STATE OF MICHIGAN
IN THE SUPREME COURT

FRANK ANTHONY SCOLA,

Plaintiff/Appellant,

v

JP MORGAN CHASE BANK, N.A., and JP MORGAN CHASE & CO,

Defendant/Appellee.

Supreme Court No. _____

Court of Appeals No. 338966

Wayne County Circuit Court
Case No. 15-002804-NI
Hon. John A. Murphy (P24492)

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APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

INDEX OF AUTHORITIES, Continued

Cases

Statutes

Court Rules

Miscellaneous

STATEMENT OF JURISDICTION

This Court is entitled to exercise its jurisdiction to review a case after a decision in the Court of Appeals under MCR 7.303(B)(1). In a civil case, an application for leave to appeal from the Court of Appeals' decision must be filed with this Court within 42 days. MCR 7.305(C)(2). If a timely motion for reconsideration is filed, as in this case, the 42 day period runs from when an order is issued denying reconsideration. MCR 7.305(C)(2)(c).

Here, the Court of Appeals issued its unpublished per curiam opinion on October 4, 2018. [Exhibit 1, Court of Appeals Unpublished Opinion]. A motion for reconsideration of that split 2-1 decision was timely filed on October 25, 2018. The majority, however, denied reconsideration on November 20, 2018. [Exhibit 2, Order Denying Reconsideration].

This application for leave to appeal was timely filed based on the Court of Appeals' order denying reconsideration.[1] Thus, this Court has discretion to exercise its jurisdiction.

OPINION AND ORDERS APPEALED FROM

Plaintiff/Appellant, Frank Scola, seeks leave to appeal from the unpublished per curiam opinion that was issued by the Court of Appeals in this case on October 4, 2018. [Ex. 1]. In a split 2-1 majority ruling, the Court of Appeals' affirmed the trial court's decision to dismiss Scola's claims against Defendants/Appellees, JP Morgan Chase Bank, N.A., and JP Morgan & Co, by granting summary disposition under MCR 2.116(C)(10). [Ex. 1].

The trial court previously dismissed Scola's claims on the same grounds as those stated by the majority opinion. [Ex. 1, pp 3-6; Ex. 3, TC Order Granting SD, p 2]. In short,

[1]Because the Court of Appeals issued its order denying reconsideration on November, 20, 2018, the deadline for filing was extended to the next business day, January 2, 2019, because New Year's Day is a holiday in Michigan. MCR 1.108(1).

the trial court concluded that Scola's claim was a premises liability, not ordinary negligence, claim, and as such, no duty was owed to Scola because the danger was "open and obvious" and no special aspects made it "unreasonably dangerous". [Ex. 4, SD Mtn Hrg, pp 14-15]. Scola sought reconsideration, but was denied. [Ex. 5, TC Order, Recon Den'd].

On appeal, the majority opinion similarly held that: 1) Scola's claims "sounded in premises liability" because "his injuries occurred from a condition on land, namely, the lack of signage" that would have warned motorists exiting the bank's parking lot as instructed not to turn the wrong-way when exiting onto the one-way street; 2) "the lack of signage [informing motorists that the bank's parking lot exited onto a one-way street] "was open and obvious" and 3) "no special aspects of the bank's parking lot removed it from the open and obvious doctrine", as it was not an "unreasonably dangerous or effectively unavoidable" condition that posed "a uniquely high likelihood of harm or severity of harm". [Ex. 1, pp 4-5].

The dissenting judge agreed that the case was a premises liability claim, and not an ordinary negligence claim, but disagreed with the majority's conclusion that the danger posed was open and obvious, concluding instead that it was "not reasonable to expect that an average person with ordinary intelligence would discover upon casual inspection that the intersecting road is a one-way, westbound road." [Ex. 1, Cavanagh, p 3]. For the dissenting judge, whether "defendants had a duty to warn drivers exiting their parking lot that they must only turn left" to avoid going the wrong way on a one-way street was a material fact question based on the record evidence in this case. [Ex. 1, Cavanagh, p 3].

Scola sought reconsideration, but his motion was denied on November 20, 2018, again in a split 2-1 ruling with the same judge dissenting. [Ex. 2, COA Order, Recon Den'd].

