004. In April 2005, Plaintiff began to notice an increasing number of spiders in the house and she was allegedly bitten by a spider. Plaintiff reported the problem to Defendant's agent but Defendant denied responsibility to eradicate the problem. Plaintiff was bitten again in June 2005; she became ill and informed Defendant of the problem. She moved out in July 2005. Plaintiff argued that under MCL 554.139, the Defendant had a duty to eliminate the spider infestation from the premises. HOLDING: Plaintiff did not identify any defect in the premises that Defendant could have "mended" to eliminate the spiders. Because Plaintiff did not establish there was any damage to the premises that was caused by the spiders or contributing to the presence of the spiders, Plaintiff failed to establish a genuine issue of material fact that Defendant failed to keep the premises reasonably repaired as required by MCL 554.169(1)(b).

- **What about Bed Bugs?**

  - *Clarizio v Forbes, et al*., unpublished opinion per curiam of the Court of Appeals, issued March 19, 2020 (Docket No. 347846). FACTS: Defendant and his wife acquired the property in question in 2009 and began renting the property out in 2010. Defendant testified that, in March 2017, he had to evict a tenant from the property, as the tenant was not taking proper care of same. Once the tenant was evicted, Defendant found bugs (including bed bugs) in the house. Defendant then had an extermination company come to the house that same month, who reported no bug activity in the house as of June 28, 2017, per an extermination report.

    Plaintiffs in this matter, a family, signed a lease for the Defendant's property on July 26, 2017, and moved in on August 5, 2017. One Plaintiff testified that she first witnessed the bed bug problem on August 23 or August 24, 2017, when she woke up with bites on her body. She testified that she then went to a doctor, who told her they were bed bug bites. She did not testify that she informed Defendant of the bed bugs at that time. Another Plaintiff testified that she believed that there were bed bugs in the house because of a Google search. This Plaintiff testified that they attempted to get ahold of Defendant about the problem, but could not reach him, so they went to his house on August 28, 2017. According to Defendant, this was the first time he was made aware of the bed bug problem on the property. The day after Defendant was notified of the bed bug problem by Plaintiffs, Defendant had the

prior extermination company return to the house to exterminate the bugs, but the house was too cluttered for them to spray the house at that time. Defendant then personally paid to have the clutter "bagged up" and moved to a storage unit for a six- month period. This process took several days and the house was not able to be sprayed until September 9, 2017.

The extermination company came a second time to spray on September 30, 2017, at which time the company indicated to Defendant that there was no bug activity at that time. Defendant testified that the company came out to the house a third time to spray on October 20, 2017, but Plaintiffs refused to let them inside. Defendant testified that Plaintiffs called an inspector to the house in October 2017 who found no bugs on the property. Lastly, on May 31, 2018, another extermination company came out to the house to inspect it with dogs and did not find any bugs.

Predating some of the aforementioned events, Defendant filed a Complaint in District Court seeking to evict Plaintiffs for non-payment of rent. In Plaintiffs' Answer and Counter-Complaint, Plaintiffs asserted a premises liability claim under numerous negligence theories – namely that Defendant knew or had reason to know of bed bugs on the property when he rented it out to Plaintiffs. These negligence theories further included alleged violations of MCL 554.139, the Michigan Housing Law, the Michigan Consumer Protection Act (MCPA), the Truth in Lending Act, the Mortgages and Practices Act, and the Consumer Leasing Act, among other theories.

On August 29, 2018, Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10) in response to Plaintiffs' counter-claim, in which Defendant asserted that he promptly addressed the bed bug issue once it was brought to his attention by Plaintiffs. In addition, Defendant argued that there was no evidence that he knew or should have known that the property had bed bugs, as he was told by the extermination company in June 2017 that the house was bed bug free. Plaintiffs never filed a response to Defendant's motion and the trial court granted the motion upon hearing. Plaintiffs filed a Motion for Reconsideration on February 6, 2019, which was denied. Plaintiffs then appealed the trial court's decision.

HOLDING: The Court of Appeals ultimately affirmed the trial court's decision and determined that Defendant demonstrated sufficient evidence to establish that he did not know or have reason to know of bed bugs on the property when he rented it out to Plaintiffs and that Plaintiffs failed to create a question of fact in this regard. In addition, the Court found that Defendant took all proper steps to promptly address the bed bug problem once it was brought to his attention by Plaintiffs. In addition, the Court rejected Plaintiffs' contention that Defendant violated the MCPA and MCL 554.139. Moreover, pursuant to MCL 125.474, a tenant shall be responsible for the cleanliness of those parts of the premises that they occupy and control. Thus, because bed bugs were discovered on the property three weeks after Plaintiffs moved in, they, as tenants, were responsible for complying with MCL 125.474, and thus, Defendant could not be held responsible for same.

- **What about Pit Bulls?**

  Michigan courts have rejected the argument that property owners should be strictly liable for attacks by their tenants' dogs. *Szkodzinski v Griffin*, 171 Mich App 711 (1988). Unlike dog owners – who are strictly liable for injuries inflicted by their dogs per MCL 287.351 – more is required to impose liability upon a landlord. "[A] landlord is liable for injuries caused by the attack of a tenant's dog *only* where the landlord has actual knowledge of the dangerous propensities of the dog *and* where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power." *Braun v York Properties,* 230 Mich App 138, 144 (1998) (emphasis added). In short, such cases often turn upon whether the landlord knew that the dog had exhibited "dangerous propensities" before the incident.

  - *Stacey v Colonial Acres,* unpublished opinion per curiam of the Court of Appeals, rel'd 12/15/11, (Docket No. 300955), held that Defendants, the owner and operator of a manufactured home community, owed no duty to the Plaintiff under the following facts: the Plaintiff was a 16-year-old resident. On the date of the incident, Plaintiff was visiting the Youngs, who were also residents in the Defendants' community. Plaintiff had been to the Youngs' residence almost daily for several years without incident, as the Youngs' teenage son was Plaintiff's best friend. However, on this date, the Youngs' pit bull bit Plaintiff in the face, suddenly and without provocation. The manufactured home community's "Rules and Regulations" prohibited its residents to keep pit bulls on their property. Plaintiff sued the owner and operator of the community, asserting that they were negligent in failing to warn Plaintiff of a prohibited, dangerous dog, and in failing to protect him from the same. The trial court held that Defendants owed no such duties, and

therefore granted Defendants' Motion for Summary Disposition. The Court of Appeals affirmed, finding that there was no evidence of the dog showing any dangerous propensities prior to the attack, much less any evidence that Defendants knew of such propensities. Plaintiff tried to show that Defendants had knowledge of the dog's dangerous propensities by pointing to the Rules and Regulations. Plaintiff argued that by specifically banning the pit bull breed, Defendants "acknowledged that pit bulls have dangerous propensities." The Court of Appeals rejected this argument as follows:

It is true that certain breeds of dog are thought to be more inclined toward vicious behavior than others. However, an inclination does not equate with a certainty…. Moreover, while several other jurisdictions have imposed liability on landlords for their tenants' dog attacks against third parties, what these cases share in common is that liability attaches only where the landlord had actual knowledge of the *particular* dog's vicious propensities and not a general conception of vicious propensity based on breed alone. *Id.* at *4 (emphasis in original).

The Court of Appeals also addressed "the issue of whether a landlord who promulgates rules and regulations regarding tenants' dogs owes third party a duty to use reasonable care to enforce those rules…." *Id.* The panel cited *Braun, supra* for the proposition that the creation of such rules does not necessarily create a duty to enforce them. Rather, the *Stacey* panel applied the seven-factor test set forth in *Braun,* at 145-148: (1) the foreseeability of harm to plaintiff; (2) the degree of certainty that plaintiff suffered injury; (3) the connection between defendant's conduct and plaintiff 's injury; (4) the moral blame attached to defendants' conduct; (5) the policy of preventing future harm; (6) the burden on the defendant and consequences to the community of imposing the duty; and (7) the availability, cost and prevalence of insurance for the risk. Considering these factors as a whole, the *Stacey* panel concluded that no actionable duty existed.

Defendants' Rules and Regulations actually placed any risk associated with owning pets squarely upon the manufactured home owner, by stating: "residents are solely and totally responsible for the behavior of their pet." Although the Rules and Regulations also stated that management would make "every effort" to enforce the rules, the Court of Appeals declined to recognize a tort duty based upon this language. "This argument goes far beyond Plaintiff's common law negligence claim. What Plaintiff encourages is essentially akin to a strict liability standard whereby whenever a manufactured home community has a rule and the rule is not

enforced, the landlord is strictly liable for the consequences, no matter what the factual scenario." *Stacey, supra* at *5. The dismissal of Plaintiff's claims against the landlord, based upon a finding of no duty, is not only consistent with previous dog bite decisions, but also with general tort principles. Under Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent.

- *Morgan v Nickowski,* unpublished opinion per curiam of the Court of Appeals, rel'd 11-28-17 (No. 334668), reaffirms earlier Court of Appeals holdings in *Braun v York Props,* 230 Mich App 138 (1998) and *Szkodzinski v Griffin,* 171 Mich App 711 (1988) that landlords can only be held liable for injuries caused by their tenants' dogs in extremely limited situations. FACTS: Plaintiffs sought to impose liability on an out-of-possession landlord, Nickowski, for an incident involving two pit bulls owned by Nickowski's tenant, Lowrey. Plaintiff Arlene Morgan – who lived next door to Lowrey – was watching her son Jerry Morgan's dog, Axel, on May 13, 2015 when Axel somehow crossed a fence and entered the property Lowrey was renting. There, Axel was injured by Lowrey's pit bulls. Ms. Morgan also injured herself on the fence while trying to break up the encounter. Ms. Morgan sued for her own injuries, while Jerry Morgan sued for Axel's veterinary bills. The landlord, Nickowski, denied any knowledge of Lowrey keeping pit bulls on the premises and moved for summary disposition.

  Plaintiffs opposed Nickowski's motion by arguing that Lowrey had a history of code violations, some of which related to dogs, which should have put Nickowski on notice of a problem at this premises. Plaintiffs also argued that the tenant allowed leaves to pile up near the fence along the two properties; this supposedly allowed either Axel or the pit-pulls to climb over the fence. This leaf pile, according to Plaintiffs, constituted a nuisance for which Nickowski would be responsible. Plaintiffs requested leave to amend their complaint to assert this theory.

  The trial court granted Nickowski's Motion for Summary Disposition, finding that Nickowski owed no duty to the Plaintiffs. The trial court also denied Plaintiffs' request for leave to amend their complaint, finding that the proposed nuisance theory would be futile. Plaintiffs appealed by right, and the Court of Appeals affirmed in all respects.

Plaintiffs argue that Nickowski, as a landlord, had a duty to (1) investigate his property, (2) maintain the property and the fence around it, (3) abate nuisances, (4) warn of dangerous conditions on the property, and (5) take reasonable measures to avoid foreseeable harm. However, Plaintiffs fail to cite any authority either to support that a Michigan landlord lacking any sort of control over leased property is burdened with such responsibility or that Nickowski, in particular, owed any such duty to Plaintiffs.

In Michigan, the only possible way that a landowner could be held liable for injuries to a third party sustained by his tenant's dog on a common law negligence theory would be if he knew of the dog's vicious nature. Landlord liability under a premises liability theory requires a similar finding.

It is undisputed that Nickowski did not have possession and control over his tenants' home or the backyard where the dogs were kept. Generally, a tenant has exclusive legal possession and control of the premises against the owner for the term of his leasehold. Once Nickowski leased the premises to Lowrey, he no longer had possession or control over it. Responsibility in premises liability cannot be extended to Nickowski when he did not own or possess the property in question or the dogs involved in the attack. An action for premises liability is conditioned upon the presence of both possession and control over the land.

The panel further held that liability could not be imposed on Nickowski under ordinary negligence principles:

> …[P]laintiffs point to … evidence … that (1) Nickowski's tenants had a history of criminal activity, (2) a dog previously owned by Nickowski's tenants had bitten four people and been adjudicated dangerous, (3) a woman in the neighborhood suspected that the tenants' dogs had attacked her pet, and (4) other neighborhood residents had witnessed the tenants' dogs engaging in dangerous behavior.
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> ***

Even if all of Plaintiffs' evidence were admissible, it would not establish that Nickowski could have known that his tenants kept pit bulls on their property or, more importantly, that the pit bulls engaged in vicious behavior. Plaintiffs both testified in their own depositions that they had no reason to believe that Nickowski had any knowledge of his tenants' pet ownership. Arlene testified that she had never seen Nickowski at all. Nickowski, in his own deposition, flatly denied having any

knowledge of his tenants' dogs or the possibility that his tenants' dogs could be dangerous. Plaintiffs failed to set forth evidence to rebut Nickowski's deposition testimony and prove that Nickowski knew his tenants kept two vicious pit bulls…. *Morgan*, unpub op at 3-5 (citations omitted).

Finally, the panel addressed Plaintiffs' request for leave "to amend their complaint to add a nuisance claim against Nickowski," and found that any such theory was "meritless on its face." *Id.* at 6. "Even assuming" that "the presence of a pile of leaves and two pit bulls on property owned by Nickowski could constitute a nuisance under the law," the panel found "no basis for imposing liability on Nickowski, the landlord, for the condition." *Id.* "A defendant held liable for the nuisance must have *possession or control* of the land." *Id.* (citation omitted; emphasis in original). "Ownership of the land alone does not create liability in nuisance, and generally a landlord is not liable for a nuisance created by the tenant." *Id*. The proposed amendment merely "restate[d] the allegations raised in the initial complaint, styling them as a claim in nuisance in addition to negligence" which made them "no more likely to succeed." So the trial court correctly denied leave to amend, and correctly granted summary disposition to Nickowski.

- **What about Criminal Activity?**

  - *Bailey v Schaff*, 293 Mich App 611 (2011) holds that a landlord owes a duty, both to tenants and their guests, to take "reasonable measures" in response to an *ongoing* crime that takes place on the premises. This generally means calling the police; landlords and their agents *are not* expected to fight crime themselves. The fact that this was an *ongoing* situation was crucial to the finding of a duty. If there had not been notice or time to react – for example, if the gunman had suddenly walked up to Plaintiff and shot him – Plaintiff's claim against Evergreen probably would have failed. The Supreme Court *did not* find that Evergreen breached a duty or that it had liability. It only found that a duty existed. The Court went out of its way to note that landlords have no duty to respond to criminal activity within rental units. "[A] landlord's duty arises only when the triggering conduct occurs in those areas under the landlord's control."

- *Zarembski-Cole v Bedrock Management Services, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2016, (Docket No. 324795). FACTS: Plaintiff was attacked in the lobby of the office building where she worked by a woman named Carolyn Winfrey. Winfrey had attacked another employee working in that building about three months earlier. Defendant owned the building and provided security services through a contractor, Guardsmark, LLC. Plaintiff filed a premises liability action against Defendant, alleging that it had breached a duty of care owed to her by virtue of her status as a tenant in the building.

  Defendant moved for summary disposition, arguing that it did not have a duty to anticipate, prevent, or protect against the criminal acts of a third party perpetrated against an unidentified person, even if there had been a similar attack against another person in the past. Defendant argued that it had fulfilled the duty owed to Plaintiff because the police were called when Plaintiff was attacked, i.e., after she had been identified as a potential victim. Plaintiff argued that Defendant owed a heightened duty to maintain the common areas of its building so that it was reasonably safe for its tenants because it should have known that Winfrey posed a foreseeable risk of harm to anyone in her vicinity. The trial court agreed with Defendant's position, dismissing the case, and Plaintiff appealed. HOLDING: The Court held that Plaintiff had failed to establish that a genuine issue of fact existed as to whether, under the facts of the case, Defendant's duty of reasonable care was triggered *before* she was attacked. The Court noted that the record was bare of any evidence that the prior assault was in any way related to the assault on Plaintiff, and there was no relationship, through work or otherwise, between Plaintiff and the prior victim. Defendant's duty of care to Plaintiff would have been triggered only after having "notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." In this case, the record revealed that no reasonable risk of imminent harm to Plaintiff was apparent until Winfrey attacked Plaintiff, and the Court therefore held that Defendant did not owe Plaintiff a duty of care until the time of the attack, and then satisfied the limited standard of care to respond by timely notifying the police.

Special Considerations for Landlords

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What about Security Deposits?

- *Tree City Properties v Perkey*, unpublished opinion per curiam of the Michigan Court of Appeals issued March 7, 2019 (Docket No. 339539). FACTS: Tree City Properties owns and manages several rental properties. Defendant Eric Perkey signed a lease to rent one of Plaintiff's rental properties from September 1, 2013, through August 20, 2014. Pursuant to the lease, Perkey paid a $2,150 security deposit. In August of 2014, Perkey and Defendant Julie Batemen signed a lease to rent the same property from August 20, 2014, through August 20, 2015, and Perkey's previous security deposit was transferred to the new lease. Perkey and Batemen moved out of the rental property at the end of that lease. Shortly thereafter, Tree City's agent inspected the property and sent Perkey and Batemen a letter claiming that Tree City "was entitled to retain the entire $2,150 security deposit because of physical damage to the rental unit, unpaid utility bills, late fees, multiple check charges, and nonsufficient fund charges. Perkey and Batemen objected to almost all of the charges that Tree City proposed to make against the security deposit.

  On the basis of stipulated facts, the District Court held that Tree City was not entitled to collect the late fees or the multiple check charges but was allowed to recover the nonsufficient fund charges of $90. The District Court further found that "because it wrongfully withheld $1,390 from the security deposit," Tree City "was subject to the double penalty provision of MCL 554.613(2)." So the District Court "entered a judgment directing Plaintiff to pay Defendants the $1390 and an additional $1390 penalty." Tree City appealed the judgment to the Washtenaw Circuit Court – which has jurisdiction over appeals from District Court rulings, see MCR 7.101 et seq. – arguing that that the double penalty provision was inapplicable. The Circuit Court affirmed the trial court's reading of the statute, and the matter went to the Court of Appeals. The Court of Appeals found the application of § 613(2) in these circumstances to be "an issue of first impression." The panel noted that MCL 554.601 et seq. "regulates relationships between landlords and tenants relative to rental agreements and the payment, repayment, and use of security deposits." "The act is intended to protect tenants, especially from the situation where a landlord surreptitiously usurps substantial sums held to secure the performance of conditions under the lease." To that end, § 605 provides that "the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit or portions thereof...."

HOLDING: After analyzing the text of MCL 613, the panel noted that Tree City had undisputedly "complied with the statutory notice requirements with respect to its intent to retain" Perkey and Batemen's security deposit. The panel unanimously found that the lower courts had erred, as a matter of statutory construction, by subjecting Tree City to the double penalty provision. The panel explained that the provision relied upon by the lower courts, § 613(2), holds a landlord liable to a tenant for double the amount of the security deposit retained only if the landlord fails to "comply fully with this section." "This" is a term "used to refer to the person or thing present, nearby, or just mentioned." "The term 'this section' is plainly self-referential and is thus read to mean that compliance with [§]613 is required and that it is the noncompliance with the requirements of [§] 613(1) that creates the double penalty liability set forth in [§] 613(2)." "The language is clear and unambiguous": because "Tree City complied with and did not violate [§] 613 ... the double penalty provision ... plainly did not and does not apply."

<u>What about condominiums</u>?

- *Francescutti v Fox Chase Condo Association,* unpublished opinion per curiam of the Court of Appeals, issued October 15, 2015 (Docket No. 323111). FACTS: Plaintiff was a co-owner of a condominium unit in Defendant's Fox Chase development. While walking his dog, the Plaintiff slipped and fell on an icy, snow-covered sidewalk located in a common area of the development. Plaintiff claimed that he was seriously injured in the fall and filed suit, alleging negligence and breach of contract. Defendant Fox Chase moved for summary disposition, arguing that the condition was open and obvious (which defeated the negligence claim) and that there was no contractual duty to remove the snow and ice from the common area. The trial court agreed and granted summary disposition. Plaintiff appealed by right. HOLDING: The Court held that "MCL 554.139 imposes… a duty on the lessor of land. Defendants are not lessors of land leased to plaintiff. Plaintiff is an owner of a condominium unit in the Fox Chase condominium development." Plaintiff argued that he should be able to invoke MCL 554.139 because "under MCL 559.136 of the Michigan Condominium Act, he is a tenant in common of the common areas of the development. And because that makes him a 'tenant,' that must make defendant a 'lessor' of the land." *Id*. The panel rejected this argument as "a semantic sleight-of-hand," noting that the Defendant was "not leasing the common areas to plaintiff under a lease and, therefore, it [was] not a 'lessor' under MCL 554.139 and that statute is not applicable to this case." Having determined that the Landlord-Tenant Act is inapplicable, the panel then rejected Plaintiff's other arguments in short order.

Special Considerations for Landlords

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Rental Property (i.e., stand-alone home):

You can have a lease that puts the responsibility for snow and ice and other maintenance on to the renter.

- *Magyar v Barnes,* unpublished opinion per curiam of the Court of Appeals, issued March 22, 2012 (Docket No. 299118). FACTS: Plaintiff lived at his mother's rental property, where he slipped and fell on ice that formed on the steps leading to the front door. The lease agreement stated that the tenants were responsible for snow removal. Plaintiff testified that he was responsible for removing ice and snow on the premises. Plaintiff argued that his negligence claim is not barred by the open and obvious danger because it cannot be used to avoid statutory obligations, and the ice on the steps was not open and obvious. The evidence established that there were other indications of a potentially hazardous condition such as: the slip and fall occurred a few days after a significant snowstorm, and the snow remained on the ground. On the day of the incident, it was warm enough to melt some of the snow and because Plaintiff was a lifelong resident, he was aware that snow and ice can re-freeze after melting. Further, Plaintiff testified that he was aware that ice tended to form on the steps and on previous occasions, he and his mother used salt to melt the ice. HOLDING: The Court found that the trial court correctly ruled that the danger was open and obvious, and because the Plaintiff and his mother assumed responsibility by lease, Plaintiff was not entitled to be heard to make a claim for injuries that arose out of the condition he took responsibility for.

Exculpatory Clauses and the Truth in Renting Act for Residential Leases:

- MCL 554.633 (the Truth in Renting Act) states that: "A rental agreement shall not include a provision that does one or more of the following:
  - Waives or alters a remedy available to the parties when the premises are in a condition that violates the covenants of fitness and habitability required pursuant to MCL 554.139; and
  - Exculpates the lessor from liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law."
  - Exculpatory clauses in residential leases are void as against public policy. *Feldman v Stein Building & Lumber Co*, 6 Mich App 180, 186 (1967).

- *Forcelli v Princeton Enterprises, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 251305). FACTS: Plaintiff claimed a violation of a statutory duty after tripping and falling on an expansion joint on a declining ramp. Defendant's lease contained an exculpatory clause that modified the statutory duty. HOLDING: Exculpatory clauses in residential leases are void as against public policy.

Commercial Leases

- **You Can Have All of the Good Stuff!**
  - Commercial leases are treated as any other contract, unlike residential leases.
    - Commercial leases may include provisions for:
      - Releases;
      - Indemnity;
      - Exculpatory Clauses;
      - Switching responsibility to tenants;
      - Switching possession and control to tenants;
      - Making tenants identify you as additional insureds;
      - Other provisions which may be particular to your property; and
      - Shortening statute of limitation.

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Notice – Knowing What Was Wrong

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I. Definition of Notice in Michigan

(A) Michigan follows the *Restatement of Torts*.

"Duty" in premises cases rests on two sections of the Restatement of Torts.

(1) Section 343 states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, **and,**

(b) should expect they will not discover or realize the danger or will fail to protect themselves against it, **and,**

(c) fails to exercise reasonable care to protect themselves against the danger.

(2) Secondly, the *Restatement of Torts*, *Sec. 343 A(1)*, provides:

(a) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(B) Plaintiff's status triggers defendant's level of duty. The duty a landowner owes to those who come upon the land turns on the status of the visitor as an invitee, licensee, or trespasser.

(1) **Invitee** — (Guests at restaurants, businesses, apartment complexes, etc., are given the highest level of duty.)

- The Michigan Supreme Court has adopted the definition of "invitee" contained in the Second Restatement of Torts, which states:

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

(b) 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.

(c) 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, 462 Mich 591 (2000), quoting Restatement of Torts, 2d, §332.

- Defendants have a legal duty of reasonable care to protect their invitees from unreasonable risk of harm caused by a dangerous condition they know or should have known the invitee would not discover, realize or protect themselves against.