QUESTIONS PRESENTED

I. Should leave be granted to address whether the lower courts correctly held that this case was a premises liability claim only, and not an ordinary negligence claim, as alleged, where motorists exiting defendant's parking lot were instructed to do so onto a one-way street without being warned, cautioned, or otherwise instructed not to turn the wrong-way?

Plaintiff/Appellant says "Yes".

Defendant/Appellee says "No".

The lower courts would say "No".

II. Should leave be granted to address whether the lower courts correctly held that the danger posed to motorists exiting from defendant's parking lot onto a one-way street was open and obvious and without any special aspects that made it unreasonably dangerous?

Plaintiff/Appellant says "Yes".

Defendants/Appellees says "No".

The lower courts would say "No".

GROUNDS FOR APPEAL

The issue in this case "involves a legal principle of major significance to this state's jurisprudence" because, as things currently stand, the outcome in similar personal injury cases depends almost completely on the judge (or judges) reviewing the case. MCR 7.305(B)(3). Without direction from this Court, some judges will analyze similar such cases as premises liability claims (and likely dismiss almost all such cases on open and obvious grounds) while other judges will view similar such cases as ordinary negligence claims (and thus, be less willing to summarily dismiss such cases on the grounds that no duty is owed).

The result in such personal injury cases should not depend so heavily on judges assessing whether the claim alleged "sounds" in premises liability or ordinary negligence. Yet, as things currently stand, that difficult (and largely subjective) assessment by judges is far too often the key to whether such cases survive summary disposition and go to trial. That was not the case before this Court issued its seminal ruling on premises liability in *Lugo v Ameritech Corp*, 464 Mich 512, 629 NW2d 384 (2001), and further empowered judges to dismiss cases on open and obvious grounds, by concluding no duty was owed.[2]

The number of appellate rulings, published and unpublished, where the issue of whether the case sounded in premises liability or ordinary negligence has grown rapidly since this Court modified how the open and obvious rule would be applied in *Lugo*.

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[2]See *Langen v Rushton*, 138 Mich App 672, 360 NW2d 270 (1984), in which the Court of Appeals applied a duty analysis consistent with an ordinary negligence claim (and not a premises liability claim) in a factually similar case where a motorist exiting a shopping mall parking lot onto a busy street was injured because the motorist's view of oncoming traffic was obstructed and the mall owner did nothing to correct that problem.

Moreover, it is clear (even by reviewing published cases only) that judicial determinations of whether a case is a premises or ordinary negligence claim is not consistent or uniform.[3]

Unlike Michigan, most other jurisdictions have moved away from placing labels on such tort claims to determine if a duty was owed, and if so, whether it was breached. In fact, the trend nationally is towards a unitary standard for such negligence claims, which not only shifts the focus from determining the status of the injured person but also recognizes that the same (or similar) duty to use reasonable care applies both to those who own or possess land and to those injured by a dangerous condition that exists or is created. [Ex. 6, Restatement of Torts 3d, Liability for Physical and Emotional Harm, ¶ 51, pp 242-252].

The existing confusion in Michigan over whether a case is a premises liability or ordinary negligence claim not only illustrates existing problems with the approach taken by the Rest Torts 2d, it underscores the impetus for the evolution that is occurring in tort law nationally, as demonstrated by the Rest Torts 3d. In Michigan, it is even more significant an issue than in other states as this Court deviated from the Rest Torts 2d in crafting its own test for premises cases in *Lugo.* See Marks, John *The Limit to Harms Caused by "Known or Obvious" Dangers: Will it Trip and Fall Over Duty-Breach Framework Emerging in The Restatement (Third) of Torts?*, 38 Tex. Tech. L. Rev. 1 (2005-2006), pp 57-61. [Exhibit 7].

Recently, this Court had an opportunity to address the confusion over whether a case that is factually similar to this one "sounds in premises liability" or is instead, an

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[3]See generally, *Laier v Kitchen*, 266 Mich App 482, 702 NW2d 199 (2005); *James v Alberts*, 464 Mich 12, 626 NW2d 158 (2001); *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006); *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008). Cf. *Jahnke v Allen*, 308 Mich App 472, 865 NW2d 49 (2014); *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 822 NW2d 254 (2012); *Compau v Pioneer Res Co*, 498 Mich 928, 871 NW2d 210 (2015); *Kachudas v Invaders Self Auto Wash*, 486 Mich 913, 781 NW2d 806 (2010).

ordinary negligence claim (to which the open and obvious danger doctrine does not apply), when it reviewed the Court of Appeals' decision in *Fowler v Menard, Inc*, unpublished per curiam opinion of the Court of Appeals, Docket No. 310890, dated September 25, 2015. Presumably, this Court opted to review the *Fowler* case more closely because it recognized the significance of its "open and obvious" issues to our state's jurisprudence. For the same or similar reasons, leave to appeal should be granted in this case under MCR 7.305(B)(3).

In *Fowler*, this Court agreed to hear oral argument on whether to grant leave to appeal or take other action. 499 Mich 908, 877 NW2d 873 (2016). After oral argument, leave was denied, thus letting stand the majority ruling. 500 Mich 1025, 897 NW2d 166 (2017). Thus, this Court implicitly affirmed the Court of Appeals' holding in the *Fowler* case.

The Court of Appeals' ruling in this case, however, is not consistent with what was said in the *Fowler* case, because, the majority in *Fowler*, clearly understood that it was an ordinary negligence claim. By letting stand the Court of Appeals' decision in the Fowler, case, this Court only added to existing confusion over how such cases should be analyzed. Simply put, the *Fowler* case cannot be easily reconciled with the outcome in this case. This Court should grant leave to appeal in this case under MCR 7.305(B)(5)(b), because it "conflicts with a Supreme Court decision or another decision of the Court of Appeals".

Leave to appeal also should be granted in this case under MCR 7.305(B)(5)(a) because the Court of Appeals' majority ruling that this case "sounds in premises liability" is "clearly erroneous" – as is its holding that the danger posed was "open and obvious" (without any "special aspects"). Therefore, it will cause material injustice if not reversed. Alternatively, this Court should peremptorily reverse and remand this case to the trial court for further proceedings, including trial, on the ordinary negligence claim. MCR 7.305(H)(1).

INTRODUCTION

Frank Scola was injured in a motor vehicle accident when he was seven years old. He was a passenger in his mother's car when she exited the Chase Bank parking lot onto Michigan Avenue by turning right. By turning right, she went the wrong way on a one-way street. Moments later, she and her son were involved in a head-on motor vehicle collision.

Scola subsequently sued Chase Bank, alleging that the exit from its parking lot onto westbound Michigan Avenue was not "reasonably safe" for exiting motorists because it did not inform them that Michigan Avenue is a one-way street, running westbound, and consequently, that no one should turn right when exiting from its parking lot onto Michigan.

The trial court summarily dismissed Scola's claims against Chase Bank, concluding that the danger of turning the wrong-way on a one-way street when exiting the parking lot was open and obvious, and no "special aspects" made it "unreasonably dangerous". In so holding, the trial court also rejected Scola's contention that the open and obvious rule did not apply because he alleged an ordinary negligence claim, not a premises liability claim.

The Court of Appeals affirmed the trial court's decision to dismiss Scola's claims against Chase Bank on "open and obvious" grounds in a split 2-1 unpublished ruling. It rejected his argument that open and obvious did not apply to an ordinary negligence claim, concluding instead that he alleged that the dangerous condition was the "lack of signage" on its premises cautioning motorists that the bank parking lot exited onto a one-way street.

In actuality, the complaint in this case clearly identified the dangerous condition as being the one-way street where motorists exited from the Chase Bank parking lot. Here, it was not simply the "lack of signage" cautioning motorists not to turn right that endangered

motorists exiting the Chase Bank parking lot, it was the fact that exiting motorists were instructed to exit onto Michigan Avenue without being informed that it is a one-way street.

Simply put, "lack of signage" alone is not a dangerous condition. Signage, when used improperly (or not employed at all), exposes a person unnecessarily to a risk of being harmed. Here, the risk of harm was that motorists exiting the parking lot as instructed could end up in a head-on collision by mistakenly turning the wrong-way on a one-way street.