  Bertrand v Alan Ford, *Inc*, 449 Mich 606 (1995).

Business Invitor (Property Owner/Possessor) has three duties:

- Duty to inspect
- Duty to warn
- Duty to protect/make safe

(2) **Licensee** — Social Guest

- Defendant landowners have a legal duty to warn licensees of dangerous conditions on the land which the owner knows or has reason to know if the licensee does not know or have reason to know of the condition.
- A landowner does not owe a licensee a duty to inspect the premises or to make the premises safe for the licensee.

  Stitt v Holland Abundant Life Fellowship, 462 Mich 591 (2000).

- Landowner only owes a duty to warn social guest/licensee.

See *Sanders v Perfecting Church*, 303 Mich App 1, 8 (2013) – because the Plaintiff was a licensee, the Defendant had no duty to warn Plaintiff unless it knew of a hidden, unreasonably dangerous condition.

(3) **Trespasser** — Very Little Duty

- Defendant landowners generally have no duty to trespassers to notify them of any condition on the land. However, landowners may not actively injure trespassers in an effort to keep them off of their property. *(E.g.,* spring-loaded guns, hidden traps, covered pits.)

  Stitt v Holland Abundant Life Fellowship, 462 Mich 591 (2000).

- Exception for trespassers: there is a duty to landowners for child trespassers if the condition may be considered an attractive nuisance. A possessor of land is subject to liability for physical harm to a child trespasser caused by an artificial condition on the land if:

(a) The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;

(b) The condition is one which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily injury to such children;

(c) The children, because of their youth, do not discover the condition or realize the risk involved in meddling with it;

(d) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are outweighed by the risk to the children involved;

(e) The possessor fails to exercise reasonable care to eliminate the danger or to protect the children.

Rand v Knapp Shoe Stores, 178 Mich App 735 (1989), *Restatement of Torts*, *2d, § 339*.

***Practice note:** All five conditions must be met for liability to attach. Also, although the plain language of the doctrine indicates that it only applies to child trespassers, the Court of Appeals has held that child invitees fall within the category of children protected under the attractive nuisance doctrine. *See Gilbert v Sabin*, 76 Mich App 137 (1977). It appears that *Gilbert* has been ignored by several unpublished decisions, but in *Salib v Child's Lake Estates*, unpublished opinion per curiam of the Court of Appeals, issued Sep. 16, 2004 (Docket No. 248715), the Court of Appeals held that *Gilbert* remained binding precedent.

Liability under the attractive nuisance doctrine is imposed only where the injury is caused by an "artificial condition." *Rand, supra*. This doctrine also extends only to those who both possess and control the land. While a defendant's duty generally ends at the boundary of his/her property, the duty may be extended to conditions on adjacent property if the defendant has exercised possession or control over those adjacent properties. *Devine v Al's Lounge*, *Inc*, 181 Mich App 117, 120 (1989).

(C) **Attractive Nuisance Cases**

- The landlord/tenant of a building was not required to take action with respect to an alleged attractive nuisance of a curb between the sidewalk and alley which was used by children as a bicycle jump.

  Rand v Knapp Shoe Stores, 178 Mich App 735 (1989).

- Landowner responsible for construction site knew that children were attracted to a sandpit under an attractive nuisance theory has been allowed.

  Bryne v Schneider's Iron & Metal, *Inc*, 190 Mich App 176 (1991).

- Property owners who own a parking lot subsequently chained off an area of the parking lot where bike riders routinely used a path which led through their parking lot on one end and exited at another end. Within hours of the chain being placed, Plaintiff ran under the chain on his bike and suffered a severe head injury. The Court found that Defendants knew child trespassers used the bike path, and Plaintiff was not the cause of the creation of the chain. The Court found that this would be a question of fact for the jury and could constitute an attractive nuisance.

  Pippin v Atallah, 245 Mich App 136 (2001).

- *Westphal v Commerce Meadows* – unpublished opinion per curiam of the Court of Appeals, issued Jan. 31, 2006 (Docket No. 255953). Plaintiff was seven years of age when he was injured while riding his scooter on Defendant's property. Plaintiff used a concrete block which was propped over a curb on the driveway next to his mobile home as a ramp for his scooter. Plaintiff was injured when he attempted to ride his scooter over the concrete block. Plaintiff's attorney argued that Plaintiff's injury was the result of an attractive nuisance. The Court of Appeals disagreed.

  Landowners are generally liable for harm caused by dangerous, artificial conditions located where children are known to trespass if children would not likely realize the danger and the owner fails to use reasonable care to eliminate a danger whose burden outweighs its benefit. Plaintiff must prove five elements (as mentioned earlier) to maintain such an action. One element is that the condition is one in which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children. Plaintiff failed to prove that Defendant had knowledge of this condition that caused Plaintiff's injury. The only evidence offered was Plaintiff's deposition testimony. Plaintiff testified that Defendant knew or should have known about the condition on the property since they perform biweekly maintenance of the property. Plaintiff maintained that she never informed management about the condition and was unaware of anyone else informing management about the condition. Since there was no other proof, there was absolutely no evidence presented which established Defendant had knowledge about the condition which caused Plaintiff's injury and, therefore, the case was dismissed.

- *Salib v Child's Lake Estates*, unpublished opinion per curiam of the Court of Appeals, issued Sep. 16, 2004 (Docket No. 248715). Minor Plaintiff injured his knee by falling on a horseshoe stake on Defendant's property. The Court recognized that the attractive nuisance doctrine applies to child invitees as well as trespassers. However, the Court granted Defendant's Motion for Summary Disposition since the child recognized, discovered, and realized the danger posed by the stake.

- *Lieding v Blackledge*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2004 (Docket No. 243850). A dog tied up/leashed in a person's yard does not constitute an attractive nuisance.

***Practice Note:** Attractive nuisance cases are extremely fact-oriented. However, the defendant's knowledge is a necessary key to these cases. If a child trespasser is injured and defendants generally know of children trespassing on their property for a certain purpose, they may be held liable depending on the type of condition which is involved. Specifically, courts seem to focus on the actions of plaintiff and if plaintiff child actually had a significant role in the condition being dangerous.

II. Some Common Examples of Defendant's Duties - Business Invitee

(A) Items on Floors/Aisles/Conditions in Store

"It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the act of negligence of himself or employees, or if otherwise caused, wherein known to a storekeeper or has existed a sufficient length of time if he should have knowledge of it."

Serinto v Borman Food Stores, 380 Mich 637 (1968).

(B) Snow/Ice Removal

"A business invitor is required to take reasonable measures within a reasonable amount of time of the accumulation of ice and snow to diminish the hazard of injury to an invitee."

Quinlivan v Great Atlantic & Pacific Tea Co, 395 Mich 244 (1975).

Plaintiff failed to establish constructive notice of icy conditions where: (1) it had not snowed for several days; (2) it had only rained a few hours before reverting to freezing temperatures; (3) the ice patch was only the size of two parking spaces; and (4) no other person, including Plaintiff, had observed the ice before the fall.

Derbabian v Mariner's Pointe Associates Limited Partnership, 249 Mich App 695 (2002).

(C) **Criminal Acts of Third Parties**

"Merchants have no obligation to anticipate the criminal acts of third parties and are not obligated to do anything more than reasonably expedite the involvement of the police once criminal activity becomes apparent."

MacDonald v PKT, Inc, 464 Mich 322 (2001).

Notice to landlord's agent of a specific and imminent threat of criminal conduct against its invitees and tenants in the common area of an apartment building was imputed to landlord.

Bailey v Schaaf, 494 Mich 595, 618 (2013).

Zarembski v Bedrock Management, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2016 (Docket No. 324795), Plaintiff was attacked in the lobby of the office building where she worked by a woman named Carolyn Winfrey. Ms. Winfrey had attacked another employee in the same building three months earlier. Following the attack, Plaintiff sued Defendant, who owned the building and provided security services through a contractor. Plaintiff alleged that Defendant breached a duty of care owed to her as a tenant in the building. The trial court granted summary disposition in favor of Defendant, finding that Defendant did not have a duty to anticipate, prevent, or protect against the criminal acts of third parties even if there had been a similar attack against another person in the past. Further, Defendant fulfilled its limited duty of care to promptly notify the police after Plaintiff was attacked during an unforeseeable criminal act. The Court of Appeals affirmed the trial court decision.

(D) Issues to Focus on —

(1) What condition is involved?

(2) Did store owner/store employees cause the condition or contribute to it?

(3) Did store owner/employees know of the condition?

(4) When did the condition form?

(5) How long did the condition exist?

(6) Should the store owner/employees have known of the condition?

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(7) The frequency of the condition (or of similar conditions) on the premises, including location.

(8) Who or what caused the condition to form?

(9) When did the property/premises owner become aware of the condition?

***Case Law Examples of No Notice in Michigan (defendant landowners/plaintiff business invitees). Unpublished decisions are not binding on lower courts, but they do provide appellate courts insight into the notice doctrine and can be persuasive to a lower court. Constructive notice arises not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements. The below noted cases are a sampling of the types of conditions involved and the time element regarding those conditions.**

- *Goldsmith v Cody*, 351 Mich 380 (1958), Plaintiff was injured by falling into a dark unbarricaded stairwell. Defendant did not know who removed the barricades, when the barricades were removed, and in what manner.

- *Filipowicz v SS Kresge Co*, 281 Mich 90 (1937), Plaintiff noticed grease on her dress after she fell down a flight of stairs. There was no evidence as to how the grease got on the stairway, and Defendant had no knowledge of the presence of the grease, or that the grease was on the stairway long enough so that the employees should have known it.

- *Whitmore v Sears Roebuck & Co*, 89 Mich App 3 (1978), Plaintiff fell on an oily substance in the parking lot of Defendant's store. There was no evidence the oil came from Defendant's employer or that oil was in the parking lot for a considerable length of time to infer knowledge.

- *Suci v Mirsky*, 61 Mich App 398 (1975), Plaintiff slipped on a "slippery substance" on Defendant's stairs. There was no evidence to show how the substance got there, when or how long it was there, or if Defendant knew of the condition.

- *Galloway v Sears Roebuck & Co*, 27 Mich App 348 (1970), Plaintiff slipped on a small puddle of clear fluid on a step. There was no evidence of Defendant's knowledge or constructive knowledge.

- *McCune v Meijer*, *Inc*, 156 Mich App 561 (1986), the Court of Appeals affirmed the trial court's summary dismissal of Plaintiff's Complaint because Plaintiff failed to establish the *prima facie* element of notice. Plaintiff McCune slipped and fell in a puddle of oil in Meijer's parking lot. Despite the fact that there was an oil stain two and a half feet in diameter surrounding the puddle of oil, the trial court granted Meijer's Motion for Summary Disposition, concluding that Plaintiff could not prove that Defendant Meijer knew or should have known of the oil spill. It was held that Plaintiff's evaporation theory was mere conjecture and did not meet Plaintiff's burden to come forth with affidavits or some other evidentiary proof to establish that there existed a genuine issue of material fact.

- *Van der Laag v Palace Sports & Entertainment*, *Inc*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 8, 2005 (Docket No. 250641), Plaintiff attended a day-long event at the DTE Energy Music Theater and left around 10:00 p.m. Two of the facility's paved parking lots were separated by a wooded area with a paved walkway through it which connected the lots. Plaintiff was walking along this strip of land where he tripped and fell over a loose piece of pavement. Defendant's safety administrator provided uncontroverted evidence that she had inspected the walkway in question earlier on the day of the accident and found no debris. There was also no evidence that Defendant created the condition. The Court found that the condition had not existed for a considerable amount of time and therefore ruled on behalf of the defense.

- *Hernandez v Kmart Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2004 (Docket No. 235818), Plaintiff slipped and fell on a "slippery soapy substance" on Defendant store owner's floor. The only evidence offered by Plaintiff to demonstrate that Defendant should have been aware of the soapy substance on the floor was the testimony of Plaintiff and his family that there were "dirty," "brownish mushy" footprints in the puddle headed in the opposite direction. This, however, only suggested that the puddle may have been on the floor for potentially one person who possibly walked through the puddle before Plaintiff and his family. There was nothing to suggest that the puddle had been on the floor for any significant amount of time or that Defendant should have known about it. (This case was factually distinguishable from *Clark v Kmart*— discussed below, involving a "crushed grape.")

- *Perez v STC*, *Inc d/b/a McDonald's*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2005 (Docket No. 250418), Plaintiff slipped and fell on smashed food while walking through a McDonald's parking lot. Plaintiff failed to provide evidence that McDonald's or its employees caused the hazard or had actual knowledge of it. Plaintiff admitted in her deposition that she had no idea how long the food had been on the ground and she further stated that she did not see the

debris on the ground when she pulled into the parking spot or when she fell. She stated she first saw the food 15 minutes after the accident when she returned to her car after reporting the fall. In contrast, McDonald's presented a Pre-Shift Check List showing that its employees had inspected the lot within an hour of the accident.

- *Haywood v Unasource Health*, *LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 245748), Plaintiff tripped and fell due to an allegedly defective condition on a sidewalk. Plaintiff claimed that Defendant had constructive notice of the condition of the sidewalk and therefore should be held responsible to the injured Plaintiff. However, Plaintiff stated in an affidavit that the sidewalk "was not crumbled and did not appear to me to be defective." Further, there was no evidence indicating that a reasonable inspection of the area would have uncovered the alleged defect in the sidewalk. Accordingly, there was no basis to support a conclusion that Defendant had notice of any defect present in the case. Because no evidence was presented that a reasonable inspection of the area would have indicated the presence of the defect, the case was dismissed.

- *Smith v Monczunski*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 4, 2005 (Docket No. 260581), Plaintiff Timothy Smith received an electrical shock while using a measuring tape in the vicinity of two electrical service panels in the course of a remodeling project that he was performing for Defendant at her home. Plaintiff argued that he was an invitee as opposed to a licensee. However, the trial court granted summary disposition in favor of Defendant because there was no genuine issue of material fact that she should have known of the danger that was involved in Plaintiff's incident.

- *Gardner v MGM Grand Detroit*, *LLC*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 24, 2006 (Docket No. 255360), Plaintiff was injured when he fell while riding up an escalator at the MGM Grand casino in Detroit. Plaintiff argued that Defendant had notice of the escalator malfunction and also that Defendant should have repaired the malfunction to avoid any injury to the public in general. Plaintiff did not present any evidence that Defendant had actual or constructive notice of the escalator's condition or malfunction at any point in time prior to Plaintiff's fall. Plaintiff failed to present evidence of the dates or causes of prior malfunctions and what Defendant could have possibly done to prevent those occurrences. Plaintiff admitted that he could not produce any evidence explaining why the escalator stopped while Plaintiff was riding it. Without that evidence or evidence of when or why the escalator malfunctioned, Plaintiff failed to establish that a genuine issue of material fact existed whether Defendant had either actual or constructive notice that the escalator was defective or presented an unreasonable danger.

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- *Lowrey v LMPJ, Inc.,* 500 Mich 1 (2016), Plaintiff was a restaurant patron who slipped and fell while descending wet stairs. She filed a premises liability action against the operator of the restaurant, which moved for summary disposition. The trial court granted Defendant's motion, but the Court of Appeals overturned the decision, ultimately holding that Defendant failed to present evidence that it lacked notice of the hazardous condition. Reversing the appellate court, the Michigan Supreme Court held Defendant was entitled to summary disposition as the premises possessor did NOT have to present evidence that it lacked notice of a hazardous condition that allegedly caused the invitee to fall. Defendant only needed to show that invitee Plaintiff presented insufficient proof to establish the notice element of her premises claim. The Michigan Supreme Court made clear that the premises owner does not have the additional burden of producing evidence to disprove the Plaintiff's claims.

- *Priester v Bell,* unpublished opinion per curiam of the Court of Appeals, issued August 16, 2016 (Docket No. 250641), Plaintiff fell because of a loose front porch step at a home she leased from Defendant. She sued Defendant alleging breach of duties owed under common-law and MCL 554.139. Defendant filed a Motion for Summary Disposition, arguing that she had no notice of the alleged dangerous condition and, in fact, had inspected the steps on two occasions before Plaintiff's fall and they appeared to be in good condition. The trial court granted Defendant's motion, holding that Defendant did not have notice of the allegedly hazardous condition and made reasonable inspection of the premises. On appeal, Plaintiff contended that a jury could infer the defective step was improperly affixed to the front porch, thereby creating a genuine issue of material fact. The appellate court disagreed and upheld the trial court's grant of Defendant's Motion for Summary Disposition.

- *Lloyd v Westborn Fruit Market, Inc.,* unpublished opinion per curiam of the Court of Appeals, issued January 17, 2017 (Docket No. 329657), Defendant appealed an order denying its Motion for Summary Disposition. Plaintiff filed suit alleging she slipped and fell in the parking lot at Defendant's Westborn Market. According to Plaintiff, she slipped on a "flattened white wax cup." Plaintiff maintained that the white cup was lying on a white parking space line and that, in the evening hours, the white cup blended in making it invisible. Defendant filed a Motion for Summary Disposition and argued that there was no evidence that Defendant had actual or constructive notice of the alleged cup. The trial court denied Defendants' dispositive motion, but the appellate court reversed and remanded for entry of summary disposition in favor of Defendant. In essence, the appellate court noted that

Plaintiff's own deposition establishes that the cup would have been visible to ordinary user upon casual inspection. As the cup constituted an open and obvious danger, Defendant had no duty to protect or warn Plaintiff of the hazard. Further, there was no evidence that Defendant had notice of the alleged hazardous condition.

- *Bacon v Sunshine Products of Mid-Michigan,* unpublished opinion per curiam of the Court of Appeals, issued February 14, 2017 (Docket No. 330332), Plaintiff visited Defendant's premises, which is a landscaping supply company. As he attempted to leave, he slipped on the store's wooden deck and was injured. He testified that, after he slipped, he touched the deck and felt that it was "slimy" in the area in which he fell. He described the substance as almost invisible and said that he could not see it, but only feel it. The substance did not leave a residue on his hand and seemed to be part of the wood. Defendant moved for summary disposition asserting that it had no notice that the deck was in defective condition. The trial court granted summary disposition on the basis that nothing indicated the substance was a condition caused by Defendant or that it was there for a sufficient amount of time that Defendant would be charged with knowing, or should have known, of the alleged condition.

- *Fagan v Uznis Family Limited,* unpublished opinion per curiam of the Court of Appeals, issued June 29, 2017 (Docket No. 331695), Plaintiff drove his car to Defendant's clubhouse to pay his apartment rent. He initially walked on the sidewalk without incident, but as he walked back toward his car, he slipped on a patch of ice on the sidewalk, sustaining serious injuries. Plaintiff filed suit against Defendant alleging negligence and violation of its statutory duties as a landlord under MCL 554.139. Plaintiff testified that he was unaware of how long the ice had been on the ground and presented no evidence indicating the length of time the patch of ice had been present. Defendant moved for summary disposition contending that it had no knowledge of the ice and/or that the condition was open and obvious. The trial court agreed. The Court of Appeals affirmed the decision of the trial court.

- *Lloyd v TSFR Apple Venture,* unpublished opinion per curiam of the Court of Appeals, issued October 26, 2017 (Docket No. 333069), Plaintiff was a business invitee at Defendant's Applebee's Restaurant. Plaintiff walked to the restroom and on her way back, slipped and fell on an area of tiled flooring in front of the kitchen. After her fall, Plaintiff noticed an oily residue on her hands and knees. Plaintiff contended that Defendant knew or should have been aware of the condition of the floor and failed to properly maintain the premises. The trial court granted summary disposition in favor of Defendant upon concluding that Plaintiff failed to establish

a genuine question of fact whether Defendant had notice or created the dangerous condition. On appeal, the appellate court noted that Plaintiff must present evidence that the hazard existed for a sufficient time and that a reasonable premises owner would have discovered the alleged danger. Plaintiff failed to meet this burden. Accordingly, the appellate court found it speculative to deduce that Defendant was responsible for placing grease on the floor or should have been on notice of any grease or oil on the floor.

- *Kodra v Stony Creek Village*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2017 (Docket No. 333392), Plaintiff left his apartment building, which was owned by Defendant, to go to work. When Plaintiff stepped on a concrete sidewalk outside of his apartment, he slipped and fell on ice. Plaintiff brought an action against Defendant alleging premises liability and violation of Defendant's statutory duties under MCL 554.139. Defendant moved for summary disposition, contending that the ice on the sidewalk was open and obvious with no special aspects and the sidewalk was fit for its intended use. In a written opinion and order, the trial court found the ice on Defendant's premises "was open and obvious with no special aspects" and that, although the sidewalk was not fit for its intended use under the relevant statute, there was no evidence that Defendant had actual or constructive notice of the condition. The appellate court agreed with the findings of the trial court and affirmed summary disposition.

- *Letourneau v Edison Institute,* unpublished opinion per curiam of the Court of Appeals, issued January 9, 2018 (Docket No. 335740), Plaintiff attended Holiday Nights at Greenfield Village. As she approached the holiday display, she tripped and fell on a curb, fracturing her knee. She filed a premises liability action contending that the darkness and crowd of people obscured her ability to see the curb. Defendant filed a Motion for Summary Disposition on the basis that the curb was open and obvious. Plaintiff responded by arguing that the curb was difficult to see due to darkness and the crowd. Ultimately, the trial court granted summary disposition and held that the curb presented an open and obvious condition, despite the darkness. Further, there was no special aspect creating an exception to the open and obvious danger doctrine. The Court of Appeals affirmed the decision of the trial court, and further stated that a central element of every negligence claim is negligence- that a defendant breached a standard of care. Here, there was no evidence of negligence committed by Defendant in its care or maintenance of the premises. Further, there was no notice on part of Defendant indicating that the curb or holiday display presented a hazardous condition.

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- In *Butler v. Gold Mountain Inc.,* unpublished opinion per curiam of the Court of Appeals, issued August 2, 2018 (Docket No. 336671), the Court found that the Plaintiff had not demonstrated that the Defendant had actual or constructive notice of the alleged ice and therefore summary disposition was appropriate. Specifically, there was evidence that ice had historically formed in a certain location on the premises but that Defendant's employees conducted regular inspections and received no other reports or indications of anyone slipping. Further, the employees both testified that they inspected the parking lot on the date in question and did not observe any ice in front of the door. The Plaintiff presented an affidavit from a "safety and human factors consultant," which the Court found to be "extremely conclusory and provides no explanation of the reasoning underlying [the expert's] conclusions." The Court also noted that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts, particularly where an expert witnesses testimony is inconsistent with the testimony of a witness who personally observed any event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. In summary, the Court held that the Plaintiff failed to demonstrate a genuine issue of material fact regarding the Defendant's constructive or actual notice of the ice.

- In *Sopiqoti v the Kroger Company of MI,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2018 (Docket No. 339895), the Court found that the Plaintiff failed to present any evidence to raise a genuine issue of material fact that the Defendant possessed actual or constructive notice of a puddle of laundry detergent on the floor. Factually, the Plaintiff claimed that a laundry detergent bottle was dripping onto the floor on the Defendant's premises. However, the Plaintiff failed to provide any evidence regarding how long the particular bottle leaked or the rate at which laundry detergent typically drips out of a laundry detergent bottle aside from her own speculative testimony and a photograph that she took. Of note, the Court stated that proof as to when the hazardous condition arose was the "missing link" in Plaintiff's case.

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***Where there is sufficient evidence that the premises owner caused the condition on the premises, a plaintiff need not prove notice.**

In *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1 (2018), the Court reaffirmed that:

> Where the possessor is the one who created the condition, knowledge of the condition is imputed to the possessor, but where the condition is created by a third person, there is a factual question regarding whether the possessor should have reasonably discovered the condition.

***Constructive Notice is based on the amount of time the condition is present on the premises and can be proven with direct or circumstantial evidence.**

***Case Law Examples of Defendant's Knowledge or Constructive Knowledge Held to Create Notice (or at least a question for the jury on the issue):**

- *Andrews v K Mart Corp*, 181 Mich App 666 (1989), Plaintiff slipped and fell on a rug as she was leaving Defendant's store in wintertime. The rugs were replaced by Defendant periodically as they would roll up around the ends. This would be constructive notice of the store owner's realization of a possible dangerous condition.

- *Evans v SS Kresge Co*, 290 Mich 698 (1939), Plaintiff slipped on a piece of meat. The Court found that it was a "fair inference" that Defendants knew of the condition by testimony of people frequently dropping food in the area and around their tables.