Putting signs up instructing motorists to exit onto a one-way street exposed them to a risk of harm. Failing to caution them not to turn right because it was a one-way street is what allegedly breached the duty to use due care to protect them from that harm, especially when, as in this case, there was ample notice that all too often motorists exiting the parking lot did not recognize that it was a one-way street and they could turn left only.

As with many other recent Michigan cases, the outcome in this tort action depended on whether it was viewed as a premises liability claim or as an ordinary negligence claim. Contrary to the conclusion that was reached by judges in both the trial court and on appeal, this case does not fit easily within the traditional confines of a premises liability claim.

Again, the hazard here is not "lack of signage" on the premises owned by Chase Bank, it is the danger of a head-on collision with on-coming traffic on a one-way street. Signage (or the lack of it) is not the dangerous condition, it just actively contributes to motorists exiting from the Chase Bank parking lot encountering that dangerous condition.

Chase Bank's parking lot was designed to encourage motorists to exit from its parking lot onto a one-way street. Yet, nothing was done by Chase Bank to caution, warn, instruct, or inform exiting motorists not to turn right because it was a one-way street. In short, Chase Bank told its exiting motorists that they must go in a direction that would put

them on a one-way street without bothering to inform them that it was a one-way street. Yet, according to the lower courts, the claim that Chase Bank actively contributed to motorists going the wrong way on a one-way street when exiting from its parking lot is not a viable tort claim because the danger posed by the one-way street was open and obvious.

In *Fowler*, however, the Court of Appeals reached a very different conclusion (and this Court saw no reason to disturb that ruling). Similarly, in *Langen*, the Court of Appeals in a factually similar case affirmed years ago a trial court's decision to deny summary disposition by applying a duty analysis more akin to ordinary negligence than premises. The decision in this particular case is inconsistent and conflicts with *Fowler* and *Langen.* Even more troubling is the fact that it is but one case where the "open and obvious" rule has been misapplied by the lower courts in cases asserting an ordinary negligence claim.

Effectively, the Court of Appeals' holding that this case "sounds in premises liability" and that the "open and obvious" danger doctrine precludes this claim exonerates defendants from any potential liability in similar such cases for failing to use reasonable care to protect individuals from being harmed by known dangerous conditions. Such unjust outcomes unduly punish injured persons for failing to recognize potential hazards even though such considerations are better left for the jury to assess when fault is apportioned. If rulings such as the Court of Appeals' decision in this case are not reversed, there is simply no reason to protect other persons from being harmed even if the danger is known.

This Court should either grant leave to appeal and clarify the distinction between ordinary negligence and premises liability claims or peremptorily reverse the lower courts' determination that this case sounds in premises liability and thus, no duty was owed because the danger of turning the wrong-way was open and obvious to exiting motorists.

STATEMENT OF FACTS

On June 27, 2003, Kathleen Scola was driving her station wagon to a job interview at a local testing center in Wayne, Michigan. Her children (including Frank), her sister, and her sister's children were also in the station wagon. [Ex. 11, K. Scola Dep Tr, pp 10-12, 14-15]. She planned to take Wayne Road south to Michigan Avenue and then travel east on Michigan. Because she was not familiar with the area, she was looking for Michigan Avenue as she traveled southbound on Wayne Road. [Ex. 11, K. Scola Dep Tr, pp 16-24].

Chase Bank is located at the southeast corner of Wayne Road and westbound Michigan. In Wayne, Michigan, there is roughly one-mile stretch of Michigan Avenue (US-12) where westbound Michigan and Eastbound Michigan are divided by several city blocks. That is not the case in any other section of Michigan between I-275 and Telegraph Road. Wayne Road is close to where Michigan turns back into a road with a divided median only.

As Ms. Scola drove south on Wayne Road, she traveled through a busy intersection. As she did so, she saw that it was Michigan. Believing she had missed her turn, she immediately pulled into the Chase Bank parking lot. [Ex. 11, K. Scola Dep Tr, pp 16-24].

After pulling in, Ms. Scola continued straight in the Chase Bank parking lot. She was looking for a way to get back to Michigan Avenue. Heading eastbound in the parking lot, she saw that the bank's teller lanes to her left exited onto Michigan. She drove left towards Michigan. As she drove past the bank's teller lanes, she saw a blue sign that marked the exit from the parking lot onto Michigan. [Ex. 11, K. Scola Dep Tr, pp 16-24].

There was only one sign near the exit from the Chase Bank parking lot onto Michigan. It was a large blue sign belonging to Chase Bank that said "Exit Only". [Ex. 9, Photograph, Exit from Chase Bank onto Michigan (2003)]. In 2003, that blue "exit only" sign

was located to the right of where motorists using the teller lanes would exit onto Michigan. There was also a yellow pavement arrow that instructed motorists leaving the area with the teller lanes to simply go straight ahead in order to exit onto Michigan. [Ex. 10, Photograph].

There were no signs informing Ms. Scola that she must turn left when exiting from the Chase Bank parking lot because Michigan Avenue is a one-way street that runs westbound. [Ex. 11, K. Scola Dep Tr, pp 49-50]. Not recognizing that she was exiting onto a one-way street, Ms. Scola turned right onto westbound Michigan and she and her family were involved in a head-on motor vehicle collision. [K. Scola Dep, pp 28-29]. Her son, Frank, age 7, was the one most seriously injured in the collision. [K. Scola Dep, pp 78-79].

Ms. Scola was neither the first person nor the last person to turn the wrong way onto Michigan when exiting from the Chase Bank parking lot. The jewelry store owner whose shop is located across the street from Chase Bank on Michigan, David Zuckerman, testified that he saw motorists turn right "almost daily" when exiting from the Chase Bank parking lot onto Michigan. [Ex. 12, Zuckerman, pp 29-30]. Before 2003, he told the bank as much, but nothing changed. [Ex. 12, Zuckerman, pp 32-36 and 38]. The police officer who investigated the collision that injured Frank Scola confirmed Zuckerman's testimony that vehicles turning right onto westbound Michigan was common. [Ex. 13, Puckett, p 24].

Walter Cygan, an expert in safety engineering, attested that "the bank had the main responsibility for minimizing this dangerous condition" by adding warning signs for motorists "because they knew about the exposure for several years, but did nothing to minimize it". [Ex. 14, Cygan Letter, p 2]. He also testified that the blue "exit only" sign at Chase Bank's parking lot was "defective" because it did not inform exiting motorists that Michigan Avenue was one-way street that runs westbound. [Ex. 15, Cygan Dep Tr, p 126].

Timothy Robbins, an accident reconstruction expert with specialized expertise in signs, basically agreed with Cygan that the lack of signs warning motorists that Michigan was a one-way street posed a danger for exiting vehicles. [Ex. 16, Robbins Dep Tr, pp 38-39].

When he reached adulthood, Frank Scola filed a lawsuit based on the serious personal injuries that he sustained in the motor vehicle collision that occurred in 2003. He sued both drivers involved in the collision. He also sued Chase Bank, alleging that it was negligent because neither its parking lot design nor its signage instructing motorists to exit onto Michigan warned motorists not to turn left because it is a one-way street westbound.

The trial court summarily dismissed Scola's claims against Chase Bank, concluding that the danger of turning the wrong-way onto a one-way street when exiting the Chase Bank parking lot onto Michigan was open and obvious, and no "special aspects" made it "unreasonably dangerous". [Ex. 4, SD Mtn Hrg, pp 14-15]. In so holding, the trial court also rejected Scola's contention that the open and obvious rule did not apply because he alleged an ordinary negligence claim, not a premises liability claim. [Ex. 4, SD Mtn Hrg, pp 14-15]. Scola moved for reconsideration, but it was denied. [Ex. 5, TC Order Den Recon].

The Court of Appeals affirmed the trial court's decision to dismiss Scola's claims against Chase Bank on "open and obvious" grounds in a split 2-1 unpublished ruling. [Ex. 1]. In so holding, the Court rejected his argument that open and obvious did not apply to an ordinary negligence claim, concluding instead that he contended that the "lack of signage" was a "dangerous condition" on its premises. [Ex. 1, COA Unpub Opn, at p 4].

The dissenting judge agreed that it was a premises liability claim, but disagreed with the majority's view that the danger was open and obvious. He would have held instead that "a genuine issue of material fact existed as to whether defendants had a duty to warn

drivers exiting their parking lot that they must only turn left because it is not reasonable to expect that an average person with ordinary intelligence would discover upon casual inspection that the intersecting road is a one-way, westbound road." [Ex. 1, Dissent, p 3].