- *Ritter v Meijer*, *Inc*, 128 Mich App 783 (1983), customer fell on a grape that was crushed. The Court hypothesized that since the grape on the floor occupied only a small portion of the floor, it must have been in the area for a while and, therefore, Defendant had constructive notice of the condition.

- *Clark v K Mart*, 465 Mich 416 (2001), P{laintiff fell on a crushed grape in a checkout aisle. The aisle had been closed for one hour before Plaintiff fell. A boot mark was in the footprints walking away from the grape that was not the Plaintiff's shoe mark. The Court found that in that one hour, Defendant could have constructive knowledge or notice of a potentially hazardous condition from the crushed grape.

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- *Herrera v Romp Entertainment*, *Inc*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 16, 2010 (Docket No. 285471), Plaintiff was injured on the dance floor area of Defendant's club where there was a wall made of corrugated metal. In front of the wall was a box on which patrons were permitted to climb and dance. A person standing on the box could, without difficulty, reach the top of the corrugated metal wall. While on the box, the Plaintiff grabbed the top of the wall and moments later realized that her fingers were nearly severed from her hand. Defendant argued lack of notice, since they did not create the condition, that the wall was installed years before Defendants operated the business, and there were no prior incidents. The Court found that a question of fact existed as to the notice issue. The Court explained that Defendant owed Plaintiff a duty to inspect the metal wall next to the box on which its customers regularly danced, to discover the wall's sharp edge, and to determine the wall's safety under the circumstances. The Court concluded that a jury could reasonably infer that Defendant knew, or should have discovered, the risk posed to dancers and taken some precaution to protect the wall's sharp metal edge.

- *Grandberry-Lovette v Garascia*, 303 Mich App 566 (2014), Plaintiff was injured when a brick came loose and she fell as she climbed the steps to the entrance of a home owned by Defendant. Defendant argued that he did not have actual knowledge of the defective condition. As to constructive notice, Defendant argued that if the defective condition was visible and should have been known, then it was also visible to Plaintiff and, therefore, open and obvious. Defendant acknowledged the tendency of brickwork to deteriorate due to Michigan's freeze-thaw cycle and that he had previously repaired the steps 9 to18 months prior to Plaintiff's fall. The Court reversed the trial court's entry of summary judgment finding that there was a question of fact as to whether Defendant would have discovered the defective condition had he performed a reasonable and timely inspection.

***Important Safety Tips — Document the following if possible.**

(1) How the condition came to be (defendant's action or third party's action).

(2) When the condition began.

(3) When the condition ended.

(4) Photograph the area if possible — (condition of the premises).

(5) When the area was initially inspected (possibly routine inspection, if any).

(6) Methods of reporting — (by customer, employee, incident report form, etc.).

(7) Document the people working/witnesses (obtain names and addresses, if available).

III. Recent Developments Regarding the Notice Defense

(A) Michigan courts have been more likely to stress plaintiffs' and defendants' knowledge of the surrounding area and the conditions of the premises, as well as circumstantial evidence to establish how long (or short) a time the condition may have existed.

Snow/Ice Conditions

- Plaintiff was injured when she was walking to her vehicle in Defendant's parking lot when she slipped and fell on a patch of black ice. It was undisputed that it snowed three to four inches the day before Plaintiff's fall. Defendant plowed and salted the parking lot in the early morning the day before the fall, and no snow fell there afterward. Plaintiff alleged Defendant failed to remove the complained of ice and snow from the parking lot within a reasonable period of time. In granting summary disposition to Defendant, the trial court held that Defendant fulfilled its duty when it plowed and salted the parking lot. Accordingly, Plaintiff had produced nothing in her deposition testimony other than mere speculations to support her claim that her slip and fall was caused by the snow melting and refreezing as ice. Accordingly, Plaintiff failed to establish a genuine issue of material fact whether Defendant breached its duty to re-inspect the parking lot for newly formed ice.

  Patricia Jackson v Bon Secours Cottage Health Services Inc, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2006 (Docket No. 259384).

- Plaintiff slipped and fell on ice in the parking lot of her apartment building, owned and operated by Defendant, sustaining injuries to her ankle. Plaintiff failed to establish that Defendant had notice of the ice. On the date of the accident, the weather was clear and cold with no snow or rain. According to Plaintiff, there was no visible snow or ice in the parking lot. When she returned from work, on her way from the parking lot to her apartment, she slipped and fell on the concrete portion of the driveway. Nothing was obstructing the area when she fell, it was still daylight, and Plaintiff did not see ice or snow on the concrete before she fell. The snow removal bill from Defendant indicated

that the snow was removed and salt was applied on the premises two days before the accident. Notably, Plaintiff presented no evidence showing how the ice patch developed, the duration of time it existed before Plaintiff's accident or that Defendant had actual notice of the ice. There was also no indication that the weather conditions were such that Defendant should have suspected ice could form in the parking lot or would need to take preventative measures regarding the same. *Gotautas v Marion Apartments of St Clair*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 16, 2006 (Docket No. 270785).

- *Anderson v Saddle Creek Apartments*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2010 (Docket No. 289952), Plaintiff slipped and fell on a patch of ice on the stairway that he was required to use to exit the apartment building where he resided. Plaintiff argued that Defendants were on notice of the potential for ice build-up on that step because they regularly tracked weather conditions and the forecast called for temperatures both above and below freezing on the day of the fall. The Court of Appeals concluded that fluctuation of temperature, alone, is not sufficient to establish that Defendant landlord, who had a history of reasonably maintaining its property, had notice of the alleged icy step. The result may have been different if other indications were present, such as piling snow near where the ice had formed, resulting in melting and refreezing.

- *Tate v Milonas Properties*, *LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No. 266054), Plaintiff slipped and fell on "black ice" as she was crossing Defendant's parking lot. At the time of the injury, the parking lot appeared wet, not icy, and Plaintiff did not notice any "black ice" adhering to the pavement under a thin layer of water until she slipped on it. Defendant argued that Plaintiff failed to present any evidence that Defendant had actual or constructive notice of the dangerous condition and the Court agreed. The meteorological evidence confirmed that the temperatures were above freezing on the morning of Plaintiff's fall. Plaintiff admitted that the parking lot was free of snow, and she did not detect any slippery areas walking from her car to the icy area. In this case, Defendants were absentee landlords. The Court explained that Plaintiff failed to demonstrate that the absentee landlords should have inspected and discovered the lot's dangerous condition without the benefit of any notice or complaints from the tenants. In a footnote, the Court further explained that individuals other than the absentee landlords/owners were in the best position to prevent the harm.

Notice – Knowing What Was Wrong

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***Practice Note: These notice requirements equally apply to statutory claims brought under the Landlord-Tenant Statute, MCL 554.139.**

As was explained in *Johnson v PM Group,* unpublished opinion per curiam of the Court of Appeals, issued November 1, 2005 (Docket No.263167), Plaintiff did not produce evidence to show at what point Defendant became aware of the existence of the alleged defect in the sidewalk. The property manager's testimony only showed that she had seen a crack in the sidewalk, not the allegedly dangerous condition alleged to have existed the day Plaintiff was injured. No evidence showed that the alleged defect was reported to Defendant prior to the accident. The trial court correctly granted summary disposition of Plaintiff's claim that Defendant breached its statutory duty on the ground that no evidence created a question of fact as to whether Defendant failed to maintain the premises in reasonable repair. MCL 554.139.

Other Miscellaneous Conditions

- Children at a local church had a habit of pushing on a glass entrance door which ultimately broke causing injury to Plaintiff. Affidavits of church members and minute notes from previous meetings of the church council noted they had been aware of the hazards associated with non-safety glass and had requested others to look into the use of safety glass for that very reason. As a result, the evidence alone raised a question of fact for a jury to resolve and, consequently, summary disposition could not be granted on the basis of lack of knowledge by the Defendant church. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56 (2004).

- Plaintiff was a nine-year-old who was on Defendant's property playing on a sand pile when it collapsed on him causing his death. The attractive nuisance doctrine applied and noted that Defendant caused the sand pile to be placed on the property in the first place. The second element required is that Defendant realized or should have realized that the condition involved an unreasonable risk of death or serious bodily harm to children. This is supported by the fact that one of Defendant's managers testified in his deposition that he understood that the sand pile represented a danger to children being injured if the children dug or tunneled in the pile and the pile collapsed on them. The Court also found that a jury could have made the assessment whether Defendant should have realized the danger the sand pile presented to children in the area by the deposition testimony of experts in the case, thereby creating a question of fact. *Fedewa v Robert Clancy Contracting Inc*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 26, 2008 (Docket No. 274088).

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- Plaintiff slipped and fell on an oily substance at a bowling alley. Plaintiff presented no admissible evidence to show that Defendant's employees caused the allegedly slippery condition on the lane, or had notice of any unsafe condition, so as to support a claim for premises liability. Plaintiff never presented anything to show that he did, in fact, slip on oil rather than any other liquid that could have been deposited in the approach lane by a myriad of different sources. Plaintiff presented one theory of the circumstances that led to his accident; however, he failed to eliminate other possibilities sufficiently to take the case out of the realm of conjecture. *Rogoszewski v State Lanes Inc*, unpublished opinion of the Court of Appeals, issued May 4, 2006 (Docket No. 263876).

- Plaintiff tripped and fell over a garden hose on the sidewalk outside of her apartment building owned and operated by Defendant. Plaintiff failed to produce evidence raising a genuine issue of material fact regarding Defendant's constructive or actual knowledge of how the garden hose ended up on the sidewalk. Plaintiff also failed to produce evidence regarding the length of time the garden hose remained on the sidewalk prior to Plaintiff tripping over it. Plaintiff also testified that she did not know where the garden hose came from and that no one at the apartment complex knew where the garden hose came from. Since Defendant did not have actual constructive knowledge of the condition, Defendant was not subject to liability for Plaintiff's injuries. Furthermore, the trial court properly granted summary disposition on Plaintiff's claim that Defendant breached a statutory duty under MCL 554.139 on the basis that there was no evidence which created a genuine issue of material fact regarding whether Defendant failed to maintain the common areas due to lack of notice. *Dover v Westchester Ltd Dividend Housing Association LLC,* unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258654).

- Plaintiff slipped and fell on melted ice cream on the floor of a common area in Defendant's mall. The trial court found the condition was open and obvious and also found that Defendant did not have notice of the condition. Ultimately, there was no evidence that Defendant was responsible for the condition or otherwise had actual knowledge thereof. Plaintiff did not know how long the ice cream had been on the floor; however, there was no evidence to show that the ice cream was completely melted or took a significant time to melt. Therefore, there was no actual constructive notice of same. *Abou-Souan v Somerset Collection*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2005 (Docket No. 260074).

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- Plaintiff slipped and fell at Home Depot on an unknown fine powder that was "all up and down the aisle." Plaintiff conceded that there was no evidence that Defendant and its employees caused the condition complained of. Therefore, the only issue on appeal was whether Plaintiff presented enough evidence to raise a jury question as to whether Defendant was on constructive notice of the condition. The Court held that Defendant cannot be charged with constructive knowledge of a substance that by Plaintiff's own testimony established was not visible from a standing position and that he had not noticed minutes before as he walked down the main aisle of the store to the plumbing department. Given the lack of visibility and the relatively short period of time Plaintiff was in the store, Defendant cannot be charged with constructive knowledge of the condition. *Hatherly v Home Depot,* unpublished opinion per curiam of the Court of Appeals, issued May 19, 2005 (Docket No. 250899).

- Plaintiff slipped and fell on snow and ice at Northwest Airlines. Plaintiff failed to submit evidence for the Court to conclude that Northwest had notice of the slippery condition. Specifically, Plaintiff did not show that the unsafe condition was known to Defendant or that the unsafe condition was of such a character or it existed for a sufficient length of time such that Defendant should have known of the condition. Plaintiff argued that Northwest should have discovered the condition; however, the Court could hardly hazard a guess as to how long the snow had been on the jet way and, therefore, it would be sheer speculation for Northwest to know the same as well. See *Pritchard v Northwest Airlines, Inc*, 111 Fed Appx 406 (CA 6, 2004).

- Plaintiff was injured when he was performing work on Defendants' roof. Evidence showed that Defendants had a hole in their roof which was repaired many years earlier. Plaintiff was injured by an alleged defect in the repair, i.e., the repair did not include placement of a board over the hole and under the shingles or otherwise render the situs of the repair capable of supporting a man's weight. Defendants were unaware of the alleged defect which was not capable of detection upon reasonable inspection. Therefore, Defendants were not liable for Plaintiff's injuries. *Daily v Chesley,* unpublished opinion per curiam of the Court of Appeals, issued Nov. 9, 2004 (Docket No. 249083).

- Plaintiff testified she slipped on a whitish, clear, milky substance on the floor of Defendant's store near a cooler at the end of an aisle. A statement by one of Defendant's employees indicated that before Plaintiff's fall, a customer informed the cashier of a spill on aisle six. The cashier inspected the spill and found what appeared to be shampoo drizzled down the aisle and she called for a cleanup. The cashier believed Plaintiff fell about the same time that the cleanup on aisle six started. The trial court granted Defendant's Motion for Summary Disposition, concluding that Defendant did not have

notice of the spill that caused Plaintiff's fall. The Court noted that Plaintiff's position seemed to be that the condition is not simply the "drizzle" that the cashier observed in aisle six but also the spill of the substance throughout the store. To impose liability on Defendant, Plaintiff was required to establish that Defendant had notice of the hazard encountered by Plaintiff, not merely knowledge of the possibility that a hazard may be present. The drizzle of the shampoo in an aisle where it was not stocked may have indicated a leaking bottle and the possibility that the substance may have leaked in other areas. This may establish awareness of a potential for a hazard in another location. Although such knowledge may be relevant to constructive notice, it does not suffice as actual awareness of a hazard. Furthermore, while the substance may have indisputably been present at the spot where Plaintiff fell, the issue of how and when it came to be were matters of sheer conjecture. As there was no evidence indicating how long the spill existed in the area that Plaintiff fell, Plaintiff asserted that the spill must have been present for at least the amount of time when the cashier was made aware of the same. However, this is no basis for inferring that the spill on which Plaintiff fell existed for the same period of time. Plaintiff's attempt to show constructive notice was too speculative to create a genuine issue of material fact. *Kahl v Borman's Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 267267).

- Plaintiff slipped and fell on water on a restroom floor of Defendant's bowling alley. Plaintiff did not see any water on the floor but other individuals who came to her aid after the fall observed water around a drain. There was no evidence that Defendant caused the hazardous condition, i.e., the accumulation of water on the restroom floor. Further, there was no direct evidence concerning how long the water had been on the floor before Plaintiff's fall. No one saw it beforehand, and Plaintiff testified that she entered the restroom at approximately 11:45 p.m. Plaintiff provided no evidence indicating how long the water had been on the floor. The condition may have appeared immediately after an employee's visit or simply moments before Plaintiff entered the restroom or anytime in between. The established facts do not provide a basis for inferring how long the condition existed and mere conjecture does not establish a triable issue of fact. *Charron v H&H Lanes*, *Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2008 (Docket No. 278277).

- Plaintiff injured herself when she stepped on the edge of a curb in an effort to walk onto a nearby asphalt parking lot. She testified there was nothing observably wrong with the curb where she put her foot. As Plaintiff's weight bore down on the concrete, the concrete crumbled away under her foot and she fell forward injuring her wrists and ankles. The Court found that Defendant manager testified that she regularly inspected the parking lot for trash and to determine whether there were any major problems which needed to be fixed. The manager also testified that photographs of the curb showed that

areas of the curb were missing concrete. Given this testimony, a question of fact existed as to whether Defendant knew or should have known of the defect in the curb and the danger that a decayed or defective concrete curb might pose to its business invitees. *Cartwright v Rite Aid of Michigan*, *Inc,* unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 272691).

- Plaintiff slipped and fell at a Taco Bell when exiting the restaurant into the vestibule on what was later determined to be a wet surface. It had snowed a short while earlier, and there was no floor mat or rug in the vestibule. In this case, Plaintiff did not contend that it was one of the Taco Bell employees who placed the water on the floor of the vestibule nor had she presented any evidence that any Taco Bell employee was actually aware of the water. Rather, the argument was based wholly on constructive notice. The Court noted that when the length of time is established as being considerably less than an hour, courts have routinely found for defendant. In this case, the evidence showed that the floor of the vestibule was dry 20 minutes before Plaintiff fell. Plaintiff testified that she did not see any water on the floor when she entered the vestibule from the parking lot, a little more than five minutes before she fell. At best, the evidence might support an inference that the water was on the floor for only a few minutes. See *Jones v Yum Brands*, *Inc,* 2008 US Dist LEXIS 27759 (2008).

- *Manser v Felpausch Food Centers*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 11, 2005 (Docket No. 253595), Plaintiff slipped and fell in a pool of dish soap at the end of a checkout lane in Defendant's store. The Court of Appeals concluded that there was no evidence to show that Defendant had actual or constructive knowledge of the condition. There was no evidence that showed how the soap came to be on the floor, or how long it had been on the floor. Summary disposition was properly granted in favor of Defendant.

- *Hagel v Pampa Lanes*, *Inc*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 24, 2006 (Docket No. 262136), Plaintiff slipped and fell on a piece of chewed gum that was located on a bowling approach at Defendant's bowling alley. Plaintiff relied on *Andrews v K Mart Corp*, 181 Mich App 666 (1989) to argue that deposition testimony regarding frequent food spillage before Plaintiff's league gave rise to constructive notice of the hazard. However, unlike *Andrews* where there was a routine rug problem where the rugs were routinely replaced, the food spillage in Defendant's facility was not a weekly occurrence. The Court also noted that *Andrews* involved knowledge of a specific problem with a specific item at a specific location in defendant's store, whereas the food spillage in Defendant's bowling facility involved knowledge of unspecific food spillage over an indefinite location, i.e., the entire floor of the bowling center. Having found that Defendant did not have actual or constructive notice of the condition, summary disposition was properly granted to Defendant.

- *Lewis v Harper Hospital*, unpublished opinion per curiam of the Court of Appeals, issued May 2, 2006 (Docket No. 258777), Plaintiff slipped and fell on an accumulation of water in the hallway of Defendant's urgent care center. After the fall, Plaintiff observed a significant amount of water on the floor as well as a mop and cones in a nearby corner. There was no evidence to suggest that Defendant's employees caused the condition, and the fact that the spill was near the nurses' station and that a mop and cones were observed in a nearby corner did not establish actual knowledge of the spill. The Court similarly found that there was no evidence of when the water was spilled on the floor, how it was spilled, or the source of the water. As such, constructive notice could not be established.

- *Thorne v Great Atlantic & Pacific Tea Co*, *Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2010 (Docket No. 281906), the Court concluded that Defendant did not have constructive knowledge where there was no evidence presented as to how long the crushed grapes were on the floor. It was determined that Plaintiff's argument as to notice was nothing more than speculation and conjecture.

- *Leske v Warren Dental Associates*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2000 (Docket No. 214078), Plaintiff slipped and fell on an oily substance in WDA's parking lot. The Court found that Plaintiff presented no direct evidence indicating how or when the oil was spilled onto the parking lot. The only evidence Plaintiff provides that Defendant knew or should have known of the oil spot is her testimony that the oil was black and had spread to two and a half feet in diameter. From these factors, Plaintiff theorizes that the oil had partially soaked into the asphalt and was longstanding enough that, had Defendant inspected its parking lot, the oil spot would have been discovered. However, mere conjecture cannot satisfy a plaintiff's burden of coming forward with evidentiary proof to establish that a genuine issue of material fact exists concerning whether a landowner knew or should have known of an unsafe condition on its premises.

- *Bate v Graystone Service Group, et al*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2015 (Docket No. 320577), Plaintiff slipped and fell on "black ice" at the Defendant's gas station. Plaintiff alleged that Defendant knew or should have known of the black ice accumulations near the gas pumps, and had a duty to either warn of or remove them. Defendant moved for summary disposition on several grounds, one of which was lack of notice. The Court of Appeals ruled that it would be unreasonable to assign to Defendant a duty to inspect every inch of its lot for black ice when the Plaintiff even admitted that it was not visible on casual inspection. The Court further held that Plaintiff failed to offer any evidence that the Defendant knew of the ice, received complaints about the ice, or could have seen the ice upon casual inspection.

- *Altairi v Alhaj*, 235 Mich App 626, 640 (1999), the Court of Appeals held that the Defendant's regular use of salt in a parking lot as a preventative measure did not lead to an inference that Defendant had either actual or constructive notice of a particular ice hazard. Instead, the preventative salting simply indicated a general awareness that ice could form in winter temperatures. That general awareness, according to the Court, was not sufficient to show constructive notice of a specific condition.

- Temporal Element: Notice

Graybill v Verna's Tavern, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2020 (Docket No. 350154).

In *Graybill,* the Plaintiff stepped outside onto the Tavern's patio in the evening to smoke. When she began to go back inside, the lights which illuminated the patio and the steps into the Tavern suddenly went out leaving the Plaintiff in sheer darkness.

On appeal, the Court of Appeals noted Plaintiff testified that she was able to observe the step until the lights went out and had no idea what caused the lights to suddenly go off. Further, although the light switch was inside by the bar, there was no testimony which suggested the lights were knowingly turned off. In short, there was nothing which suggested the Tavern knew or caused the lights to go out. Rather, the Plaintiff's fall on the steps was nearly simultaneous to the sudden blackout.

- Evidence regarding how long the defect existed is required. Failure to discover a defect may not equate to active negligence

Jaber v Meijer Group, Inc, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2020 (Docket No. 348158).

In *Jaber,* the Plaintiff slipped and fell while shopping in a Meijer store. The Plaintiff "slipped in a puddle of water in a grocery aisle, fell backward, hit her head, and lost consciousness." The leak in this case was due to a failure of an installed drainage system in the cooler." *Id.* "The record in this case does not establish either how long the leak existed nor what the inspection schedule was for the aisle at issue." *Id.* "Mere failure to discover a problem with the drainage system does not create active negligence and, therefore, obviate the need for notice." *Id.*

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- It remains a plaintiff's burden to prove constructive notice

Carter v Meijer, Inc., unpublished opinion per curiam of the Court of Appeals, issued November 4, 2021 (Docket No. 355680).

Plaintiff alleged that he fell and sustained serious injuries as a result of a broken soap dispenser leaking clear soap on the floor. An employee cleaned the restroom earlier in the day and did not observe any soap on the floor. The Court of Appeals found that although Plaintiff contended that the mess in the bathroom earlier in the evening should have put Defendant on notice that there could be additional damage to the bathroom, a defendant in a premises liability action is not required "to present evidence of a routine or reasonable inspection ... to prove a ... lack of constructive notice of a dangerous condition on its property." *Id.* at 10. Therefore, without more, Plaintiff failed to establish a genuine issue of material fact concerning whether Defendant's staff knew that the bathroom floor had become slippery or that the slippery condition existed for such a time that they should have known of its existence. *Id.* at 11.

It is not enough for a plaintiff to simply assert that it is likely a hazardous condition had been present for a sufficient amount of time. There must be sufficient evidence establishing that the hazardous condition had been present on the premises for a significant amount of time such that a premises owner should have known of its existence.

- More on a plaintiff's burden to establish facts that support a finding of constructive notice

DeClark v Professional Suites, LLC, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2020 (Docket No. 348308).

In *DeClark,* the Plaintiff fell down two steps of a staircase leading to the front entrance of the Defendant's office building. Plaintiff and her husband had an appointment with a professional in the building. It was a sunny day and the stairs were visible. The couple walked up the staircase without noticing any hazardous condition. Their appointment lasted an hour, and on the way out the Plaintiff fell. She stepped with her right foot onto the second step. When she attempted to follow with her left foot, her right heel got "caught or wedged," and her left leg folded behind her. Plaintiff "slid down" the remaining steps, sustaining a deep cut. *Id.* at 1-2. Both sides submitted photographs of the steps. The pictures were essentially inconclusive. Defendant filed a Motion for Summary Disposition based upon the open and obvious defense and alternatively, lack of notice.