Scola moved for reconsideration, arguing that he brought an ordinary negligence claim, not a premises liability claim, and that the dangerous condition was traveling the wrong-way on a one-way street, not "lack of signage", as the Court of Appeals concluded. Reconsideration was also denied by a 2-1 majority ruling. [Ex. 2, COA Order Den Recon].

Scola now asks this Court to either grant leave to appeal in order to address the lower courts' decision to dismiss this case on open and obvious grounds or peremptorily reverse on the grounds that this case should be treated as an ordinary negligence claim.

STANDARD OF REVIEW

The standard of review on appeal is de novo when summary disposition is granted under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423, 864 NW2d 609 (2014). However, "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003). Under MCR 2.116(C)(10), the trial court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507, 717 NW2d 855 (2006).

ARGUMENT

I. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER THIS CASE WAS AN ORDINARY NEGLIGENCE CLAIM, NOT A PREMISES CLAIM.

A. If such cases are not treated as ordinary negligence claims, injured persons are unduly punished and similar risks will not be addressed.

In Michigan, the distinction between what must be shown to survive summary disposition on a premises liability claim as compared to an ordinary negligence claim could not be more striking. To say that the outcome in such cases often hinges on whether the claim is viewed as an ordinary negligence claim or premises liability claim would be an understatement. Simply put, premises claims in Michigan pose a significant legal hurdle for injured claimants that is not present when an ordinary negligence claim is litigated, because whether a duty is owed depends on whether the condition is open and obvious.

In Michigan, unlike most other jurisdictions, the open and obvious danger doctrine presents a legal question as to whether a duty was owed that must be addressed before a factual determination can be made about whether a duty to protect persons from harm was breached. Thus, most premises liability cases in Michigan are resolved by judges who assess whether the condition was open and obvious, and if so, whether any special aspects made it unreasonably dangerous or effectively unavoidable when encountered.

Currently, the possessor of land is held responsible to persons on its land only when the dangerous condition is hidden from view or the injured person was either "trapped" by the dangerous condition or forced to navigate an unduly risky hazard such as a "30-foot pit". Effectively, the outcome is the same as if a much lower standard of care was applied.[4]

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[4]See Exhibit 7, 38 Tex. Tech. L. Rev. 1, supra, at pp 57-61; and also Rest Torts 3d, ¶ 51, supra, at pp 242-252, and Rest Torts, 3d, Table, ¶ 51, supra, at pp 265-269.

In contrast, the duty imposed on injured claimants in Michigan to use ordinary care at all times to protect themselves from harm exists unabated by any such qualifying factors. In Michigan, as in other jurisdictions, due care is owed whenever an action is undertaken. Failing to do so results in proportional reduction in the damages recovered in a tort case, including damages for economic loss. See MCL 600.2959. In fact, in states like Michigan, failing to do so precludes the injured person from recovering non-economic loss damages including pain and suffering if his or her percentage of fault exceeds fifty (50) percent. Id.

Presumably, if a danger is open and obvious, and a person is nonetheless injured by it, fault will be assessed against that person for failing to use due care to avoid it. But, in Michigan, no such assessment is typically required because the open and obvious rule negates liability completely for the possessor of land unless special aspects are shown.

Effectively, the open and obvious rule as it has been applied in Michigan reinstates a legal hurdle in premises liability cases that is not dissimilar from the contributory negligence rules that were rejected four decades ago when this Court modified the common law in *Placek v City of Sterling Heights*, 405 Mich 638, 275 NW2d 511 (1979). See generally, *Blackwell v Franchi*, 502 Mich 918, 921-922, 914 NW2d 900 (2018). Unfortunately, the end result is that there is little, if any, incentive for possessors of land to ameliorate even known dangerous conditions, because the civil justice system in Michigan does not require them to do so and there is no downside to ignoring such risks.

Michigan law now unduly punishes injured persons for not recognizing hazards, while exonerating possessors of land from any duty to protect persons from harm. It also empowers judges to determine what conditions pose a danger that is open and obvious, when such fact questions are better left to the jury to assess when fault is apportioned.