In opposing Defendant's motion, Plaintiff did proffer a report from an inspector, who opined that there were "gaps and separation" in the steps that "could cause injury." *Id.* However, the panel construed this report to say that the "gaps and separation" referred to the stairs separating from the underlying brickwork (and not where the Plaintiff stepped). *Id.* Moreover, the panel found that this "inspection was performed too long after the accident to have much probative value." *Id.* And neither side's photographs revealed anything that, in the panel's view, was "suggestive of a defect or hazard." *Id.* Summary disposition was therefore warranted because there was no evidence that any defect in the steps "had existed for long enough or was of such a character" that the Defendant "should, by exercising reasonable care, have discovered it." *Id.*

Practice Note: In general, Constructive Notice will not be found where the defect is latent, i.e., of such a nature that it would not be discoverable upon casual inspection. The failure to make a diligent inspection may constitute negligence, but only if such inspection would have disclosed the defect.

- *Davies v Sheets,* unpublished per curiam opinion of the Court of Appeals, issued September 8, 2015, (Docket No. 320765). In this case, the Plaintiff was injured when a patio he was standing on collapsed. Defendant obtained summary disposition, based on the fact that a casual inspection would not have revealed the damage to the foundation that caused the patio to collapse – citing the Plaintiff's testimony that neither he nor his girlfriend noticed anything wrong with the patio and that the Plaintiff failed to present any evidence that a casual inspection would have uncovered the underlying foundation issues.

IV. The Causation Element that Frequently Arises

In premises liability cases, plaintiff must present evidence linking a specific "defect" or condition on the premises to the injury-producing event. Mere speculation and conjecture are insufficient. *See Stefan v White*, 76 Mich App 654, 661-62 (1977). The mere occurrence of an accident, in itself, is not sufficient to establish a genuine issue as to factual causation. *Skinner v Square D Co*, 445 Mich 153, 160 (1994).

Michigan courts have repeatedly rejected claims of landowner negligence where plaintiff cannot demonstrate the cause of injury. Several unpublished cases from the Michigan Court of Appeals address this issue.

- *Adams v Lemonde Bistro*, *LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2006 (Docket No. 266685). This case involved an injury suffered when Plaintiff slipped and fell on a step in Defendant's restaurant. Plaintiff testified she lost her footing on something slick like "ice" or "grease." However, she failed to identify the presence of grease or any other foreign substance on the step where she slipped. Because the suggestion of grease on the step was entirely speculative, no fact question was created. In reaching its decision, the Court noted that, in opposing a motion for summary disposition, a party cannot establish a question of fact through conjecture or speculation, citing *Libralter Plastics*, *Inc v Chubb Group of Insurance Companies*, 199 Mich App 482, 486 (1993).

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- In *Dupont v Morrison Lake Resort Assoc*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 27, 2002 (Docket No. 236819), Plaintiff claimed that a wood post lying on the ground next to a dumpster constituted the requisite defect or condition that contributed to her fall. However, Plaintiff could not identify the cause of her fall when it occurred, but merely surmised that the post, which was lying next to the dumpster and which appeared to have shifted, was what she tripped on. However, citing *Stefan*, *supra*, the Court held that Plaintiff's speculation and conjecture regarding the instrumentality of her fall was insufficient to create a question of fact.

- In *Russel v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 15, 2005 (Docket No. 256756), Plaintiff testified that she fell, but was unable to identify specifically where she fell and what caused her to fall. Plaintiff initially alleged that she tripped over a raised portion of sidewalk, however at deposition failed to provide precise testimony as to the location of her fall and the cause of her fall. Although the condition of the sidewalk was a possible cause of Plaintiff's fall, the Court held that there was nothing, besides conjecture, linking the condition of the sidewalk to her fall.

- In *Jones v Carter Food Center*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 8, 2006 (Docket No. 268756), while a customer in Defendant's store, Plaintiff tripped and fell when her foot caught on a bunched-up, rubber-backed rug that she had pushed her shopping cart over. Plaintiff's complaint alleged that the rug was old and unraveling, and that Defendant knew or should have known of its unsafe condition. The Court of Appeals affirmed the trial court's ruling granting Defendant's Motion for Summary Disposition based upon its finding that Plaintiff failed to present evidence concerning the age of the rug or whether its age contributed to the condition that caused Plaintiff's fall.

- In *Demo v Red Roof Inns*, *Inc*, 274 Fed Appx 477 (2008), Plaintiff slipped and fell on an icy step while a guest at Defendant's hotel. Plaintiff was unable to identify the cause of his slip, although he speculated that a sheet of ice must have covered the step area. Plaintiff testified that he never saw ice and did not return to the scene to examine the area. At another point in his deposition, Plaintiff stated that "I would say that the surface on the steps were slippery and that's basically why I come down the steps the way I did." In light of this testimony, the Court held that Plaintiff failed to demonstrate or establish the cause of his fall. The Court reasoned that Plaintiff's deposition testimony presented nothing more than rank speculation about the cause of his fall. Although Plaintiff presented vague statements concerning the cause, when asked how he slipped, Plaintiff clearly and repeatedly indicated that he only assumed the steps were icy. In the context of Plaintiff's inability to provide specific knowledge of what caused his fall, his generalized statements were insufficient to create the requisite causal inference.

Third-Party Contractors

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I. Third-Party Contractors

Third-party contractors are entities entering into verbal or written contracts with premises owners to perform particular services. Common third-party contractors in the premises liability context include the following:

- Landscapers
- Snow removal companies
- Irrigation companies
- Roofing contractors
- Gutter installers
- Awning companies
- Parking lot resurfacing companies
- Cleaning crews

II. Negligence: Generally

It is well-established that a *prima facie* case of negligence requires a plaintiff to prove four elements:

1. Duty;
2. Breach of that duty;
3. Causation; and
4. Damages.

Fultz v Union-Commerce Assoc, 470 Mich 460, 643 (2004), *citing Case v Consumer Powers Company*, 463 Mich 1, 6 (2000).

The threshold question in a negligence action, therefore, is whether the defendant owed a duty to the plaintiff. There can be no tort liability unless the defendants owe a duty to the plaintiff. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162 (2011), *citing Beaty v Hertzberg & Golden, PC*, 456 Mich 247 (1997).

Duty in a premises liability context usually arises as one of the following:

1. Statutory duty;
2. Contractual duty (third-party beneficiary); and
3. Common law duty.

Third-Party Contractors

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III. The Duty of Third-Party Contractors

A. Historical Perspective

Traditionally, the duty of a third-party contractor has been broadly construed. With every contract, there was a common law duty to perform with ordinary care the thing agreed to be done, and a negligent performance constituted a tort as well as a breach of contract. *Talucci v Archambault*, 20 Mich App 153 (1969). Generally, those foreseeably injured by the negligent performance of a contractual undertaking were owed a duty of care. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 708 (1995), *overruled* on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446 (1999). At the time, many argued for abolishing contractual privity and permitting suit in negligence by any third-party. *See Williams v Polgar*, 391 Mich 6 (1974).

B. Significant Developments in Case Law

1. *Derbabian v Mariner's Pointe Associates Limited Partnership*, 249 Mich App 695 (2002)

   - In *Derbabian*, Defendant was a snow removal contractor. Because Defendant had no common law duty to plow, inspect or salt the parking lot in which Plaintiff was injured, the Court of Appeals held that Defendant did not breach a duty of due care when it failed to inspect the parking lot on the day in question. Plaintiff, therefore, did not have an independent tort action against the third-party contractor.

   - The *Derbabian* Progeny: cases following *Derbabian* focused on whether the claim was based on a failure to perform the contractual duties or a performance of the contractual duties in an actively negligent fashion.

     - "Nonfeasance vs Misfeasance"

   - Based on *Derbabian*, no tort claim arises solely from a defendant's failure to perform its contractual obligations.

2. *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004)

   - Again, Defendant was a snow removal contractor. Plaintiff slipped and fell on an icy parking lot, which Defendant allegedly failed to plow or salt. The Michigan Supreme Court rejected the misfeasance/nonfeasance analysis as too "slippery." For example, what if an accident of nonfeasance occurs in the course of an undertaking assumed (i.e., a surgeon fails to sterilize his instruments, an engineer fails to shut off steam, a builder fails to fill in a ditch in a public way)?

   - The Court adopted the definition of a tort action stemming from misfeasance of a contractual obligation as the "***violation of a legal duty separate and distinct from the contractual obligation***."

   - As Plaintiff's claim against Defendant was for its failure to perform its contractual duty of plowing or salting the parking lot, the claim failed under the "separate and distinct" analysis. Plaintiff's cause of action against the third-party contractor, therefore, was dismissed.

   - *Fultz* presumably upheld the *Derbabian* decision to the extent no tort claim arises solely from a failure to perform a contractual duty.

3. The *Fultz* Progeny

   - Plaintiff can make no claim against a third-party contractor for its failure to perform its contractual obligations.

   - *The Fultz standard is still pretty "slippery."*

   - Interestingly, the Defendant in *Fultz* actually plowed on the day of Plaintiff's accident and applied salt near the store's entrance. Defendant returned later in the day but did not spread salt or plow at that time. Nevertheless, the Michigan Supreme Court interpreted Plaintiff's claim as one for nonfeasance not misfeasance. Because the Supreme Court interpreted the claim as one for nonfeasance, there was no detailed analysis of the "separate and distinct" approach.

- Michigan courts, in a long line of unpublished decisions following *Fultz*, seemed to focus their determination on whether a contractor, through an affirmative act, "created a new hazard or increased the danger to the plaintiff."

4. *Banaszak v Northwest Airlines, Inc,* 477 Mich 895 (2006)

   - In *Banaszak*, Otis Elevator was contracted to construct the elevators, escalators and moving walkways throughout the new airport terminal in Detroit. Otis was required to provide a cover over the "wellway," an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area. Plaintiff was injured when she stepped on an inadequate piece of plywood covering the wellway. According to the Michigan Supreme Court, "This hazard was the subject of the Otis contract," so Otis "owed no duty to plaintiff that was 'separate and distinct' from its duties under the contract."

   - As part of that contract, Otis Elevator was to be responsible for complying with all applicable codes, ordinances, rules, and regulations, including federal and local OSHA regulations, involving safety on the project. These contractual duties also required Otis Elevator to provide MIOSHA compliant coverings over the wellways. The purpose of the coverings was to protect persons using or working in that area. While working in the vicinity of where Otis Elevator employees had installed the moving walkways in the floor of the terminal, the Plaintiff was injured when she fell through an inadequate piece of plywood that was placed over a wellway. The Michigan Supreme Court reversed the Court of Appeals' ruling and held that "[t]his hazard was the subject of the Otis contract. As a result, Otis owed no duty to the plaintiff that was 'separate and distinct' from its duties under the contract."

   - In *Banaszak*, Defendant clearly "increased the danger" to the Plaintiff. Nevertheless, the Supreme Court held Defendant breached no duty "separate and distinct" from its contract. This decision was in sharp contrast to the *Fultz* progeny.

5. *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007)

   - In *Mierzejewski*, the Michigan Supreme Court reversed the Court of Appeals and held that the Defendant snowplow contractor did not owe the Plaintiffs a duty of care "separate and distinct" from its contract with the property owner. In that case, the Plaintiffs claimed that the snowplow contractor piled the plowed snow onto landscaped curbed islands in the parking lot, which created

a new and unreasonably dangerous hazard because of the melting and refreezing that occurred in and around those areas. Again, the Supreme Court rejected Plaintiff's argument that the Defendant owed Plaintiff a duty "separate and distinct" from the contract and held:

> The Court of Appeals erred in reinstating plaintiffs' claim on the basis of a duty owed by the defendant to plaintiffs. The defendant did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premise's owner.

6. The Old Conclusion

- The Michigan Supreme Court's holdings in *Banaszak* and *Mierzejewski* clearly state that a plaintiff cannot prevail in a tort action against a contractor where the alleged hazard or damage resulted from specific acts undertaken by the contractor in the performance of the work contracted for.

C. Current State of the Law

1. *Loweke v Ann Arbor Ceiling,* 489 Mich 157 (2011)

- In *Loweke*, the Court rejected *Mierzejewski, Banaszak*, and other post-*Fultz* decisions that had significantly curtailed (or arguably extinguished) the "separate and distinct duty" exception to *Fultz*.

- *Loweke* arose out of an accident which occurred at a construction site where the Plaintiff was working for an electrical subcontractor. The Defendant was a carpentry and drywall subcontractor. The Defendant's employee allegedly left more than twenty sheets of cement board stacked against the hallway wall. While the Plaintiff was working on installing wiring in the hallway, the cement boards fell on the Plaintiff and injured his leg. The Plaintiff filed a lawsuit alleging that the Defendant negligently stacked the cement boards and created a "new hazard" which did not previously exist.

- The Court of Appeals held that, under *Fultz,* the Defendant's action did not go beyond the requirements of the contract. The Court of Appeals looked at the terms of the contract and made a determination of whether Defendant's action of stacking the boards was required under the contract. After reviewing the contract, the Court of Appeals found that there was little question that the alleged hazard was not outside the construction zone and did not present any

unique risk not contemplated by the contract. Therefore, the Plaintiff's claim was based on Defendant's negligence in performing the requirements of its contract, and as a result, the Defendant owed no duty separate and distinct to the Plaintiff. However, the Supreme Court reversed and remanded in an opinion that was signed by five Justices, and did not generate a dissent. The Court held that *Mierzejewski, Banaszak,* and the Court of Appeals' holding in *Loweke* were all based upon "the mistaken belief that *Fultz* extinguished preexisting common-law duties." *Loweke,* Slip Op at 14. *Fultz* "did not extinguish the simple idea that is embedded deep within the American common law of torts...: if one having assumed to act, does so negligently, then liability exists as to a third party for failure of the defendant to exercise care and skill in the performance itself." *Loweke,* Slip Op at 13. Rather than looking to the contract first in such cases, the Court in *Loweke* clarified that under *Fultz,* the "proper initial inquiry" is "whether, aside from the contract, defendant owed any independent legal duty to the plaintiff." *Id.* at 14. The Court further clarified that this "independent legal duty" need not be imposed by statute, but may simply be the general "common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings."

- The essential holding of *Loweke* can be summarized as follows: "a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to non-contracting third parties in the performance of the contract." *Loweke,* Slip Op at 2. In so holding, the Court explicitly rejected the reasoning of *Hatcher v Senior Home Health Care,* unpublished Court of Appeals opinion, released 8/19/10 (289208), *Carrington v Cadillac Asphalt* unpublished Court of Appeals opinion, released 2/9/10 (Docket No. 289075), and *Bennett v MIS Corp,* 607 F3d 1076 (6th Cir 2010), along with *Mierzejewski* and *Banaszak*. The Court appears to have been persuaded by the Sixth Circuit's criticism of post-*Fultz* jurisprudence in *Davis v Venture One Constr, Inc,* 568 F3d 570 (6th Cir 2009) – even though *Davis* was later rejected by the Sixth Circuit in *Bennett* for being inconsistent with Michigan law.

2. The *Loweke* Progeny

- To date, very little case law has developed interpreting the *Loweke* decision. There are no published opinions discussing *Loweke* in the context of a premises liability case. However, the unpublished opinions to date have

routinely interpreted *Loweke* in favor of the plaintiff. There has yet to be a post-*Loweke* case dismissing a third-party contractor for lack of a duty owed to a plaintiff.

3. *Hill v Sears, Roebuck & Co*, 492 Mich 651 (2012)

   - The Michigan Supreme Court addressed the issue of whether appliance installers had a duty, separate from their contract to install appliances, to take action with respect to an exposed, uncapped gas line within the appliance niche. Ultimately, the Supreme Court held that, due to their limited relationship, the installers did not have a duty to take any action, nor did they have a duty to warn the homeowners about the uncapped gas line. Finally, citing *Fultz*, the Court noted that the installers did not create a new hazard by placing the dryer in front of the uncapped gas line.

4. *Bailey v Schaaf*, 494 Mich 595 (2013)

   - In *Bailey*, the Michigan Supreme Court re-examined the issue of whether the third-party contractor, Hi-Tech (the security personnel hired to patrol the premises), was under a duty to the Plaintiff based upon the contract to provide security services. The Plaintiff was shot and paralyzed during an outdoor event at the premises' common area. The Court of Appeals had rejected the theory that the Plaintiff was a third-party beneficiary of the contract between Hi-Tech and the landlord/management company. Finally, the Court of Appeals also held that Hi-Tech did not owe the Plaintiff a duty that was separate and distinct from Hi-Tech's duties under the contact.

   - Ultimately, the Michigan Supreme Court focused its attention more on the landlord/management company's duties to the Plaintiff to notify the police if given notice of a criminal situation on the premises. However, the Supreme Court agreed with the Court of Appeals that the facts alleged involving the contract between Hi-Tech and the landlord would impute to the landlord the notice of the criminal situation. As such, the landlord had a duty to inform the police.

   - The Supreme Court further remanded the case back to the Court of Appeals for consideration of the Plaintiff's negligence claims against Hi-Tech as the Court of Appeals failed to discuss the clarification of *Fultz* within the *Loweke* decision.

5. *Leone v. BMI Refractory Services, Inc.*, 893 F.3d 359 (6th Cir. 2018)

- The Plaintiff brought suit against the contractor that his employer hired to clear debris and slag from a degasser. The Plaintiff was injured when a forty-pound piece of slag fell and struck the Plaintiff. The question for the 6th Circuit was whether the contractor owed the Plaintiff a duty of care separate and distinct from the contractual duties to the employer or whether a new hazard had to be created for the contractor to be liable.

- The 6th Circuit held that the duty of care did extend to the Plaintiff because the contractor's duty of care to a third-party was "separate and distinct" from the contract.

- Further, Michigan law incorporates the "voluntary-assumption of duty doctrine," which states that if one assumes to act and does so negligently, then liability exists as to a third party for failure to exercise care and skill in the performance itself.

IV. Moral of the Story

The Court in *Loweke* specifically noted, at footnote 3, that it *was not* overruling *Fultz*. However, several post-*Fultz* decisions often relied upon by the defense bar, including *Mierzejewski* and *Banaszak*, no longer remain good law considering *Loweke.*

According to *Loweke,* courts presented with a *Fultz* defense should begin their inquiry not with the contract, as defendants have long advocated. Rather, courts are now instructed to begin with an analysis of whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort.

By referring to a broad "common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons," *Loweke* opens the door for virtually any injured party to argue that they were owed an independent common-law duty of ordinary care.

It should be noted that plaintiffs have also frequently sought to avoid *Fultz* defenses by arguing that they are third-party beneficiaries of the contract. *Loweke* does not speak to this aspect of *Fultz* and plaintiffs who take this route will still have the difficult task of establishing their third-party beneficiary status under MCL 600.1405, as interpreted most recently in *Shay v Aldrich,* 487 Mich 648 (2010).

Essentially, if a third-party contractor performs an act, it must do so reasonably. This analysis is, in large part, returning to the former standard governing misfeasance versus nonfeasance. A third-party contractor's failure to act, despite a contractual duty to do so, will not establish liability. However, unreasonable actions, regardless of the contractual language, will impose liability on a third-party contractor.

V. The Open and Obvious Defense is Likely Inapplicable to Third-Party Contractors

Ghaffari v Turner Construction Company, 473 Mich 16 (2005)

In *Ghaffari*, Plaintiff was a subcontractor working at a construction site. He tripped on pipes on the ground and sued the construction manager and two subcontractors, which allegedly owned the pipes. The Michigan Court of Appeals, in a published opinion, applied the open and obvious defense in dismissing all of Plaintiff's claims. In doing so, the Michigan Court of Appeals held:

> There is nothing in the history of the open and obvious danger doctrine . . . to suggest the doctrine should not apply in other contexts [i.e., contexts other than in a premises liability claim].

Unfortunately, the Michigan Supreme Court granted leave to appeal the *Ghaffari* decision.

The Michigan Supreme Court reversed the Court of Appeals and held that the open and obvious danger doctrine did not apply. According to the Supreme Court, "The open and obvious doctrine is specifically applicable to a premises possessor." The Supreme Court detailed the history of the common work area doctrine and the inherent inconsistencies in applying the open and obvious defense in such a context.

Pursuant to *Ghaffari*, therefore, the open and obvious defense will not apply in construction cases. However, the *Ghaffari* decision will also be argued to bar the use of the open and obvious defense by anyone other than a premises possessor. Such an argument is likely to succeed. Thus, the open and obvious defense will not apply to most third-party contractors.

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Insurance and Indemnity Issues

Matthew J. Consolo, Executive Partner
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LEASING ISSUES RELATED TO INDEMNIFICATION AND INSURANCE ISSUES IN PREMISES CASES

BY
MATTHEW J. CONSOLO

A nuts and bolts analysis of when and under what circumstances your insureds owe indemnification; when you should tender the defense; when you should and should not accept the tender; and when you should defer those decisions strategically.

Insurance and Indemnity Issues

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In order to properly analyze the tender of defense issues and strategies, you need to examine the lease or contract (including vendor, construction, repair, snow removal and other kinds of contracts) as a whole, and, in particular, the three types of lease clauses that go directly to this issue which are:

1. Lease clauses that define the "leased premises";

2. Indemnification clauses (and related lease clauses that go to the issue of the intention to indemnify);

   and

3. Insurance clauses.

Lease clauses that define the "leased premises":

1. Examples of when this becomes an issue whenever you have a multi-tenant situation;

2. The case law definition of the phrase "in, on, or about the leased premises";

3. Related documents that define the footprint or the dimensions of the rented space;

4. Related lease clauses that help you define the "leased premises";

5. Interrelated issues regarding possession and control; and

6. Regardless of what the lease says, who really does the maintenance in the area, and for the circumstances, in which the plaintiff was injured?

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<u>Analysis of indemnification clauses themselves</u>:

1. Your success in tendering the defense and/or obtaining indemnification is directly related to the language of the indemnification clause itself.

2. Examples of indemnification clause language, starting with the least helpful to the most helpful:

   A. "Tenant assumes all risk of injury to its customers";

   B. "Tenant agrees to indemnify and hold harmless landlord";

   C. "Tenant agrees to hold harmless and indemnify landlord from and against any and all claims";

   D. "Tenant agrees to hold harmless and indemnify landlord from and against any and all claims that arise in, on, or about the leased premises from any cause whatsoever";

   E. "Tenant agrees to hold harmless and indemnify landlord from and against any and all claims that arise in, on, or about the leased premises from any cause whatsoever, including where the landlord itself is partially negligent. However, this indemnification provision does not apply where the landlord is solely negligent in causing the injury"; and

   F. "Tenant agrees to hold harmless, defend, and indemnify landlord from and against any and all claims that arise in, on, or about the leased premises from any cause whatsoever, including where the landlord is partially negligent, but provided that the landlord is not solely negligent in causing the injury, including all settlements, judgments, attorney fees, and court costs."

3. Case law tells us that:

   A. An indemnity contract is construed in the same fashion as are contracts generally;

B. Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and surrounding the making of the contract; and

C. An indemnity contract will be construed against the party who drafts the contract and the party who is the indemnitee.

4. Other related lease clauses that go to the heart of the intent to indemnify.

Insurance-related clauses:

1. Simple clauses that just require liability insurance with specified limits;

2. Clauses that say, "For the benefit of" the other party, but not necessarily requiring that the other party be named as "an additional named insured";

3. The difference between a mere "certificate holder" and "an additional named insured"; and

4. What happens where the insured is supposed to give the other party either a "certificate of insurance" or name them as "an additional named insured" but fails to do so?

ANALYSIS OF INDEMNIFICATION CLAUSES AND EVALUATING LIABILITY BASED UPON THEM

Contractual indemnity can arise only from an express agreement between the parties to a contract. An indemnity contract creates a direct, primary liability between the indemnitor and indemnitee that is original and independent of any other obligation. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161; 848 NW2d 95 (2014).

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As with any other contract, a court's primary task in construing a contract for indemnification is to give effect to the parties' intention at the time they entered into the contract. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 165; 848 NW2d 95 (2014). The court determines the parties' intent by examining the language of the contract according to its plain and ordinary meaning. *Miller-Davis*, supra at 165. See also *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340; 527 NW2d 79 (1995). In doing so, the court avoids an interpretation that would render any portion of the contract nugatory. *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340; 527 NW2d 79 (1995); *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165; 530 NW2d 772 (1995).

Where parties have expressly contracted for indemnification, "the extent of the duty must be determined from the language of the contract." To this end, the indemnity clauses in the parties' contract are critical in applying general indemnification principles to the facts of this case. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014).

Generally, the language in an indemnity contract such as "from and against any and all claims" and "from any and all causes whatsoever" is generally construed to protect the indemnitee, which is generally the landlord, from the landlord's own negligence. *Pritts v JI Case Co*, 108 Mich App 22; 310 NW2d 261 (1981) ("[T]here cannot be any broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions."); *See also City of Birmingham v Royal Oak Landscaping*, 2005 Mich App LEXIS 1082 (2005). Moreover, a contract may provide for indemnification for the indemnitee's own concurrent negligence, if this intent can be ascertained from other language in the contract, surrounding circumstances, or the purpose sought to be accomplished by the parties. *Sherman v DeMaria Building Co, Inc*, 203 Mich App 593; 523 NW2d 187 (1994). Therefore, a careful analysis of the indemnification language is necessary to properly evaluate liability pursuant to the indemnification clause. Although some of these clauses may be lengthy, they are not that difficult to analyze in accordance with the above case law.

Keep in mind that there is a statute in Michigan that precludes indemnification in favor of an indemnitee who is solely negligent in connection with a contract for the "repair or maintenance of a building," regardless of what the indemnification clause says. MCL 691.991. That statute holds that such an indemnification provision would be void as against public policy. Additionally, exculpatory clauses in residential leases that negate a landlord's statutory duties are unenforceable because they violate public policy. *Wendzel v Feldstein, No. 324216, 2015 WL 7288057, at *1 (Mich Ct App Nov. 17, 2015)*. However, in these types of cases, the comparative negligence of the plaintiff still counts in determining the issue of "sole negligence" of the indemnitee. Accordingly, indemnification would still be owed to the indemnitee, notwithstanding that statute, if the plaintiff was guilty of some comparative negligence.

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A contract may provide for indemnification for the indemnitee's own negligence and concurrent negligence, if this intent can be ascertained from other language in the contract, surrounding circumstances, or the purpose sought to be accomplished by the parties. *See Schoening v KIA Motor Eng'g, Inc.,* No. 194420, 1997 WL 33343876, at *1 (Mich Ct App Oct. 31, 1997*)* citing *Sherman v DeMaria Building Company, Inc,* 203 Mich App 593, 597; 513 NW2d 187 (1994). In *Schoening*, the lease's indemnification provision opens with the following language: "Lessor shall be indemnified, defended and held harmless by Lessee from and against any and all claims, actions, damages, liability and expense, including attorneys' fees, in connection with ... personal injury...." This language clearly demonstrates the intent that the lessor should be held harmless from its own negligence.

The indemnity provision analyzed by the *Schoening* Court also discussed the various circumstances under which the lessee agrees to hold the lessor harmless and to indemnify the lessor. The indemnity provision indicates, amongst other circumstances, that the lessee will indemnify the lessor for "personal injury ... arising from or out of ... any occurrence in, upon or at the ... Common Areas allocated to the Leased Premises, including ... all persons in the Common Areas at its or their invitation or with their consent...." *Schoening v KIA Motor Eng'g, Inc.*, No. 194420, 1997 WL 33343876, at *1 (Mich Ct App Oct. 31, 1997).

In sum, the same rules apply toward the analysis of whether or not indemnification is owed for accidents arising out of common or shared areas. If a tenant agrees to indemnify a landlord for all accidents that occur "in, on, or about the leased premises," but the lease defines the "leased premises" as only that store in the strip mall that the tenant has rented, then the tenant would not owe the landlord indemnification for someone that fell in a parking lot. On the other hand, if the indemnification provision itself, or the definition of "leased premises" in the lease includes common areas, with phrases such as "common areas allocated to the leased premises," then the tenant would owe the landlord indemnification for a parking lot type accident. *Schoening v Kia Motor Engineering*, *Inc,* 1997 Mich App LEXIS 2539 (1997).

Therefore, in order to properly evaluate indemnification claims, you must thoroughly analyze not just the indemnification language, but all of the other language of the lease and/or contract as well.

Claims for express contractual indemnity must generally be filed within six years after accrual of the claim. MCL 600.5807(8); *Insurance Co of North America v Southeastern Elec Co, Inc*, 405 Mich 554, 275 NW2d 255 (1979). This period, however, may be shortened by agreement of the parties. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

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ANALYSIS OF LEASES AND VENDOR CONTRACTS INVOLVING PRO-RATA SHARE OF EXPENSES FOR MAINTENANCE OF COMMON AREAS WHERE THE PLAINTIFF IS INJURED IN A COMMON AREA

Often times a lease will require a tenant to pay its pro-rata share of the maintenance costs of common areas. This is typically based on the percentage of a strip mall that is occupied by the tenant. The question is whether or not such a lease provision creates a duty owed to plaintiffs in those common areas, and whether or not the tenant can be sued on that basis, where common area maintenance was clearly needed but never done. The answer is that the tenant cannot be liable under such circumstances, and would not owe a separate and distinct duty to the plaintiff, using the classic "possession and control" analysis.

This rule even applies where the tenant is the sole tenant of the property. *Shackett v Schwartz*, 77 Mich App 518; 258 NW2d 543 (1977). In that case, the Court held that possession and control of the premises is critical in determining whether or not a landlord, the tenant, or both will be liable for injuries sustained in common areas. In that case, the decision as to which repairs were necessary, and the actual maintenance on the parking lot itself, was done exclusively by the landlord. Moreover, it was the landlord's failure to make the necessary repairs. Accordingly, even where the tenants ultimately pay for such common area repairs, common area accidents are generally the responsibility of the landlord only in the absence of indemnification or other lease provisions. Again, in order to properly evaluate liability for a common area accident, it is necessary to thoroughly analyze the entire lease.

One must also look at all vendor contracts to determine if indemnity is owed for work performed by a particular vendor. In certain circumstances, a vendor may perform work on the property and if an injury arises out of the active negligence of the vendor, a landowner may be able to tender the defense of the claim to the vendor if there is a proper indemnity agreement between the parties.

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Recreational Land Use Act –

Promoting the Recreational Use of Land Since 1953

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I. Introduction

A. What is the Recreational Land Use Act and what is its purpose?

MCL 324.73301(1), commonly known as the Recreational Land Use Act ("RLUA"), sets forth:

1) Except as otherwise provided in this section, a cause of action does not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

The RLUA was first enacted in 1953 and was expanded over time. Its general purpose is to encourage landowners to make land and water areas available to the public for recreational use by limiting landowner liability.

B. What is the practical implication of the RLUA?

Generally, the RLUA provides that a landowner is not liable to a person who is injured on their land if the person did not pay for the use of the land and was using the land for a recreational purpose, unless the injuries were caused by the landowner's gross negligence or willful and wanton misconduct.

II. Interpretation of the RLUA through case law

A. Historically, Michigan courts defined "land" narrowly under the RLUA.

Wymer v Holmes, 429 Mich 66 (1987)

The Michigan Supreme Court held that the RLUA was only intended to apply to large tracts of undeveloped land suitable for outdoor use. Thus, the RLUA did not apply to urban, suburban and subdivided land.

B. The Michigan Supreme Court subsequently overturned *Wymer v Holmes, supra*, and expanded the definition of "land."

Neal v Wilkes, 470 Mich 661 (2004)

The Michigan Supreme Court overturned *Wymer v Holmes, supra*, and held that its decision in *Wymer* was inconsistent with the plain language of the RLUA. The Court clarified that "land" simply means land. The RLUA contains no limitation on the type of land involved and applies to owners of large tracts of land and small tracts of land, undeveloped land and developed land, vacant land and occupied land, land suitable for outdoor recreational use and land unsuitable for outdoor recreational use, urban or suburban land and rural land and subdivided land and unsubdivided land. Therefore, the RLUA applies to any type of land.

In *Spors v State of Michigan and Department of Natural Resources*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 2022 (Docket No. 353216), the Court of Appeals further confirmed that the RLUA also applies to public land.

C. The Supreme Court recently clarified what the phrases "for the purpose of" and "any other outdoor recreational use" in the RLUA mean.

1. Courts look to the injured party's purpose at the time of the injury, not the initial purpose for which the injured party enters the land, when determining if the RLUA applies.

In *Rott v Rott*, ___ Mich ___ (2021) (Docket No. 161051), the Michigan Supreme Court made it clear that the RLUA is triggered when, at the time of the injury, a person is injured while on the land of another "for the purpose of" participating in recreational activities. The initial purpose for which one enters the land is not the proper focus. Accordingly, if the injured person entered the land to attend a birthday party, but then went fishing and was injured, the RLUA could be invoked.

2. The RLUA's catchall, "any other outdoor recreational use," does not include every outdoor activity.

The RLUA is worded to cover fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, *or any other outdoor recreational use or trail use*. In *Rott v Rott, supra*, the Supreme Court held that the RLUA does not apply to *any* outdoor recreational activity and is limited to include only those outdoor recreational uses of the same kind, class, character, or nature as those specifically enumerated in the RLUA.

The Court further held that, to qualify as "any other outdoor recreational use," the activity must be one that traditionally could not be engaged in indoors and one that requires nothing more than access to the land – i.e., permission to be present and not trespassing – without needing to change it.

Example: zip-lining is not considered "other outdoor recreational use" covered by the RLUA because it requires making changes to the land.

While zip-lining is an activity that traditionally could only be performed outdoors, it is not an activity or use that requires only access to the land to enjoy. Zip-lining cannot be performed without modifying or enhancing the land, and it is not possible to use a zip-line without installing human-made zip-lining equipment.

Zip-lining is also distinguishable from hunting and riding motorcycles, as one is perfectly capable of hunting and motorcycling without making any changes to the land, even though many hunters use a tree stand or blind and motorcyclists make tracks. *Rott v Rott, supra*.

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D. Liability under the RLUA

1. When is a landowner liable?

A landowner becomes liable to a person who is on their land without paying the owner for recreational use if the injury is caused by the landowner's gross negligence or willful and wanton misconduct.

2. What is gross negligence or willful and wanton misconduct?

a. **Gross negligence** is defined as conduct that is so reckless as to demonstrate a substantial lack of concern for whether an injury resulted to another person. *Xu v Gay*, 257 Mich App 263, 269 (2003).

b. **Willful and wanton misconduct is defined as:**

i. Conduct that shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Xu v Gay, supra* at FN 3.

ii. **Willful or wanton misconduct exists when the defendant has:**

aa. Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another;

bb. Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and

cc. The failure to use such care and diligence when, to the ordinary mind, it is apparent that the result is likely to prove disastrous to another. *Burnett v City of Adrian*, 414 Mich 448, 463 (1982).

3. Does the RLUA protect landowners when the injured person is a minor?

The Legislature enacted the RLUA to provide immunity for landowners from personal-injury lawsuits by all persons using their property recreationally, regardless of age. Thus, the RLUA even protects landowners when a minor is injured. See, for example, the published Michigan Court of Appeals case of *Estate of Riley Robinson v Robinson*, ___ Mich App ___ (2021) (Docket No. 354534).

4. The RLUA does not create an exception to governmental immunity.

The RLUA does not create an exception to the statutory governmental immunity provided in MCL 691.1401 *et seq*. Therefore, unlike a non-governmental landowner, a government entity may not be sued for personal injuries resulting from the recreational use of its property, even when the injury is caused by gross negligence or willful and wanton conduct, unless MCL 691.1401 *et seq.* authorizes the suit. See *Flickinger v Van Buren County Rd Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued February 2, 2010 (Docket No. 289701).

However, if suit against a government entity is authorized, the RLUA can still be invoked. *Spors v State of Michigan and Department of Natural Resources, supra*.

5. The RLUA bars any type of action, not just actions that sound in premises liability.

The RLUA bars "any cause or cause of action," not only those causes of action that sound in premises liability. *Schoonbeck v Kelly,* unpublished per curiam opinion of the Court of Appeals, issued February 10, 2015 (Docket No. 318771) (applied the RLUA to bar a negligence claim).

E. Recent developments

1. The RLUA trumps the liability imposed by the Motor Vehicle Code.

In the recent published decision of *Estate of Riley Robinson v Robinson, supra*, the Court of Appeals held that the RLUA trumped the owner's liability provision of the Michigan Motor Vehicle Code, MCL 257.401(1), because the RLUA was the more specific statute. In *Estate of Riley Robinson*, a child passenger on an ATV was injured while the ATV was being driven on the Defendant's land. The Defendant owned the ATV but was not driving it. Under the owner's liability provision of the Michigan Motor Vehicle Code, the owner of a motor vehicle – including an ATV or ORV – is liable for the injuries caused by the negligent operation of that vehicle. However, under the RLUA a landowner typically is not liable to a person injured while engaging in the recreational use of an ATV.

The Court of Appeals, citing the longstanding rule that the more specific statute controls, held that the pointed language of the RLUA applied with greater specificity to the facts of the case and that the Defendant was therefore immune from suit. Per the Court, the RLUA applied when someone was injured while on another's land for the *specific* purpose of recreational use of a motor vehicle (in this case an ATV), whereas the owner's liability provision of the Motor Vehicle Code *generally* applied to "all motor vehicles in all places and circumstances."

2. The Michigan Supreme Court held that "beach play" is a recreational activity under the RLUA.

In *Otto v Inn at Watervale, Inc.*, 501 Mich 1044 (2018), the Plaintiff was injured when she stepped on hot coals in a fire pit while engaging in "beach play" ("building sandcastles, throwing stones in the water and splashing around"). In determining that such "beach play" qualified as "outdoor recreational use" under the RLUA, the Supreme Court focused on the word "recreational" and defined that term as "a means of refreshment or diversion[.]" *Id*. at 1045. The Supreme Court rejected the notion that all of the listed activities in the RLUA involve or require a particular heightened degree of physical intensity or inherent risk, and held that "beach play" is covered by the RLUA's catchall phrase since it met the definition of "recreational." *Id*. at 1044-1055.

3. **To avoid application of the RLUA, the injured person must actually pay the landowner for use of the land.**

   In *Spors v State of Michigan and Department of Natural Resources, supra*, the Plaintiff was injured while camping on public land. The Plaintiff's sister, not the Plaintiff, paid the Defendants for the campsite. On appeal, the Court of Appeals held that the Plaintiff's negligence claim was barred by the RLUA because *she* did not pay valuable consideration to the landowner to use the campsite.

4. **A landowner who only has a possessory right in a lake may still take advantage of the RLUA defense.**

   In *Warden-Pittman v Pancotto*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2016 (Docket No. 327005), the Court of Appeals held that a landowner with possessory rights to a lake may invoke the RLUA defense, even though that landowner did not "own" the specific portion of the lake where the Plaintiff had drowned.

5. **The RLUA bars recovery to a plaintiff who hit a fallen tree while sledding.**

   In *Nash v Duncan Park Commission*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket Nos. 331651, 331840, 331842, 331869), an 11-year-old boy was killed when he hit a fallen tree while sledding. The trial court granted the Defendant's Motion for Summary Disposition based on the RLUA, and the Plaintiff's estate appealed. The issue before the Court of Appeals was whether the Defendant landowner was "liable for the death of [the Plaintiff] when [he] struck a naturally fallen tree while sledding down a wooded, natural hill in an undeveloped tract of land." The Court of Appeals, affirming the trial court, held that the case was nothing more than a mere negligence case wherein the Plaintiff was engaged in an outdoor recreational activity without paying. Thus, the RLUA applied.

Recreational Land Use Act –

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Daniel S. Schrode, II, Partner
Secrest Wardle, Troy

III. Conclusion

A. What is the impact on landowners?

If a person enters your land and, without paying for its use, engages in certain outdoor recreational activities and is injured, you, the landowner, are not liable for the injury unless the injury was caused by your gross negligence or willful and wanton misconduct.

B. Examples:

1. If someone crosses your land while cross-country skiing and falls injuring himself, you, the landowner, are not liable under the RLUA (assuming the skier did not pay to use your land and you did not act grossly negligent).

2. If someone is injured while snowmobiling across your parking lot, you, the landowner, are not liable under the RLUA (again, assuming the person did not pay to use the land and that you did not act grossly negligent).

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Landowner Liability for Independent Criminal Acts on the Premises

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I. Introduction

- **What constitutes an independent criminal act?**
    - These are unforeseeable acts committed against invitees on the premises by third parties.

II. The Duties Owed by Landowners to Those Who Come on the Property

- **Duty owed to Invitees** (those entering the premises at the express or implied invitation of the owner):
    - Invitees are either members of the public entering for a purpose for which the land is held open to the public or entering the property for a purpose connected with the business or other interests of the landowner or occupier (e.g., guests in businesses and apartment complexes, visitors to museums or airports, and customers in stores). The general duty, as set forth in *Bertrand v Alan Ford, Inc*, 449 Mich 606 (1984), is to use reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that they either know, or should have known the invitee would not discover. The landowner must inspect, warn and make safe.

- **Duty owed to Licensees** (those entering the property with the landowner's permission – either express or implied – for the licensees' own business or purpose, i.e., are on the premises of another because of some personal unshared benefit and are merely tolerated on the premises by the owner):
    - Licensees are generally social guests. The landowner owes only a duty to warn of known dangerous or concealed conditions and, unlike the duties owed to invitees, there is no duty to inspect and make safe. (See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000).)
        - Note, however, that guests of tenants in an apartment complex are considered invitees, not licensees, as part of the rent paid to the landlord/landowner is consideration for giving to tenants the right to invite others onto the property. (See *Stanley v Town Square Cooperative*, 203 Mich App 143 (1994).)

- **Duty owed to Trespassers** (those entering the property without invitation or privilege):
    - Generally no duty, except in limited situations, such as a known or anticipated trespasser. For purposes of independent criminal acts, no duty elaborated under common law.

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- **Can duty be statutorily modified?**

  - Yes. The Legislature is empowered to modify legal duties by statute. Note, however, that **ordinances** create no duty whatsoever – statutory or otherwise. (See *Johnson v Davis*, 156 Mich App 550, 555 (1986); *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120,135 (1990).)

III. The Evolution of Landowner Duty in the Courts

- **Historical treatment of Landowners:**

  - *Samson v Saginaw Professional Building, Inc*, 393 Mich 393 (1975)

  It is the responsibility of the landlord to ensure that the common areas of a building are kept in good repair and are reasonably safe for the use of tenants and invitees. If the risk presented involves possible death or serious injury to a number of persons, the law requires that some care be exercised, even if the probability that the incident will occur is only slight.

  - *Aisner v Lafayette Towers*, 129 Mich App 642 (1983)

  A landlord owes a duty to its tenants to protect them from unreasonable risks of harm resulting from the foreseeable criminal activities of third parties within the common areas of the premises.

  - *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988)

  A landowner is not liable to invitees for physical harm caused to them by an activity or condition on the property whose danger is obvious and known to the invitee, unless the landowner should have anticipated the harm, despite the fact that it was obvious.

  - *Holland v Liedel*, 197 Mich App 60 (1993)

  A landlord may be held liable for exposing invitees to an unreasonable risk of harm arising out of the tenant's use of the premises, and has a duty to protect tenants from the foreseeable criminal activities of third parties in the common areas of the premises.

Landowner Liability for Independent Criminal Acts on the Premises

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- *Scott v Harper Recreation, Inc*, 444 Mich 441 (1993)

Liability may not be imposed on merchant who, in good faith effort to deter crime, fails to prevent all criminal activity on the premises, and suit may not be maintained on the premise that the safety measures taken are less effective than they could, or should have been.

- *Stanley v Town Square Cooperative*, 203 Mich App 143 (1994)

While guests of tenants in an apartment complex are considered invitees, the landlord does have a duty to protect tenants and their guests from foreseeable criminal activities in common areas on the premises, because the landlord possesses exclusive control over these common areas. If a landlord has created a condition on the land presenting an unusual risk of criminal attack, the landlord has a duty to take reasonable measures to protect its invitees. However, the landlord does not have a duty to make its premises safer than the surrounding community.

- *Mason v Royal Dequindre, Inc*, 455 Mich 391 (1997)

While merchants are not insurers of their invitees' safety, and have no duty to protect the invitees from unreasonable risks that are unforeseeable, they do have a duty to use reasonable care to protect invitees from the foreseeable criminal acts of third parties, and the measures they take must be reasonable.

- *Krass v Tri-County Security*, 233 Mich App 661 (1999)

Although a property owner can control the condition of the premises by correcting physical defects that may result in injury to invitees, merchant, and its agents, who voluntarily take safety precautions against the general societal problem of crime cannot be sued on the premise that the precautions taken were less effective than they could, or should have been.

- *MacDonald v PKT, Inc*, 464 Mich 322 (2001)

A merchant has no obligation generally to anticipate and prevent criminal acts against its invitees, and its only duty to respond is to make reasonable efforts to contact the police. Furthermore, because a merchant can assume that its patrons will obey the law, it is only a present situation on the premises, not any past incidents, that creates a duty to respond. This overrules *Mason v Royal Dequindre, Inc*.

Landowner Liability for Independent Criminal Acts on the Premises

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- *Trestain v Occidental Development*, unpublished Ct App (2002)

The duties owed by landlord/property owner to an invitee assaulted in the parking lot of an apartment building are the same as duties that would be owed by merchants, as set forth in *MacDonald* -- to make reasonable efforts to contact the police.

- *Graves v Warner Bros, et al*, 253 Mich App 486 (2002), *lv den*, 469 Mich 853 (2003)

Duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees, and the duty to respond is limited to contacting the police. The duty does not continue after the merchant/invitee relationship ends.

- *Benton v Briggs*, unpublished Ct App (2004)

The fact that a property owner/landlord had an allegedly defective exterior door on one of its apartments was not a foreseeable cause of the death of a tenant, who was shot through that door while trying to hold it closed against an intruder. Based on the circumstances of the case, to include the fact that the decedent had opened the door and then tried to close it when he saw the intruder had a gun, there was insufficient evidence to show that, had there been a more substantial door with a stronger lock, the tenant would not have been killed.

- *Smith v Smith*, unpublished Ct App (2005)

Property owner/landlord was not negligent in hiring an employee with a criminal history, who subsequently killed a tenant during a personal sexual encounter, because the killing took place outside of the employee's scheduled work hours. Furthermore, the sexual relationship between the employee and the decedent was clearly outside of the course and scope of the employee's job, and the tragic outcome was therefore not a foreseeable consequence of any negligent conduct by the property owner/landlord.

- *Zsigo v Hurley Medical Ctr*, 475 Mich 215 (2006)

The exception to the respondeat superior rule of employer liability found in *1 Restatement Agency, 2d, § 219(2)(d)*, under which an employer would be liable for the torts of an employee acting outside the scope of his or her employment when the employee is "aided in accomplishing" the tort "by the existence of the agency relation," is not adopted in the State of Michigan.

Landowner Liability for Independent Criminal Acts on the Premises

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- *Velez v Dollar Tree Stores, Inc*, unpublished Ct App (2006)

Merchant Dollar Tree owed no duty to a customer assaulted by another customer, except to make reasonable efforts to contact the police – even though Dollar Tree had its own security personnel in the store.

- *Lamar* v *Ramada Franchise Syst, Inc*, unpublished Ct App (2007)

The reasonableness of Defendant's efforts to contact the police should be decided by the jury and not the court. This case is distinguishable because there was a factual dispute as to how long Defendant had known the fight had been going on before it called the police, which related to whether Defendant's response to the fight was "reasonable" or not.

- *Brown v Brown*, 478 Mich 545 (2007)

An employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to potentially place the employer on notice of the employee's violent propensities. *Citing Hersh v Kentfield Builders, Inc*, 385 Mich 410 (1971).

- *Bailey v Schaff*, 293 Mich App 611 (2011)

A landlord owes a duty to both tenants and their guests to take reasonable measures in response to *ongoing* crime taking place on the premises. This generally only means calling the police and landlords and their agents are *not* expected to fight crime themselves. Landlords are under no duty to provide security services for their properties and, if security services have been provided, it does not create a duty to prevent crime.

- *Zarembski-Cole v Bedrock Management Services, L.LC*, unpublished Ct App (2016)

The fact that an assault similar to the assault on Plaintiff had occurred three months earlier, and the fact that both assaults were committed by the same individual, did not create a heightened duty for the landlord to maintain the common areas of its building. The landlord's duty of care to Plaintiff would have been triggered only after having "notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." In this case, the record revealed that no reasonable risk of imminent harm to Plaintiff was apparent *until Plaintiff was actually assaulted*, and the Court therefore held that the landlord did not owe Plaintiff a duty of care until the time of the attack, and then satisfied the limited standard of care to respond by timely notifying the police.