Viewing cases like this one as ordinary negligence claims, as opposed to premises liability claims, however, is far more consistent (and true) to Michigan's comparative fault rules, which hold all parties responsible to the extent that they contributed to the resulting harm. No one is excused from liability because the person injured could have avoided being harmed if such claims are viewed as ordinary negligence claims. And, conversely, no one is punished disproportionately where the person injured could have avoided harm.

This case clearly should be treated as an ordinary negligence claim, not a premises liability claim. Moreover, this Court should further consider whether the traditional rules applied to premises liability claims in Michigan have outlived their usefulness generally, as many other jurisdictions have concluded. See Ex. 6, Restatement of Torts 3d, Liability for Physical and Emotional Harm, ¶ 51, pp 242-252, and also Table of States, at pp 265-269.

B. The danger posed to motorists in this case is not "lack of signage" but being involved in a head-on motor vehicle collision after exiting the premises as instructed onto an unmarked unidentified one-way street.

The Court of Appeals concluded that this case "sounded in premises liability" because, according to the majority opinion, it was based on a claim that a "dangerous condition on land" existed as a result of the "lack of signage" informing motorists exiting onto Michigan that it was a one-way westbound street. Neither the complaint nor the arguments made by Scola, however, support the majority's characterization of this case.

In truth, Scola argued that Chase Bank was negligent because the exit from its parking lot onto Michigan was not "reasonably safe" for exiting motorists. He did not contend that there was a dangerous condition in the parking lot, nor did he allege that Chase Bank owned or possessed the adjoining land where vehicles traveled westbound on Michigan. Instead, he identified the danger posed as being the one-way westbound

street. Inadequate signage was merely the manner in which Chase Bank breached its duty to warn motorists exiting from its parking lot as instructed of a known dangerous condition.

As in *Langen*, supra, Scola contended that the one-way street posed a danger to motorists exiting from the defendant's parking lot. As in *Fowler*, supra, the danger posed in this case similarly came from oncoming traffic. Signs, as in the *Fowler* case, or the lack of signs, as in this case, merely increased the danger of being struck by a motor vehicle.

In both cases, the danger was oncoming traffic, not signage. But, unlike in this case, the legal issues were not confused in *Fowler* and *Langen* by analyzing the case as a premises claim. Clearly, it was understood in both cases that such a simple tort claim involved an ordinary negligence claim only.[5] This Court should reach the same conclusion.

Here, the Court of Appeals confused the danger posed to motorists exiting (as instructed) from the Chase Bank parking lot with steps that Chase Bank could have taken to ameliorate the risk to motorists exiting onto a one-way street like Michigan. Here, Scola simply did not make the argument below that the Court of Appeals concluded that he did.

To the contrary, Scola argued that inadequate (and confusing) signage breached the duty that Chase Bank owed to motorists exiting from its parking lot onto Michigan. That duty was to protect exiting motorists from a known dangerous condition on the adjoining street, namely, encountering westbound vehicles when exiting as instructed onto Michigan.

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[5]See also *Balcer v Forbes*, 188 Mich App 509, 470 NW2d 453 (1991), where a similar tort claim involving a vehicle traveling the wrong-way on a one-way street after exiting the defendant's parking lot was rejected but only because the wrong-way vehicle traveled "a full city block" before it was struck by a vehicle involved in a high-speed chase and plaintiff, a pedestrian, was struck by that second vehicle; otherwise, there was a duty to use reasonable care to protect other persons from harm that could result from exiting the premises and turning the wrong-way on a one-way street. Again, it was clear that the case involved an ordinary negligence claim, not a premises liability claim.

Because the "dangerous condition" in this case was not on Chase Bank's property, the lower courts clearly erred by analyzing this case as a premises claim, instead of an ordinary negligence claim. Here, as in *Langen*, and *Fowler*, the claim asserted was an ordinary negligence claim and the open and obvious danger rule thus had no application.

II. LEAVE OTHERWISE SHOULD BE GRANTED TO ADDRESS WHETHER THE DANGER OF EXITING ONTO MICHIGAN WAS OPEN AND OBVIOUS AND WITHOUT SPECIAL ASPECTS THAT MADE IT UNREASONABLY DANGEROUS.