- *Estate of Sharita M. Williams v Consuela Lewis and Advance Security*, unpublished Ct. App. (2017)

The fact that Plaintiff had told Defendant Lewis, a security guard working for Defendant Advance Security at Plaintiff's workplace that Plaintiff's ex-boyfriend, a co-worker, was stalking her and threatening violence did not create a "special relationship," and Defendants had no legal duty to take any action to warn Plaintiff or prevent a crime (Plaintiff's murder by the ex-boyfriend) that the Court believed Defendants could not reasonably foresee.

- *Lennox Emanuel v Days Inn of Port Huron, et al*, unpublished Ct. App. (2018)

Plaintiff filed suit against Days Inn of Port Huron, among others, for negligence and premises liability, stemming from the hotel receptionist declining to call the police when requested to do so by Plaintiff, who was subsequently assaulted by the individual about whom Plaintiff had requested that the hotel contact authorities. Relying on *MacDonald v PKT, Inc*, the Court of Appeals held that the hotel receptionist had no duty to protect Plaintiff from potential future criminal activity. In order for a duty to arise, there must be an imminent threat of harm, which was not present in this case.

- *Grifo & Co., PLLC v Cloud X Partners Holdings, LLC, 485 F Supp 3d 885 (ED Mich 2020)*

In *Grifo*, the United States District Court, Eastern District of Michigan considered a unique case brought by an accounting firm against its cloud hosting company for breach of contract, negligence, and gross negligence, stemming from security breach wherein a cybercriminal embedded a "ransomware" virus in Defendant's internal systems. The virus sealed off and encrypted the data hosted on Defendant's servers and the cybercriminal demanded payment to remove the encryptions and allow Defendant, and its customers including Plaintiff, to regain access. Defendant chose not to pay the ransom and, as a result, most of Plaintiff's data was corrupted and unable to be restored or recovered. The Court generally agreed with the holding in *Williams v Cunningham Drug Stores, Inc.*, discussed previously, noting that, "absent special circumstances," "there is no duty to protect another from the criminal acts of a third party." It held, however, that these special circumstances are narrowly applied to certain categories of relationships including "landlord-tenant, proprietor-patron, employer-employee, residential invitor-invitee, psychiatrist-patient, ... doctor-patient ... common carrier-passenger[,] and innkeeper-guest." The Court refused, however, to extend this duty to relationships between a public accounting firm and cloud hosting company contracted to host firm's data.

Landowner Liability for Independent Criminal Acts on the Premises

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IV. Conclusion

- **What the Landowner can and should do:**

  - Because *MacDonald v PKT, Inc* refers to "landowners" as well as merchants in its holding, as opposed to only merchants, the only duty to respond to an independent criminal act in the common areas of the premises should be to make reasonable efforts to contact the police. Under the most recent case law, the authorities should be contacted without delay if the crime is ongoing in nature.

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The Use of Statutory Immunity in Defending Amusement and Leisure Focused Claims, Such As, Ski Areas, Roller Skating Centers, and Horse Stables

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ABSTRACT

The "Ski Area Safety Act of 1962," often referred to as "SASA," codifies the statutory defenses available in claims for ski area injuries. MCL 408.321 provides immunity from liability for cases brought by skiers and snowboarders hurt in ski areas on hazards enumerated in the Act, or that are (1) inherent in the sport, and (2) obvious and necessary to the sport. MCL 408.342. Ski areas should be careful to comply with all aspects of SASA, including having proper inspections, permits, and appropriate signage. SASA does not apply to snow tubers. Ski areas should draft waivers to increase protections from liability for activities and circumstances not covered by SASA like snow tubing.

The Roller Skating Safety Act of 1988, often referred to as "RSSA" codifies the statutory defense available in potential claims for injuries arising out of roller-skating centers. MCL 445.721, et. seq. provides immunity for the roller skating center for dangers arising out of, but not limited to, injuries that result from collisions with other roller skaters or other spectators, injuries that result from falls, and injuries which involve objects or artificial structures properly within the travel of the roller skater which are not otherwise attributable to the operator's breach of his or her common law duties. Thus, by participating in the sport of roller skating, a participant assumes the risk of injury from obvious and necessary dangers inherent to the sport of roller skating.

The Roller Skating Act does not extend to ice skating rinks, golf courses, swim clubs and tennis clubs. The Legislature has also codified a premises owner's immunity from litigation for bowling centers and horse stables under the Michigan Bowling Center Act, MCL 691.1581, et. seq. and the Equine Liability Act, MCL 691.1661.

INTRODUCTION

Unfortunately in Michigan, as in other states, we have a group of very litigious, clumsy people (a.k.a. customers) who hurt themselves on the property of others, then sue the property owners for injuries which are largely their own fault. To address this problem in the ski area context (as well as in the context of roller skating rinks, bowling centers and horse stables), the Legislature provided property and business owners sweeping statutory immunity from claims brought by patrons. This article addresses the scope and effectiveness of the Ski Area Safety Act in providing immunity from claims that arise in ski areas, as well as the Roller Skating Safety Act in providing immunity from claims that arise in roller skating rinks. This article will also discuss statutory immunities granted to roller skating centers, bowling centers and horse stables.

The Use of Statutory Immunity in Defending Amusement and Leisure Focused Claims, Such As, Ski Areas, Roller Skating Centers, and Horse Stables

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I. THE DEFENSE OF SKI AREA CLAIMS

A. The Definitions and Scope of the Act

Of first importance in understanding and utilizing the Act is identifying its scope. The definition section provides these guideposts for utilizing SASA:

> (d) "Operator" means a person who owns or controls, or who has operational responsibility for, a ski area or ski lift. An operator includes this state or a political subdivision of this state.
>
> (e) "Passenger" means a person, skier or non-skier, who boards, disembarks from, or is transported by a ski lift, regardless of whether the ski lift is being used during the skiing season or non-skiing season, and includes a person waiting for or moving away from the loading or unloading point of a ski lift.
>
> (f) "Ski area" means an area used for skiing and served by one or more ski lifts.
>
> (g) "Skier" means a person wearing skis or utilizing a device that attaches to at least one foot or the lower torso for the purpose of sliding on a slope. The device slides on the snow or other surface of a slope and is capable of being maneuvered and controlled by the person using the device. Skier includes a person not wearing skis or a skiing device while the person is in a ski area for the purpose of skiing.
>
> (h) "Ski lift" means a device for transporting persons uphill on skis, or in cars on tracks, or suspended in the air by the use of cables, chains, belts, or ropes, and are usually supported by trestles or towers with 1 or more spans. Ski lift includes a rope tow.
>
> MCL 408.322.

The Use of Statutory Immunity in Defending Amusement and Leisure Focused Claims, Such As, Ski Areas, Roller Skating Centers, and Horse Stables

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Thus, the above identifies the ski areas and skiers subject to the Act. Note here that a "ski area" must contain a "ski lift" to qualify.[1] Also note that "skier" includes snowboarders under the definition, as a snow board "attaches to at least one foot . . . for the purpose of sliding down a slope." *Id*. Claims arising from skiing and snowboarding are both defensible against ski areas and resorts that have at least one ski lift.[2] The scope of the Act also includes anyone riding on a ski lift, or anyone in the ski area who is participating in skiing or snowboarding whether or not they are currently wearing their respective gear.

Not surprisingly, to earn the protections of the Act, ski areas must comply with certain statutory requirements.[3] The vast majority of the requirements involve obtaining inspections and permits for the ski lifts and lift equipment. MCL 408.329. Permits expire after September 30th of every year. MCL 408.331. A governing body established by the Act, referred to as the Ski Area Safety Board, creates the rules and monitors enforcement of the Act around the state. MCL 408.326. Additionally, ski areas must be current and accurate with signage throughout the ski area as required by MCL 408.326a. This includes placing signs marking the beginning of each run and the difficulty of the hill.

In addition to providing the responsibilities of the ski area, SASA also sets forth the duties of the skiers and snowboarders:

> (1) While in a ski area, each skier shall do all of the following:
>
> (a) Maintain reasonable control of his or her speed and course at all times;
>
> (b) Stay clear of snow-grooming vehicles and equipment in the ski area;
>
> (c) Heed all posted signs and warnings; and
>
> (d) Ski only in ski areas which are marked as open for skiing on the trail board described in section 6a(e).
>
> MCL 408.342 (1).

[1] Please note that the definition of "ski lift" also generally includes tow ropes.
[2] See also *Shukoski v Indianhead Mountain Resort, Inc*, 166 F3d 848 (1999). In *Shukoski*, the Court held that a minor injured while snowboarding was subject to the defenses of the Ski Area Act.
[3] Interestingly, a ski area may obtain a hardship waiver of many of the ski act requirements by appealing to the Ski Area Safety Board. MCL 408.335.

The Use of Statutory Immunity in Defending Amusement and Leisure Focused Claims, Such As, Ski Areas, Roller Skating Centers, and Horse Stables

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B. The Immunity Provision and Application to Hazards Identified in the Statute

The Act places the responsibility for a skier's safety squarely on his/her own shoulders:

> (1) **Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary.** Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.
>
> MCL 408.342 (2).

The Act essentially codifies the classic common law "assumption of the risk defense." Numerous cases have tested the scope of the risk skiers assume for claims against ski areas and fellow skiers.[4] Courts have enforced the Act broadly. Generally speaking, a skier or snowboarder who hurts himself in a ski area while skiing or snowboarding cannot hold the ski area liable for any hazard identified in the Act or similar hazard. *McGoldrick v Holiday Amusements*, *Inc*, 242 Mich App 286, 618 NW2d 98 (2000). The reasonableness of the placement of any hazard causing injury is irrelevant. The reasonableness of the skier's conduct or expectations as to the hazard are irrelevant.

As SASA is statutory, it preempts common law, thereby rendering the Open and Obvious Doctrine inapplicable. *Id.*

In *McGoldrick*, a minor skier struck a tow rope tension pole and died. Plaintiff brought suit claiming that the tension pole was improperly placed in such a way as to cause an unreasonable risk of harm. Plaintiff used national ski area standards to argue that SASA was insufficient to protect the public in this instance. Defendant responded that because skiers expect tow rope tension poles in ski areas, the ski area was immune, regardless of the claimed national standard. The Court of Appeals sided with the ski area, and granted it total immunity from liability.

[4] The provisions of the Ski Area Safety Act are valid in both claims against ski areas and other skiers on the slope. *Rusnak v Walker*, 273 Mich App 299, 729 NW2d 542 (2006).

The Use of Statutory Immunity in Defending Amusement and Leisure Focused Claims, Such As, Ski Areas, Roller Skating Centers, and Horse Stables

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> The clear language of SASA establishes that Plaintiff's injury comes within the immunity provisions. The statute plainly states that a collision with "ski lift towers and their components" comes within the dangers that are necessary and obvious.
>
> Further, SASA explicitly states that the definition of "ski lift" includes "a rope tow." MCL 408.322(h); MSA 18.483(2)(h). Plaintiff does not dispute that the metal pole with which Plaintiff's decedent collided was part of a tensioning structure associated with a rope tow that was designed to take slack out of the rope tow. This pole is logically a component of the rope tow in question, which is included in the definition of "ski lift" under SASA. Because the statutory language is clear, judicial construction is not permitted.
>
> *McGoldrick* at 293-294.

Recently, however, in an unpublished decision, the Michigan Court of Appeals has found liability as to a ski lift operator, due to improper signage. In the case, *Rhoda v O'Dovero, Inc. d/b/a Marquette Mountain,* unpublished Michigan Court of Appeals docket number 321363, March 24, 2016, a snowboarder's conservator filed a negligence action against a ski area operator alleging that the operator failed to properly close a defective snowboard rail and to warn of its danger. Summary disposition was granted by the Marquette Circuit Court, but the Michigan Court of Appeals found summary disposition inappropriate. More specifically, the Court of Appeals noted that SASA applies to snowboarding runs with or without rails. The ski area operator's placement of two crossed red bamboo poles at the top of the defective unwelded snowboard rail that had a gap did not comply with the ski area safety board rule governing marking of closed runs pursuant to SASA. SASA requires a sign containing a regulatory symbol and the word "closed" in three-inch or larger letters, plus the placement of a rope, mesh tape or fence across the top or entrance to the closed run.

Further, the Michigan Court of Appeals in *Rhoda* noted that the assumption of risk provision of SASA did not apply to the snowboarder from recovering from the ski area operator for injuries he received when he used the defective unwelded combination rail that had a gap and that did not have proper closure markings pursuant to SASA requirements. The reasoning was that the gap was not a necessary danger, did not inhere in the sport of snowboarding and it substantially altered the risks that the snowboarder faced when he engaged in snowboarding.

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Despite *Rhoda*, which is unpublished and therefore does not have binding precedent over Michigan courts, overall, Michigan courts have generally, in published decisions, found SASA protects ski areas and ski area operators. *Rhoda* is a reminder, however, that proper signage under SASA may protect a ski area and ski area operator from liability for any injuries that occur as a result of alleged negligence.

C. Applicability of Immunity to Hazards not identified in the Statute, or: *The Anderson Test*

For analyzing the applicability of the Act to hazards not specifically named in the non-exhaustive list above, courts utilize the *Anderson Test*. In *Anderson v Pine Knob Ski Resort*, *Inc*, 469 Mich 20; 664 NW2d 756 (2003), the Michigan Supreme Court set forth a two element test to determine the Act's applicability to any alleged hazard. In *Anderson,* a downhill skier had a collision with a "timing shack."[5] The skier sued the ski area for his injuries, claiming a "timing shack" did not fall within the purview of the statute. The Court noted that "timing shack" was not identified in the non-exhaustive list of potential hazards and concluded courts should use a test based on the language of the statute to make a determination as to the applicability of the assumption of the risk statutory defense.

> The natural hazards to which the act refers without limit are "variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris ...." MCL 408.342(2). The unnatural hazards include "collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment." MCL 408.342(2). For both types of hazards, the examples are clearly only examples because the Legislature specifically has indicated that the covered dangers are not limited to those expressly described. The examples are employed to give the reader guidance about what other risks are held to be assumed by the skier. We undertake this analysis by determining what is common to the examples. This exercise is what legal scholars describe as discerning meaning by use of the doctrine of ejusdem generis, **and leads us to conclude that the commonality in the hazards is that they all inhere in the sport of skiing and, as long as they are obvious and necessary to the sport, there is immunity from suit**.
>
> *Id.* at 25.

[5] A timing shack is where people stand to observe and time ski runs and races.

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The Court created two elements:

1. *Is the hazard inherent in the sport of skiing?*
2. *Is the hazard obvious and necessary to the sport?*

Meeting both of these elements provides complete immunity under the statute. In *Anderson*, the timing shack met both. Timing shacks are used in the timing and judging of ski runs and thus are inherent in the sport. Also, timing shacks are obvious and necessary to the sport. The Court afforded complete immunity under the Act for the collision with the timing shack. *Id.* at 26. Trial courts widely use *Anderson* today. These elements apply equally to those potential hazards that arise from snowboarding. *Barrett v Mount Brighton*, *Inc*, 474 Mich 1087; 712 NW2d 154 (2006).[6]

D. Application of Immunity to Chairlift Injuries

SASA also grants broad immunity to ski areas in claims involving chair lift injuries, even in the context of active negligence claims arising from the conduct of operators.[7] *Kent v Alpine Valley Ski Area*, *Inc,* 240 Mich App 731; 613 NW2d 383 (2000). In *Kent,* a grandfather attempted to grab his grandson who had fallen under a chairlift. The operator did not stop the lift. The lift pinned and injured the grandfather's arm. The grandfather brought a claim against the ski area for negligence. However, the courts again extended immunity to the ski area.

> Ultimately, other than generalized opinions that the stop button should be utilized whenever there are children involved and that any lift carrying children should be equipped with a slow button, as well as a stop button (even though plaintiff's expert conceded that the lack of a slow button did not violate B77), **plaintiff's experts pointed to no factual evidence to establish statutory violations by defendants that could affect the otherwise unrestricted immunity for operators when a skier collides with a chairlift**.
>
> *Id.* at 746.

[6] In *Barrett*, a downhill skier struck a rail placed for snowboarding. The skier sued arguing that the rail placement for snowboarders avoided immunity under the Act. The Court disagreed and granted the area immunity. *Barrett*, 474 Mich at 1087.

[7] This assumes the Ski Area had obtained the appropriate inspections and permits as to the chairlift at issue.

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Here, the Court held that, to avoid immunity under the statute, a plaintiff must prove a violation of SASA itself. *Id.* A plaintiff's attempts to use experts to prove violation of national or industry standards are not enough to avoid immunity. Only proof of a direct SASA violation can avoid immunity.

The Court of Appeals also upheld broad immunity as to chair lift injuries in *McCormick v Go Forward Operating Ltd. Partnership*, 235 Mich App 551; 599 NW2d 513 (1999). In *McCormick*, Plaintiff attempted to exit the chairlift and tripped over a fellow skier that had fallen before her while exiting the chairlift. Plaintiff brought a claim against the ski area claiming that the area was improperly marked, among other claims. The Court of Appeals again extended immunity to the ski area under SASA. The Court held that the risk of exiting a ski lift and encountering another skier is a risk inherent in skiing and directly envisioned in the protections of the Act.

> The language of the statute itself establishes that plaintiff's injury comes within the immunity provisions. The statute says that collision with another skier comes within the dangers that are necessary and obvious. It does not exclude the ski lift exit area.
>
> Therefore, because plaintiff's injury arose from the collision with another skier, or the attempt to avoid such a collision, it comes within the immunity provision of the statute. That is, by statutory definition, any collision with another skier constitutes a necessary and obvious danger for which defendant is immune. In short, the location of the collision or fallen skier is irrelevant.
>
> *Id.* at 554.

Plaintiffs attempted to circumvent SASA immunity in *McCormick* and other cases by arguing a roller skating case, *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997), stands for the proposition that violation of industry standards can avoid statutory immunity. Courts have consistently disagreed, as did the *McCormick* Court.

> Plaintiffs' reliance on *Dale* is misplaced. In *Dale*, the Court had to consider the provisions of the Roller Skating Safety Act, MCL 445.1721 *et seq.*; MSA 18.485(1) *et seq*., and, specifically, the statutory requirement that roller skating center operators comply with safety standards published by the rink operators association, MCL 445.1723(b); MSA 18.485(3)(b), and that rink operators are liable for civil damages resulting from a violation of the act, MCL 445.1726; MSA 18.485(6).

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> Indeed, the liability of the defendant in *Dale* was specifically premised on those statutory provisions and the conclusion that those provisions provided an exception to the general immunity afforded rink operators. *Id*. At 66-67.
>
> *McCormick*, 235 Mich App at 555.

E. The Trouble with Tubes

Snow tubing has vastly grown in popularity in recent years. Most ski areas now provide some form of tubing on their hills. Unfortunately, SASA has not kept up and tubing is outside of the SASA definitions. SASA currently provides no immunity from claims arising from snow tubing. Ski areas should note that national safety standards for tubing exist and should be followed.[8] However, until the Legislature amends SASA or case law includes tubes under the Act, ski areas must defend negligence claims without immunity. In addition to industry standards, tubing cases must be addressed on waivers (see below) and signage.

F. Collisions with Other Skiers

By enacting the Ski Area Safety Act (SASA), the Legislature has provided a system whereby skiers assume the risk of injury from dangers inherent in skiing that are obvious and necessary, but which also provides liability against a skier for any injuries that were caused by a violation of the duties imposed on skiers under the SASA. In the case of *Rusnak v Walker*, 273 Mich App 299 (2006), the Michigan Court of Appeals reversed and remanded summary disposition in favor of an injured skier. The Court of Appeals found that under the assumption-of-risk provision of Ski Area Safety Act (SASA), a "downhill" skier, who was injured in collision with an "uphill" skier, assumed the risk of being injured by a collision with another skier, but because the "downhill" skier showed that the "uphill" skier might have violated his duties under the SASA and that these violations might have caused the "downhill" skier's injuries, the "uphill" skier might still be liable to the "downhill" skier for that portion of the loss or damage resulting from that violation.

[8] Safety mechanisms generally include but are not limited to inflatable barricades, measures to keep tubers in an individual lane, and placement of something that will slow them down at the end of the run.

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In *Rusnak,* the Michigan Court of Appeals found the *Anderson* test inapplicable. Specifically, the Court stated that the Legislature has specifically determined that collisions with other skiers are an "obvious and necessary" danger that inheres in the sport, MCL 408.342(2). Thus, there is no need to engage in the analysis employed by the *Anderson* Court. Stated differently, the two-part *Anderson* test is to be used for determining whether a natural or unnatural object or condition that is *not* listed within the statute is an obvious and necessary danger that inheres in the sport of skiing, and therefore a risk assumed by the skier.

II. THE DEFENSE OF ROLLER SKATING RINK CLAIMS

A. Definitions and Scope of the Roller Skating Safety Act

A person who engages in roller-skating in an indoor skating facility, whether by conventional "roller skates" or with "in-line roller skates," is subject to the provisions of the Act and therefore assumes the dangers of roller-skating for risks that are open and obvious. *Weisman v U.S. Blades, Inc*., 217 Mich App 565; 552 NW2d 484 (1996).

Specifically, MCL 445.1722 provides that as used in this Act:

(a) "Emergency personnel" means police, fire, or other appropriate emergency medical personnel.

(b) "Operator" means a person or entity who owns or controls or who has operational responsibility for a roller skating center.

(c) "Roller skater" means a person wearing roller skates while that person is in a roller skating center for the purpose of roller skating.

(d) "Roller skating center" means a building, facility, or premises which provides an area specifically designed to be used for roller skating by the public.

(e) "Spectator" means a person who is present in a roller skating center only for the purpose of observing skating activity, whether recreational or competitive.

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B. Requirements of the "RSSA"

MCL 445.1723 provides that each roller skating center must do *all* of the following:

(a) Post the duties of roller skaters and spectators as prescribed in the RSSA and the duties, obligations, and liabilities of operators as prescribed in the RSSA in conspicuous places;

(b) Comply with the safety standards specified in the roller skating rink safety standards published by the roller skating rink operators association;

(c) Maintain roller skating equipment and roller skating surfaces according to the safety standards published by the roller skating rink operators association; and

(d) Maintain the stability and legibility of all required signs, symbols, and posted notices.

On the other hand, MCL 445.1724 provides that each roller skater, while in a roller skating area, must do *all* of the following:

(a) Maintain reasonable control of his or her speed and course at all times;

(b) Read all posted signs and warnings;

(c) Maintain a proper lookout to avoid other roller skaters and objects;

(d) Accept the responsibility for knowing the range of his or her own ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability; and

(e) Refrain from acting in a manner which may cause injury to others.

C. Immunity Provision of RSSA

An integral feature of the RSSA is the balancing of risks assumed by the skater with the responsibilities of the operator. *Dale, supra* at 66. MCL 445.1725 expressly states that:

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> **Each person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries that result from collisions with other roller skaters or other spectators, injuries that result from falls, and injuries which involve objects or artificial structures properly within the intended travel of the roller skater which are not otherwise attributable to the operator's breach of his or her common law duties.**

Thus, by participating in the sport of roller skating, a participant assumes the risk of injury from obvious and necessary dangers inherent to the sport of roller skating. *Skene, supra;* see also *Weisman v U.S. Blades, Inc*. 217 Mich App 565; 552 NW2d 484 (1996) (Near collision with another skater and collision with wall as a result were obvious and necessary dangers of roller skating in roller skating facility). The assumption of risk clause therefore renders the reasonableness of roller skaters' or roller skating operators' behavior irrelevant. *Skene, supra.*

However, the skater does not assume the risk of an operator violating the prescribed duties under the Act. *Dale, supra.*

In order to preserve the legislative purpose underlying RSSA, the assumption of risk provision of §5 must be read in conjunction with the duties of operators set forth in §3 and the creation of civil liability for operators as set forth in §6. *Id.* at 67. If a violation of §3 of RSSA is alleged and proved, then pursuant to §6 the operator "who violates this act shall be liable in a civil action for damages for that portion of the loss or damage resulting from the violation." MCL 445.1726. Thus, the *only* enumerated risk that is limited by a roller-skating rink operator's breach of a common-law duty is for injuries "which involve objects or artificial structures properly within the intended travel of the roller skater." *Dale, supra,* at 57.

In *Dale, supra*, a super panel of the Court of Appeals examined a roller-skating collision where the Plaintiff alleged the roller rink rented him skates that were not equipped with toe-stopper brakes. Observing that *Skene* is "overly broad and problematic when applied to more complicated circumstances" such as where "the plaintiff also alleges that defendant supplied defective skating equipment," it was held that a question of fact for jury resolution was presented. The Court noted that §3 of the RSSA requires rink operators "to maintain roller skating equipment according to the safety standards published by the Roller Skating Rink Operators Association," and those standards require that rental skates be equipped with toe stoppers.

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D. Collisions with Other Skaters

In an unpublished case, *Kline v Skatemore, Inc.* the Michigan Court of Appeals addressed the Roller Skating Safety Act.

In *Kline*, on December 22, 2009, Plaintiff's complaint was dismissed under the Roller Skating Safety Act because she was not truly engaged in the activity of mere roller skating as contemplated by the act at the time of her injury.

In review of Plaintiff's complaint and her appellate brief the Michigan Court of Appeals found that Plaintiff makes no claim whatsoever that Defendants violated any of the duties of a roller skating center operator outlined in § 3 of the RSSA. In regard to § 5, in part, Plaintiff has not made any claim that the injuries involved objects or artificial structures properly within Plaintiff's intended travel; therefore, Defendants' possible breach of any common-law duty would appear irrelevant. Under the RSSA, the only arguable avenue for Plaintiff to proceed with the litigation arises from the first sentence in § 5, which provides that "[e]ach person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary." The next sentence in § 5 dictates that those dangers include "injuries that result from collisions with other roller skaters[.]" Under the plain language of § 5, an inherent danger of roller skating, for which a roller skater assumes the risk, necessarily includes a collision with another skater.

Here, Plaintiff's injuries were the result of a collision with another roller skater. The question becomes whether the fact that roller derby lessons were being given somehow alter the application of § 5. As opposed to the danger of collisions that inhere in the course of roller skating under normal conditions, which typically result from an accident or even possibly an intentional act not directed by the rink operator, the roller derby lessons, sponsored and taught by Defendants, gave rise to the potential for purposeful or intentional collisions between skaters as directed by Defendants. The Court of Appeals found the Legislature certainly did not intend to protect a rink operator from liability in a scenario in which, by way of example, the operator skated into a rink and intentionally and unexpectedly collided into another skater at full force intending to cause injury, thereby committing a criminal act, despite the fact that it could be viewed as simply a collision with another skater encompassed by § 5. Such an act would not be a risk assumed by the harmed skater when choosing to roller skate. The Court of Appeals found they do not have any evidence of this kind of egregious conduct in this case.

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Because the Court in *Dale II* restricted the § 5 clause referring to breach of common law duties to injuries involving objects or artificial structures and not collisions, roller skating collisions caused by negligence, which cause of action requires the existence and breach of a duty, *Case v Consumers Power Co.,* 463 Mich 1, 6; 615 NW2d 17 (2000), would not appear to give rise to liability under the RSSA. This is unless of course a separate duty arose under § 3 of the RSSA, which has not been argued or alleged here. Accordingly, the Michigan Court of Appeals affirmed summary dismissal of the defendant.

E. MCL 445.1721 *et seq.* Does Not Extend to Ice Skating Rinks

"The Legislature has yet to modify the common law of torts regarding recreational activities, except in two narrow areas not at issue here. (RSSA & SASA). Thus, the development of this area of the law, for now, is up to the courts." *Placek v Sterling Heights,* 405 Mich 638; 275 NW2d 511 (1979). *Ritchie-Gamester v City of Berkley,* 461 Mich 73; 597 NW2d 517 (1999). Our Supreme Court has concluded that, at least in the context of an "open skate," the risks of skating include the reality that people "of various ages and abilities" will pile onto the ice in proximity to each other. *Id.* at 89.

In *James v Good Sports Ltd.,* No. 216023, 2001 WL 740469, at *1 (Mich Ct App Feb. 16, 2001), the trial court properly concluded that although the risk of being hit by another skater during a public skating session was open and obvious, issues of fact existed regarding whether there were other aspects of the skating session and ice rink that nonetheless made the risk of harm unreasonable. See also *Singerman v Municipal Service Bureau, Inc*., 455 Mich 135; 565 NW2d 383 (1997) (The danger was so obvious and apparent that the coach could have been expected to discover the danger himself).

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III. STATUTORY IMMUNITY IN OTHER RECREATIONAL CENTERS

It is important to note that other businesses which do not enjoy such a statutory immunity include: ice skating rinks, golf courses[9], swim clubs[10] and tennis clubs[11]. Conversely, the Legislature has codified a premises owner's immunity from tort litigation for bowling centers and horse stables.

A. Bowling Centers

Michigan's Bowling Center Act, MCL 691.1581 *et seq*., requires the operators of all bowling centers to post a conspicuous notice near each entrance and exit of the bowling center that cautions against wearing bowling shoes outside because they are specialized footwear that, if worn outside, may be affected by substances or materials that may cause the wearer to slip, trip, stumble, or fall inside the bowling center. MCL 691.1583. Importantly, MCL 691.1584 regarding a bowling center's immunity from tort litigation, expressly provides that:

> (1) If an operator posts a notice as required by section 3, the *operator is not civilly liable* for injuries to a bowler resulting from a slip, trip, stumble, or fall inside the bowling center substantially caused by a substance or material on the bowler's bowling shoes that was acquired outside the bowling center before the bowler entered or reentered the bowling center.
>
> (2) The protection from liability under this section does not apply if the injury results from acts or omissions amounting to willful or wanton misconduct or if the operator fails to maintain the premises in a reasonably safe condition and the condition substantially causes the injury to the bowler.

The Act applies only to a cause of action that accrues on or after January 1, 2012. MCLA 691.1585.

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[9] **Golf Courses**. Golfer was injured by a falling tree limb during a windstorm. The jury found the golf course negligent in failing to trim the trees, and the verdict was affirmed on appeal. *Gregoricka v Lvtyniak*, 123 Mich App 196; 333 NW2d 221 (1983).

[10] **Swim Clubs**. Failure of a swimming facility operator to provide a lifeguard or lifesaving equipment may be evidence of negligence. *Braden v Workman*, 146 Mich App 287; 380 NW2d 84 (1985). Where a drowning occurred in a school swimming pool, liability might be premised upon the technique that the rescuers utilized in attempting to resuscitate the child. *Webber v Yeo*, 147 Mich App 453; 383 NW2d 230; 31Ed Law Rep 220 (1985).

[11] **Tennis Clubs**. The owner of a sports facility who rents space to adults to play court games has no duty to supervise the conduct of the games. *Dillon v Keatington Racquetball Club*, 151 Mich App 138; 390 NW2d 212 1986).

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B. Equine Activities

The Equine Activity Liability Act, MCL 691.1661, provides that the operator of an equine activity is not liable for the injury or death of a participant in an equine activity. The Act requires the operator display a warning sign at the entrance of the stable.

The Act provides that participants in the sport, including visitors to veterinary facilities, accept the "inherent risk of an equine activity" and are barred from suing for injury that occurs from "an equine's propensity to behave in ways that may result in injury" and "the unpredictability of an equine's reaction to things such as sounds, sudden movement, and people, other animals, or unfamiliar objects." *Cole v Ladbroke Racing Michigan, Inc*., 241 Mich App 1; 614 NW2d 169 (2000). Liability remains for the owner's negligent act that results in personal injury. *Id.* Examples include: providing faulty tack, failure to assess the ability of a rider before renting a horse, or injury caused by a latent dangerous condition of the riding area. However, by written agreement, liability can also be waived for these situations.

In *Beattie v Mickalich,* 486 Mich 1060; 784 NW2d 38 (2010), the Supreme Court held that the EALA does not bar recovery for negligent acts of horse owners. See also *Amburgey v Sauder*, 238 Mich App 228; 605 NW2d 84 (1999) ("The Legislature broadly defined engagement in an equine activity to include visiting, touring, or utilizing an equine facility").

IV. THE USE OF WAIVERS

In Michigan, liability waivers are enforceable like any contract. *Paterek v 6600 Ltd*, 186 Mich App 445, 448-449; 465 NW2d 342 (1990). In *Paterek,* Plaintiff sustained an injury while playing softball on Defendant's field. Before playing, Plaintiff signed a liability waiver. After the injury, Plaintiff tried to void the waiver by claiming that he did not know what he was signing and was fraudulently induced to entering the agreement. Despite Plaintiff's arguments, the Court enforced the waiver under standard Michigan contract law.

> Finally, we find no merit in plaintiffs' argument that the release was invalid for lack of consideration. Defendant's agreement to allow Daniel Paterek to play softball on its field was adequate consideration because it was (1) a legal detriment (2) which induced plaintiff's promise to release defendant from liability, and (3) plaintiff's promise to release defendant from liability induced defendant to suffer the detriment.
> *Id.* at 451.

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Under *Paterek*, ski areas can draft contractual waivers to both reinforce the protections of SASA as well as guard uncovered areas such as snow tubing. The courts will consider the above factors to confirm the validity of the contract. Thus, ski areas can effectively shield themselves from tubing liability with carefully drafted language.

Minority, however, presents a problem for waivers in Michigan. *Woodman v Kera*, *LLC*, 280 Mich App 125; 760 NW2d 641 (2008). In *Woodman*, a minor went to a party at a business that had a large inflatable for children to play on. Before playing, the parent signed a liability waiver on behalf of the child. The Court held the waiver unenforceable, ruling that a/the parent could not waive the child's right to recover for his injuries.

> Currently, our Legislature has clearly identified certain, very specific situations in which parents are allowed to compromise the rights of their minor child. However, nothing has been discovered in the current statutory scheme that would permit a parent to release the property rights of his or her child in circumstances similar to those in this litigation. Specifically, this Court is aware of no legislative enactments upholding exculpatory agreements, executed by parents on behalf of their minor children before injury, that waive liability for injuries incurred in either commercial or nonprofit settings. Rather, given the preclusion of parental authority to compromise post injury claims initiated on behalf of children without significant court oversight or the institution of legislatively created safeguards, it is counterintuitive to believe it acceptable or justifiable that inchoate rights or preinjury claims could be waived by parents, particularly given the absence of sufficient factual information or informed negotiation in such preinjury circumstances. Given the case law and the context of legislative enactments and safeguards, it is apparent that Michigan is particularly cautious when it comes to permitting the compromise of any child's rights and strictly adheres to the common-law preclusion of parental authority in these situations, recognizing only very limited and specific statutory exceptions to this general rule.
>
> *Id.* at 148-149.

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Since *Woodman*, the Legislature attempted to address the issue of minor waivers in MCL 700.5109, with mixed results. The new act, which took effect on June 21, 2011, states:

(1) Before a minor participates in recreational activity, a parent or guardian of the minor may release a person from liability for economic or noneconomic damages for personal injury sustained by the minor during the specific recreational activity for which the release is provided.

(2) This section only applies to a recreational activity sponsored or organized by a nongovernmental, nonprofit organization.

(3) Either or both of the following may be released from liability under this section:

(a) The sponsor or organizer of the recreational activity.

(b) An individual who is paid or volunteers to coach or assists in conducting the recreational activity.

(4) A release under this section only releases the sponsor, organizer, owner, lessee, or other person released from liability for injury or death that results solely from the *inherent risks* of the recreational activity. *A release under this section does not limit the liability of the sponsor, organizer, owner, lessee, or other person released for the sponsor's, organizer's, owner's, lessee's, or other person's own negligence or the negligence of its employees or agents that causes or contributes to the injury or death.*

(5) A release under this section shall be in writing.

(6) This section does not restrict the limitation of liability afforded by section 73301 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.73301, or 1964 PA 170, MCL 691.1401 to 691.1419.

(7) As used in this section, "recreational activity" means active participation in an athletic or recreational sport.

This act is ordered to take immediate effect.

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The above allows for waivers of nonprofit organizations of the inherent risks for recreational activities, but does not waive claims of negligence or "active" negligence which are specifically exempted. Thus, waivers can be utilized, however their effective scope will be limited in application to inherent risks rather than negligence claims. Ski areas, roller skating rinks, bowling centers, and all other recreational centers should bear this in mind particularly when addressing minors which arguably can avoid the above-mentioned statutes and liability waivers in claims for negligence.

V. CONCLUSION

Effective lawyers can raise immunity under the above-mentioned statutes to successfully defend a vast majority of claims. Further, these statutes combined with appropriately drafted waivers can shield premises owners from liability in the vast majority of injury situations. However, owners of ski areas, roller skating rinks, bowling centers and horse stables should handle cases involving minors carefully, as current waivers may be inapplicable.

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Premises Liability vs Ordinary Negligence
(Condition vs Conduct)

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In the world of premises liability, a plaintiff will sometimes seek to plead their premises liability cause of action as one of general negligence instead. Typically, the primary motivation for this is to avoid the open and obvious defense; a defense that has been the subject of many court opinions resulting in the dismissal of premises cases.

The difference between the two causes of action comes down to whether a defendant's potential liability arises from the defendant's CONDUCT vs a CONDITION on the land controlled by the defendant.

Consider a retail store employee who mops a tile floor but adds too much cleaning agent to the water leaving a slippery, soapy residue on the floor after it dries. A customer who then slips on the floor sues the store. Was the cause of the plaintiff's fall the fact that defendant put too much soap in the water; in other words, the defendant's negligence? Or, was the cause of the plaintiff's fall a condition of the premises; that the floor was slippery, for whatever reason. In this case, if the plaintiff wished to avoid summary disposition based on the open and obvious defense, they may wish to plead general negligence as opposed to premises liability.

The seminal case in this area is *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005). In *Laier*, the Defendant borrowed the Plaintiff's tractor, equipped with a front-end loader, and broke a hydraulic hose while using the front-end loader on his farm. The following day, both the Plaintiff and the Defendant went to Defendant's farm to fix the front-end loader. While the two were working on the tractor, the tractor's bucket pinned Plaintiff's decedent between the bucket and the tractor causing his death. The Plaintiff's decedent sued the Defendant alleging a single count of general negligence. The trial court determined that the claim sounded in premises liability and granted summary disposition based on the open and obvious defense.

On appeal, the *Laier* Court ruled that the Plaintiff had claims sounding in both ordinary negligence (the Defendant's conduct while working on the tractor with the Plaintiff) and premises liability (the Defendant's duty to protect the Plaintiff from unreasonable risks on the land and to warn of those risks); the open and obvious defense did not apply to the ordinary negligence claim. The Court also held that, just because a plaintiff brings a premises liability action, the plaintiff is not precluded from making a separate "claim grounded on an independent theory of liability based on the defendant's conduct…" *Id.* at 493.

In *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685; 822 NW2d 254 (2012), the Court of Appeals dealt with a case in which the Plaintiff slipped and fell on ice outside of Defendant's building. The Plaintiff pled *both* a premises liability cause of action as well as an ordinary negligence cause of action. At the trial court level, the premises liability claim was dismissed based on the open and obvious defense but the separate ordinary negligence claim survived.

Premises Liability vs Ordinary Negligence
(Condition vs Conduct)

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On appeal, the *Buhalis* Court ruled that, "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.* at 258. Basically, the Court established the rule that, even when a plaintiff asserts that the defendant caused the dangerous condition by some negligent act or omission, the cause of action is not transformed from one of premises liability into one for ordinary negligence. The *Buhalis* Court ultimately ruled that Plaintiff's entire case should have been dismissed because it sounded in premises liability and, therefore, did not survive the open and obvious defense.

In 2008, the Michigan Supreme Court issued a one-paragraph opinion in *Kwiatowski v Coachlight Estates of Blissfield Inc., et al.*, 480 Mich 1062; 743 NW2d 917 (2008). This single sentence decision adopted the dissenting opinion from the Court of Appeals. It is one of two relatively recent one-paragraph opinions offering guidance on this issue from the state's highest court.

In *Kwiatowski*, the Plaintiff lived in a mobile home located in a park controlled by the Defendant. As the Plaintiff approached the Defendant's mobile home, the Defendant's agent opened a door, striking the Plaintiff, and causing him to fall and injure himself. The Plaintiff sued Defendant alleging a premises liability theory of liability and the Defendant moved for summary disposition based on the open and obvious defense. The trial court granted Defendant's motion but also gave Plaintiff a second chance - the Plaintiff was allowed to file an amended complaint making an ordinary negligence claim against the Defendant. When the Defendant again sought summary disposition, the trial court denied the motion.

While the Court of Appeals reversed the trial court, finding that Plaintiff's alleged injury was caused by a condition of the land and not Defendant's conduct, and therefore sounded in premises liability, the dissent found that Plaintiff's claim was based on Defendant's negligence in opening the door as opposed to Defendant's failure to protect Plaintiff from dangerous conditions on the land. The Supreme Court reversed the Court of Appeals adopting this dissenting opinion.

In *Campau v Pioneer Res. Co., LLC*, 498 Mich 928; 871 NW2d 210 (2015), the Plaintiff was watching lawn mower races when one of the lawn mowers lost control and came through the fence near where the Plaintiff was watching. As she backed up to make sure she avoided the mower, she tripped over a railroad tie and broke her wrist. She brought counts for premises liability and for ordinary negligence against the Defendant. The trial court determined that the Plaintiff's claims sounded in premises liability only and dismissed the complaint based on the open and obvious doctrine.

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(Condition vs Conduct)

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The Court of Appeals reversed the trial court holding, in a 2:1 decision, that the open and obvious defense may apply to the Plaintiff's premises liability claim. However, the Plaintiff also had a valid ordinary negligence claim to which the open and obvious defense did not apply; that the Defendant breached its duty to safely design the track and operate the races. In another one-paragraph opinion, the Supreme Court overruled the Court of Appeals and reinstated the trial court in holding that the railroad tie was a condition of the land and was open and obvious.

On October 14, 2015, the Supreme Court heard oral arguments in *Black v Shafer,* 499 Mich 950; 879 NW2d 642 (2016). The case involves a Plaintiff who was non-fatally shot on the Defendant's property by a gun owned by the Defendant. The Court of Appeals found that the case was one sounding in ordinary negligence and not premises liability. However, in granting leave to appeal, the Supreme Court instructed the parties to address whether the claim sounded in ordinary negligence or premises liability.

The opinions from *Laier* and *Kwiatowski* show us that, depending on the facts, it is not always clear whether a cause of action arises from a condition of the land or from a defendant's conduct. A plaintiff is likely to see a claim for general liability survive summary disposition when the defendant's actions are unrelated to the defendant's status as a controller of the premises or when the defendant's physical act directly caused the plaintiff's injury.

There are a number of unpublished opinions that may provide helpful guidance when dealing with similar facts.

When Courts Held That the Plaintiff's Case Arose Out of Premises Liability

In the following unpublished opinions, the Court of Appeals determined that the plaintiff's cause of action sounded in PREMISES LIABILITY (CONDITION) and not ordinary negligence:

- Where Plaintiff fell over a construction barricade on a city sidewalk. Plaintiff asserted claims of negligence and nuisance against Consumers Energy Company, which had used the barricade in a project wherein Consumers installed gas service lines along the edge of certain sidewalks in the City of Marshall. *Ford v City of Marshall*, unpublished per curiam decision of the Michigan Court of Appeals, issued January 13, 2022 (Docket No. 355541).

- Where Plaintiff fell over a purportedly faulty sidewalk - *Rutledge by Next Friend Rutledge v Suffolk Court Apartments*, No. 345752, 2019 WL 6340949, at *1 (Mich Ct App Nov. 26, 2019).

- Where Plaintiff injured his head due to a descending garage door and the presence of smoke that reduced visibility. *Grias v EQ Detroit, Inc*., No. 344699, 2019 WL 6888648, at *1 (Mich Ct App Dec. 17, 2019).

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- Where Plaintiff sought damages flowing from carbon monoxide exposure as a result of an alleged improper flue design in the laundry room of a leased premises. *Greiner v R & P Investments, Inc.,* No. 340619, 2019 WL 1780972 (Mich Ct App Apr. 23, 2019).

- Where Plaintiff fell out of a wheelchair after he was instructed by a property owner to use a specific path of travel that included a 3 ½" drop step. *Wilson v BRK, Inc*., 328 Mich App 505; 938 NW2d 761 (2019).

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- Where Plaintiff allegedly fell on a step in a dark theater while attempting to find her seat - *Davis v Olympia Entm't, Inc*., Mich Ct App Docket No. 332807 (October 10, 2017).

- Where Plaintiff fell while walking up an icy driveway to serve as a caregiver for the resident - *Lymon v Freeland*, Docket No. 323926, March 29, 2016.

- Where Plaintiff was injured when the Defendant's portable hot-oil fryer tipped over when wind blew in the walls of the tent that the fryer was under spilling oil - *Shammout v Jaycee*, Docket No. 323532, March 29, 2016.

- Where Plaintiff was injured when, while riding a bike, he was struck by a vehicle exiting the Defendant's parking lot when the driveway was obstructed by two overgrown trees - *Holcomb v Gwt, Inc*, Docket No. 325410, March 1, 2016.

- Where Plaintiff alleged that Defendant was negligent in inviting festival attendees onto defective and dangerous land where they encountered an uneven sidewalk - *Eaton v Frontier Communs. Ilec Holdings*, Docket No. 324499, February 9, 2016.

- Where Plaintiff tripped and fell on edging adjacent to a sidewalk under the possession and control of Defendant - *Held v N. Shore Condo. Ass'n*, Docket No. 321786, February 4, 2016.

- Where Plaintiff sued Costco after being injured when pinned between two vehicles that collided while filling up and waiting in line at a Costco gas station - *Krupinski v Costco, et al.*, Docket No. 321780, December 17, 2015.

- Where Plaintiff slipped and fell on a puddle left after Plaintiff or someone else spilled water from a bucket being used to provide beautician services for customers at Defendant's beauty school - *Tolen v Karschnick*, Docket No. 321990, October 22, 2015.

- Where Plaintiff slipped and fell on spilled laundry detergent in an aisle at Defendant's store and alleged that Defendant was negligent in failing to clean the spill once it was put on notice - *Eng v Meijer, Inc*, Docket No. 322065, October 20, 2015.

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- Where Plaintiff slipped and fell on black ice that formed after Defendant's agent dumped a bucket of water on spilled gasoline at a gas station - *Stokes v Adam Oil*, Docket No. 321855, August 6, 2015.

- Where Plaintiff tripped over a hose that an agent of Defendant had stretched across the entire width of an entrance at Kroger and partially covered with a mat - *Macaskill v Kroger*, Docket No. 319297, March 5, 2015.

- Where Plaintiff fell on steps under the control of Defendant that had areas of missing or shredded carpet and where the carpet had duct tape covering holes in the carpeting on the steps - *Church v Citadel Broad. Co*., Docket No. 319210, February 17, 2015.

- Where Plaintiff fell on an area of a walkway where pavers had been moved by Defendant - *Jahnke v Allen*, 308 Mich App 472; 865 NW2d 49 (2014).

- Where Plaintiff opened an unlocked, unmarked door in a condo and fell through an open floor - *Anbari v Union Square Development, Inc.*, Docket No. 302833, March 15, 2012.

- Where Plaintiff fell off a stage - *Berry v Dearborn Heights Montessori, Inc.*, Docket No. 300737, January 1, 2012.

- Where Plaintiff slipped on wet roof after Defendant implied that it was safe to be on the roof - *Dupras v Lloyd – Lee*, Docket No. 295130, May 19, 2011.

- Where Plaintiff was standing on a pallet at Defendant's store and the pallet broke injuring Plaintiff - *Weeks v Menard*, *Inc.*, Docket No. 294208, January 6, 2011.

- Where Plaintiff attempted to open a locked glass window and injured himself when the window broke - *Demchik v Comaty*, Docket No. 292370, October 21, 2010.

- Where Plaintiff slipped and fell on grapes in a grocery store - *Thorne v Great Atlantic & Pacific Tea Co., Inc.*, Docket No. 281906, March 4, 2010.

- Where Plaintiff exited a building from a dark doorway and fell after missing two steps not visible in the darkness - *Ahola v Genesee Christian School*, Docket No. 283576, December 15, 2009.

- Where Plaintiff slipped and fell on debris outside Defendant's restaurants - *Koontz v Sybra, Inc.*, Docket No. 278658, July 17, 2008.

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When Courts Held That the Plaintiff's Case Arose Out of General Negligence

In the following unpublished opinions, the Court of Appeals found that the plaintiff's cause of action sounded in ORDINARY NEGLIGENCE (CONDUCT) as opposed to premises liability:

- Where an employee of a pharmacy allegedly caused a stack of folding chairs located on the top shelf of a sales rack to fall and injure Plaintiff. *Thomas v Woodward Detroit CVS, LLC, d/b/a CVS Pharmacy*, Mich Ct App Docket No. 331486 (October 24, 2017).

- Where a minor-Plaintiff drowned after Defendant allegedly allowed its swimming pool to become cloudy and allowed an emergency door to remain propped open allowing the minor-Plaintiff access to the pool area - *Audi v Estay*, Docket No. 321418, December 3, 2015.

- Where Plaintiff was injured when a mannequin fell off of a wall and struck the Plaintiff as the Defendant's agent was using a long pole to reach for merchandise on a high wall display - *Arsenault v Designer Warehouse Ctr*., Docket No. 316381, October 28, 2014.

- Where Plaintiff-driver fell off steps of a large front-end loader on Defendant's property - *Perkins v Mid-Michigan Recycling, LLC*, Docket No. 312936, June 19, 2014.

- Where Plaintiff fell while walking across a parking lot with uneven pavement grades - *Schoch v Michigan Paving & Materials Co.*, Docket No. 291435, September 30, 2010.

- Where Plaintiff-truck driver was transporting snow-covered lumber, and slipped and fell when attempting to cover the lumber with a tarp - *Floyd v Insulspan, Inc.*, Docket No. 286442, September 29, 2009.

When Courts Held That the Plaintiff's Case Arose Out of Both

In the following unpublished opinions, the Court of Appeals determined that the plaintiff's claim sounded in both premises liability and ordinary negligence:

- Where a third-party was cutting down a tree with a chainsaw as Plaintiff and Defendant held ropes to pull it down and Defendant ran away causing the tree to fall on Plaintiff - *Fayad v Darwich*, Docket No. 284181, May 5, 2009.

- Where Plaintiff slipped on water in a service bay and fell while being escorted by an employee at an auto dealership - *Pernell v Suburban Motors Company, Inc.*, Docket No. 308731, April 23, 2013.

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- Where Plaintiff was riding a model train operated by Defendant and was injured when the train derailed - *Cohen v Great Lakes Live Steamers, Inc.*, Docket No. 275190, March 6, 2008.

As one can plainly see based on the above-referenced unpublished opinions, there are some cases in which it will be clear whether a claim sounds in premises liability or ordinary negligence. However, there are many fact patterns that could sound in premises liability or ordinary negligence or, in some cases, both.

Interplay Between No-Fault and Premises Liability

In *Kemp v Farm Bureau*, Docket No. 319796, May 5, 2015, Plaintiff sought no-fault benefits after injuring himself while falling in his driveway. When Plaintiff fell, he was unloading personal items from the backseat of his pickup truck. In a 2:1 decision, the Court of Appeals ruled that the Plaintiff's injury had nothing to do with the "transportational function" of the vehicle, and, therefore, the injury did not arise out of the use of a motor vehicle as a motor vehicle. The Plaintiff was not entitled to no-fault benefits.

This case provides some guidance on the interplay between premises liability and a cause of action brought pursuant to the No-Fault Act. Should the Plaintiff in *Kemp* have injured himself in some other manner while attempting to retrieve a personal item from the back of his truck, for example if he fell on uneven concrete while retrieving the item, according to this unpublished opinion, he would be precluded from no-fault benefits. However, under those circumstances, he may have a claim in premises liability instead.

In *Grantham v Jiffy Lube and Allstate*, Docket No. 298673, June 30, 2011, the Plaintiff took his vehicle to a Jiffy Lube for an oil change. After driving his vehicle into the service garage, the Plaintiff exited his vehicle and began walking to the office area to pay when he slipped in the snow-covered parking lot. While on the ground, the Plaintiff saw that there was oil underneath the snow. Plaintiff sued both Jiffy Lube and Allstate, his no-fault carrier. The trial court dismissed the claims against both Defendants.

In regard to the claim against Jiffy Lube, the Court of Appeals found that the snow presented an open and obvious danger even though there may have been oil underneath the snow. Case law establishes that an individual is expected to exercise caution when approaching snow because of the likelihood that the person could slip. (In regard to the no-fault claim against Allstate, the trial court determined that there was no genuine issue of material fact regarding whether the Plaintiff's injury arose out of the use or maintenance of his motor vehicle as a motor vehicle. The injury was not directly related to the motor vehicle's character as a motor vehicle and there was no causal connection between the vehicle and the Plaintiff's injury because the injury was incidental to the oil change.)

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In *Jackson-Ruffin v Metro Cars*, Docket No. 276144, May 22, 2008, the Plaintiff was injured when she attempted to exit a shuttle owned and operated by Defendant and slipped on the shuttle's snow-covered steps suffering serious injury. Plaintiff filed an ordinary negligence claim against Defendant and, on appeal, the Defendant argued that the trial court erred by not instructing the jury on the open and obvious doctrine. The Court of Appeals held that the open and obvious doctrine applies only to premises liability actions and that the case was not one sounding in premises liability. Rather, the case was a third-party, ordinary negligence claim and, therefore, the open and obvious doctrine did not apply.

Interestingly, the Defendant cited an 1887 opinion, *Caniff v The Blanchard Navigation Co.*, 66 Mich 638; 33 NW 744 (1887), for the proposition that the open and obvious defense would apply to dangerous conditions that exist on passenger vehicles. In *Caniff*, the Plaintiff was an experienced sailor and was injured when he fell through an open hatchway on the deck of Defendant's ship which was stowed away off-season. The Michigan Supreme Court held that the Plaintiff had enough experience to realize the danger of his conduct and was precluded from recovery because of his own negligence. While the Supreme Court did not specifically use the term "open and obvious," it referred to the case in a 1992 opinion as being an important case in the development of the open and obvious danger doctrine. *Riddle v McLouth Steel Products Corp.*, 440 Mich 85, 91; 485 NW2d 676 (1992).

The *Jackson-Ruffin* Court determined that, just because the *Caniff* opinion may have been part of the theoretical basis for what would eventually become the open and obvious danger doctrine, the Court of Appeals had explicitly stated that the open and obvious danger doctrine applies in premises liability cases *which arise out of the injuries occurring on land*. See *Laier, supra*. In this case, the injury was caused by the maintenance, or lack thereof, of the steps on a passenger vehicle. The Court added that, even if the open and obvious danger doctrine had applied in this case, the dangerous condition was effectively unavoidable and would, therefore, form a basis for liability despite its open and obvious nature.

In *Perez v STC, Inc. and State Farm*, Docket No. 250418, April 12, 2005, the Plaintiff and her grandson went to McDonald's and parked in a handicapped parking spot near the entrance. The Plaintiff testified that she did not notice any debris when she pulled into the spot. As the Plaintiff was closing the door to her vehicle after exiting, her right foot slipped on something and she fell injuring herself. After going into the store to make an incident report, the Plaintiff returned to the place of the fall and saw ketchup-covered french fries on the ground near the driver's side door which looked like they had been driven over or walked on. She also noticed food on her shoe.

Plaintiff, in her Complaint, alleged premises liability against McDonald's for failing to maintain the parking lot in a safe condition, and brought a claim for no-fault benefits pursuant to the No-Fault Act against State Farm alleging that her injuries arose out of the ownership, operation, maintenance or use of her vehicle. Both State Farm and McDonald's were granted summary

disposition by the trial court. More specifically, the Court indicated that Plaintiff could not prove notice of the smashed food which was fatal to her premises liability claim and that, since the use of the car was unrelated to her injury, the No-Fault Act was not triggered.

The Court of Appeals found that the Plaintiff's injury did not satisfy the first step of the no-fault coverage analysis because her injury was not related to the transportation function of the vehicle. Plaintiff had testified that the closing of her door had nothing to do with her fall. The Court of Appeals also found that Plaintiff was not "alighting" from her vehicle when she fell because she had finished removing herself from the confines of her vehicle and had planted both feet on the ground, according to her testimony. Therefore, she was not alighting from the car when the injury occurred and she was not eligible for no-fault benefits.

In regard to the premises liability claim, the Court of Appeals agreed with the trial court in that there was no evidence that McDonald's or its employees caused the hazard or had actual knowledge of it. While notice may be inferred from evidence that the hazard existed long enough that a prudent inviter would have discovered it, there was no evidence regarding the length of time that the food was in the parking lot. The Court of Appeals upheld the trial court's dismissal of the premises liability claim as well.

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Liability for Animal Attacks

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Landowner Liability for Animal Attacks

In animal attack lawsuits, plaintiffs typically seek damages from the animal's owner. However, in certain instances, plaintiffs may also recover from a landowner and/or the keeper of the animal. Particularly, landowners are only potentially liable under narrowly defined circumstances. Knowing the difference between the types of animal attack causes of actions is important for tendering a proper and appropriate defense.

I. Common-Law Theories of Liability for Animal Attacks

A. Common-Law Strict Liability

Under common-law strict liability, the owner or keeper of a domestic animal is liable for damages caused by that animal when the owner or keeper knows or should know of the animal's dangerous or vicious propensities. *Trager v Thor*, 445 Mich 95 (1994).

i. Keeper of animals

A temporary custodian, caretaker, or babysitter is not considered a "keeper" of the animal. A temporary caretaker has no choice regarding whether the dangers an animal may present will be introduced into the community, nor have they agreed to shoulder responsibility for injuries it might inflict. Therefore, common-law strict liability is not applicable to temporary caretakers. *Trager*, supra.

ii. Owners of equine animals (horse, mule, donkey, etc.)

Typically, common-law strict liability will apply to situations involving equine animal attacks. However, the Legislature granted immunity from tort liability involving equine animal attacks in situations where the owner is an "equine professional" for compensation and the "participant" sustains an injury as a result of the inherent risk of equine activity. MCL 691.1662.

Those visiting, touring, or using an equine facility or stable are considered participants under the Equine Activity Liability Act (EALA). *Amburgey v Sauder*, 238 Mich App 228 (1999).

Additionally, the EALA mandates that the equine professional post and maintain conspicuous (no less than 1 inch in height) warning signs in the area where the equine animal is kept. MCL 691.1666.

iii. Knowledge of animal's vicious or dangerous propensities

1. Are specific dog breeds inherently dangerous?

Contrary to popular belief, pit bulls are not categorically dangerous under Michigan law. Even with pit bulls, liability only attaches where the owner or keeper had actual knowledge of the particular dog's vicious propensities. *Stacey v Colonial Acres Assocs, LLC,* unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 300955).

Additionally, in *Taylor v Mobley*, 279 Mich App 309 (2008), the Michigan Court of Appeals upheld the trial court's evidentiary ruling that the breed of the dog, pit bull, was irrelevant to the issue of damages and more prejudicial than probative.

2. Is an animal's history of previous bites conclusive evidence of viciousness?

Evidence of previous bites is relevant in determining whether the owner or keeper of the animal knew or should have known of the animal's violent propensities. *Veal v Spencer*, 53 Mich App 560 (1974). However, the fact that an animal has bitten or attacked someone in the past is not evidence that the animal should be considered vicious as a matter of law. *Veal*, supra.

3. Is barking, growling, and/or jumping conclusive evidence of viciousness?

The fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way is common canine behavior. Thus, such behavior will ordinarily be insufficient to show that a dog is abnormally dangerous or unusually vicious. *Hiner v Mojica*, 271 Mich App 604 (2006).

B. Common-Law Negligence

Michigan law recognizes that an owner, keeper, or even a temporary caretaker may be liable under common-law negligence if that person fails to exercise ordinary care to control the animal and knows or should know of the animal's dangerous propensities. *Trager*, supra.

The Equine Activity Liability Act (EALA), does not prevent or limit liability for an equine animal bite caused by the owner's negligence. MCL 691.1665; see, also, *Beattie v Mickalich,* 486 Mich 1060 (2010).

i. Restraining the animal

Notably, dogs are generally regarded as so unlikely to do substantial harm that their owners have no duty to keep them under constant control. The mere failure to do so does not constitute breach of any duty. However, when the animal's dangerous propensities are known or should be known, then there is a duty to keep the animal under control. *Trager*, supra.

Similarly, in situations where there is *no* knowledge of the animal's dangerous propensities, the owner, keeper, or temporary caretaker can still be liable for negligently failing to restrain the animal or prevent harm by the animal. *Trager*, supra; see, also, *Hiner v Mojica*, supra.

ii. Normal vs dangerous dog behavior

In *Kinney v Crane*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 314191), Plaintiffs were jogging past Defendants' home when Defendants' son let the adult dog out of the house. The dog ran toward Plaintiffs, jumped on its hind legs and placed its front paws on one of the Plaintiff's shoulders. Plaintiff fell backwards, but was caught by her husband before hitting the ground. The dog then began to circle Plaintiffs. The dog *never* growled, snarled, barked, nor bit them. Plaintiff alleged an aggravation of a back injury and scratches (none broke the skin).

Eventually, the *Kinney* Court found there was no breach of any duty owed to Plaintiffs because no reasonable juror could conclude that Defendants were negligent for normal dog behavior that was neither aggressive nor vicious. Plus, the dog had no history of aggressive behavior. *Kinney*, supra, reaffirms that normal dog traits are not enough to establish that a dog is dangerous or vicious. See, *Hiner*, supra.

C. Common-Law Liability of Landowners

i. Negligence

1. When is a duty imposed?

As with other non-owners (keepers or temporary caretakers) of animals, a landlord is only liable for injuries caused by the attack of a tenant's animal when the landlord knows or should know of the animal's dangerous propensities. *Szkodzinski v Griffin*, 171 Mich App 711 (1988).

The failure to enforce rules and regulations regarding dog breed and/or size does not, by itself, create a tort duty on the part of the property owner. *Braun v York Properties*, 230 Mich App 138 (1998); see, also, *Stacey*, supra. Instead, courts will look to the following factors:

> (1) The foreseeability of harm to plaintiff (defendant's knowledge of dog's dangerous propensities);
> (2) the degree of certainty that plaintiff suffered injury;
> (3) the connection between defendant's conduct and plaintiff's injury;
> (4) the moral blame attached to defendants' conduct;
> (5) the policy of preventing future harm;
> (6) the burden on the defendant and consequences to the community of imposing the duty; and
> (7) the availability, cost and prevalence of insurance for the risk.

Braun, supra; *Stacey*, supra.

2. Does a landowner have a duty to protect third parties off premises?

Landowners do not owe a duty to protect third parties from attacks by a tenant's dog that take place off the leased premises where the dog was acquired after the premises were leased. *Feister v Bosack*, 198 Mich App 19 (1993).

However, a landowner may be liable for off premises attacks when the landowner knows or should know of the dangerous propensities of the animal.

3. Does a landowner have a duty to inspect leased premises for dangerous animals?

A landowner has no duty to inspect the leased premises to discover the existence of a tenant's dangerous animal. *Feister*, supra.

ii. Premises liability

1. Is an animal a condition on the land?

In *Klimek v Drzewiecki*, 135 Mich App 115 (1984), a loose, unsupervised dog, either on the property owner's land or in close proximity, without an obstacle to prevent the dog from entering the land was considered a "condition on the land" within the meaning of a premises liability action. In this case, the property owner was aware of the dog's prior bites. The *Klimek* Court found that the property owner owed a duty to exercise

reasonable or ordinary care to prevent injury to a child social guest because he was aware of dog's prior bites.

However, even in situations where an animal may be deemed a "condition on the land," it still must be proven that the landowner knew or should have known that the animal posed an unreasonable risk of harm. *Myers v Myers*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 241298).

2. What about animals allowed on the property by the landowner?

In *James Michalek v Estate of Patricia Malik, et. al*., unpublished opinion per curiam of the Court of Appeals, issued January 13, 2022 (Docket No. 355877), a dying woman's son was given permission by Ascension Providence Hospital to bring her dog to the hospital. Plaintiff was bitten by the dog when he bent down to kiss his dying aunt goodbye while visiting her at the hospital. Plaintiff eventually filed an Amended Complaint against Ascension for common law negligence and premises liability.

The Court of Appeals found that Plaintiff's exclusive remedy was under the dog-bite statute and only against the dog's owner. However, there was no discussion nor evidence that Ascension knew or had reason to know of the dog's dangerous tendencies. Therefore, the property owner, Ascension, could not be liable for Plaintiff's injuries. This decision is consistent with the published and binding opinion in *Klimek*, supra.

D. Innkeeper Liability for Animal Attacks

In *Heuschneider v Wolverine Superior Hospitality, Inc. d/b/a Comfort Inn & Suites*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2019 (Docket No. 341053), Plaintiff was bitten by a spider in Defendant's hotel. There was no dispute that the hotel was not intentionally harboring, possessing or exercising dominion and control over the venomous spiders. The hotel also argued that it treated guest rooms for pests, including spiders, on a rotating basis of one third of the rooms each month.

The hotel asserted Plaintiff could not prove proximate causation by producing sufficient evidence to show the spider had not arrived with Plaintiff. Further, Defendant argued that it owed no duty of care to Plaintiff under the doctrine of *ferae naturae*. The doctrine of *ferae naturae* holds that a landowner cannot be held liable for the actions of wild animals on his property unless the animals were in the landowner's possession or control.

However, an innkeeper owes a duty to protect its guests from injury and, in doing so, must "exercise ordinary care and prudence to keep his premises reasonably safe for business invitees." *Upthegrove v Myers*, 99 Mich App 776, 779 (1980). Moreover, Plaintiff relied on MCL 125.474, which provides that "[t]he owner of every dwelling shall be responsible for keeping the entire building free from vermin."

First, in reversing the lower court decision, the Court of Appeals found error with the lower court's conclusion that spiders were not "vermin" for the purposes of the Innkeepers' Liability Statute. Since vermin was not defined in the statute, the common Merriam-Webster's Dictionary (11th ed.) definition was used to determine that spiders were indeed vermin.

While acknowledging spiders are vermin, the hotel argued it complied with its duty in treating Plaintiff's room two months before the incident as the pesticide has some residual effect. Plaintiff countered that the hotel's failure to treat all of the rooms monthly to ensure effective pest management was a breach of its duty. With these competing arguments, the Court of Appeals found a question of fact remained as to whether the hotel breached its duty to Plaintiff under the Innkeepers' Liability Statute in keeping the room free of vermin.

As to how this spider came to be in Plaintiff's room, there was also conflicting testimony. The hotel expert testified that spiders are transported from place-to-place on luggage thereby making its presence foreseeable. The expert also conceded that it could have been in the room before Plaintiff arrived or Plaintiff could have brought the spider in. The Court of Appeals found reasonable minds could disagree as to how the spider came to be in that room and, therefore, whether the hotel's breach in failing to keep the room free of vermin could have proximately caused Plaintiff's injuries.

II. Statutory Strict Liability for Dog Bites

The Michigan Legislature enacted MCL 287.351, the Dog Bite Statute, which imposes almost absolute strict liability on a dog's owner for bites of his/her dog. Specifically, Michigan's Dog Bite Statute states:

> (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.

(2) A person is lawfully on the private property of the owner of the dog within the meaning of this act if the person is on the owner's property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or if the person is on the owner's property as an invitee or licensee of the person lawfully in possession of the property unless said person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act.

A. Liability only Attaches to the Dog's Owner

Dog bite victims often try to impose statutory liability on property owners when the dog is owned by a tenant. However, Michigan courts have rejected the argument that a property owner is strictly liable under the statute. *Szkodzinski v Griffin*, 171 Mich App 711; 431 NW2d 51 (1988).

i. Who is the dog's owner?

A temporary caretaker or keeper cannot, as a matter of law, be considered the dog's owner within the meaning of the Dog Bite Statute. *Trager v Thor*, supra.

In *Foster v Szlaga*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2016 (Docket No. 324837), a deputy sheriff was responsible for possessing and maintaining a law enforcement canine 24 hours per day, regardless of whether he was off duty, on vacation, or outside the county. While off duty, the deputy took the dog to a cottage where it eventually bit someone. Regarding the claims under the Dog Bite Statute, the Court found that even in light of the deputy's possession, control, and care of the dog, he was not an owner under the statute because the dog ultimately belonged to the county. Therefore, even 24 hour possession, control, and care of a dog will not automatically make a person an owner of the dog.

III. Defenses

A. Trespasser

In common-law actions, a landowner does not owe any duty to a trespasser except to refrain from injuring the trespasser by "willful and wanton" conduct. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000).

Similarly, a trespasser is not entitled to any recovery under the Dog Bite Statute. A dog bite victim must show that he was an invitee or licensee in order to be protected by the Dog Bite Statute. *Alvin v Simpson*, 195 Mich App 418 (1992). In *Alvin*, a child bitten by a neighbor's dog was a trespasser as matter of law after he climbed over the owner's fence

and entered the yard. Permission to enter the property could not be implied because the child knew he did not have permission to enter the property.

In *Cummings v Girtman*, unpublished decision of the Court of Appeals, issued December 12, 2017 (Docket No. 334015), Plaintiff was bitten by Defendants' dog while he was in his niece's backyard, which was adjacent to Defendants' backyard. The properties were separated by a fence. At some point, Plaintiff asked one of the Defendants whether the dog bites and was told that it had never bitten anyone. Next, Plaintiff placed his hand on the fence, with a portion of his hand extending into Defendants' yard and the dog bit him. Ultimately, the Court concluded Plaintiff was a trespasser on Defendants' private property when part of his hand entered the property without permission. Therefore, even a slight or incidental trespass into property is enough to trigger the trespass defense in a dog bite case.

In *Kelsey v Lint*, 322 Mich App 364 (2017), the Court ruled that Plaintiff was not a trespasser when returning to Defendant's property after a garage sale. Plaintiff had an implied license to enter the property based on an implied license to approach a residential home and knock on the front door. Absent fencing or a "no trespassing" sign, Plaintiff was still within the scope of the public's implied license when she exited her vehicle and was attacked by property owner's dog.

B. Provocation

There is a defense to claims brought under the Dog Bite Statute when the victim provokes the dog. *Bradacs v Jiacobone*, 244 Mich App 263 (2001). In *Bradacs*, Plaintiff's act of unintentionally dropping a ball near the dog while it was eating did not constitute provocation.

i. Unintentional acts

A person can commit unintentional acts that are sufficiently provocative to relieve a dog owner of liability under the statute. *Brans v Extrom*, 266 Mich App 216 (2005). In *Brans*, Plaintiff unintentionally stepped on the dog's tail and was bit in the leg. The Court looked at the definition of provocation and found that the intent of the victim is not relevant to determining whether there was provocation.

ii. Intentional acts that are not provocation

In *Koivisto v Davis*, 277 Mich App 492 (2008), Defendant's dogs escaped, entered Plaintiff's property, and attacked her cats. In response, Plaintiff stuck her fingers in one of the dog's eyes and kicked the other dogs. The dogs eventually attacked Plaintiff. The Court held that Plaintiff's intentional acts did not constitute provocation under the statute because the dogs were already in an aggressive and violent state before Plaintiff made contact with them.

C. Comparative negligence

i. Common-law claims

In an action based on tort or another legal theory seeking damages for personal injury, the plaintiff's award of damages must be reduced by the percentage of fault allocated to the plaintiff. MCL 600.2959. Therefore, a plaintiff's comparative fault will be taken into account to reduce the damages awarded in any common-law animal attack action.

ii. Dog Bite Statute

In a statutory dog bite action, comparative fault is not considered. Outside the context of provocation, the Dog Bite Statute simply does not allow for any consideration of comparative negligence on the part of the dog bite victim, or anyone else. Similarly, fault of the dog owner is not admissible in a statutory claim either. *Hill v Sacka*, 256 Mich App 443 (2003). In other words, "any allocation of fault would be immaterial and simply not relevant because, if provocation exists, there would be zero liability, and if provocation is lacking, there would be absolute liability." *Id*. at 454.

***Practice Notes:**

Evidence of prior bad (or good) behavior of the dog is not admissible nor relevant in a statutory dog bite action. Such evidence is also irrelevant to a finding of liability under the statute. *Nicholes v Lorenz*, 396 Mich 53 (1976).

The Dog Bite Statute does not preclude a plaintiff from recovering under common-law theories. MCL 287.288. Indeed, a plaintiff can present statutory and common-law claims to a jury in one case. *Hill v Hoig*, 258 Mich App 538 (2003); see, also, *Ball v Fourment*, unpublished decision of the Court of Appeals, issued February 21, 2017 (Docket No. 331670).

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