A. The danger posed to motorists exiting as instructed from the Chase Bank parking lot onto Michigan Avenue was not open and obvious.

On appeal, the dissenting judge would have held that there was a material fact question in this case as to whether the danger posed to motorists exiting the Chase Bank parking lot was "open and obvious". He would have reversed the trial court's decision to dismiss this particular case on "open and obvious" grounds. In sum, he simply did not agree with the majority view that the danger posed to motorists exiting from the Chase Bank parking lot onto Michigan was open and obvious "because it is not reasonable to expect that an average person with ordinary intelligence would discover upon casual inspection that the intersecting road is a one-way, westbound road." [Ex. 1, Dissent, p 2].

The majority, however, reached the opposite conclusion because it found that the "white lines" on Michigan alone were enough to inform motorists exiting from the Chase Bank parking lot that a right turn was prohibited because Michigan was a one-way street that traveled westbound. No other evidence was cited by the majority to support its ruling other than testimony from the investigating police officer that there likely was a one-way street sign located at the intersection of Wayne Road and westbound Michigan in 2003.

But, in so concluding, the majority erred by failing to focus its attention closely enough on what motorists exiting from the Chase Bank parking lot onto Michigan would have seen.[6]

Here, motorists exiting the Chase Bank parking lot onto Michigan Avenue (in 2003) would have observed that vehicles were instructed to travel northbound towards Michigan because there was a yellow arrow painted on the pavement that pointed towards Michigan and because a blue sign stating "exit only" was posted to the immediate right of the exit. Clearly, motorists would have understood only that they should exit onto Michigan, as instructed, because no information was provided as to the direction of travel on Michigan.

Exiting motorists also likely would have seen white lines marking multiple lanes of travel on Michigan. But, as in *Langen*, supra, there similarly was a large tree near the exit (in same vicinity as the blue "exit only" sign) that would have partially obstructed the view of oncoming traffic from the right as motorists pulled forward in the Chase Bank parking lot towards Michigan. [Ex. 9, Photograph, Exit from Chase Bank onto Michigan (2003)].

Scola presented deposition testimony from two experts in this case who disagreed with the majority's view that the danger posed to exiting motorists was open and obvious. Timothy Robbins, an expert in accident reconstruction and signs, testified that using a yellow pavement arrow to instruct exiting motorists to drive straight ahead was misleading,

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[6]The majority opinion relied also on evidence that there was a one-way sign at the intersection of Wayne Road and westbound Michigan. It is unclear why a one-way sign located at a nearby intersection should have any bearing on whether an average user with ordinary intelligence would discover upon casual inspection that Michigan was a one-way westbound road, as presumably not all motorists using the Chase Bank parking lot passed through that intersection (as Ms. Scola did). If the test is truly objective, not subjective, what motorists may have observed elsewhere is no more significant than what motorists might observe by consulting a road map. If the test is truly objective, only what a person sees exiting the parking lot should be considered.

given the lack of signs in the parking lot warning them that it was a one-way street. [Ex. 1, Dissent, p 2]. Walter Cygan, a safety engineering expert, similarly testified that "a curved painted arrow on the pavement, leading in the correct direction" would have minimized the danger posed to motorists exiting from the parking lot onto Michigan. [Ex. 1, Dissent, p 2].

Scola also offered ample evidence in this case that motorists turning right onto westbound Michigan was common (and not only from the Chase Bank parking lot). David Zuckerman, the owner of the jewelry shop across the street, testified that he saw motorists turn the wrong way onto Michigan "almost daily" when exiting the Chase Bank parking lot. [Ex. 1, Dissent, at p 2]. Similarly, the investigating police officer, Robert Puckett, testified that it was "pretty typical" for motorists to turn the wrong way onto Michigan. He testified that "we have people go the wrong way on Michigan Avenue daily". [Ex. 1, Dissent, p 2].

Even more importantly, Zuckerman testified that he reported the problem to bank employees repeatedly (and he did so before this accident in 2003), but nothing happened. [Ex. 1, COA Unpub Opn, p 2]. No changes were made to the exit from the Chase Bank parking lot onto Michigan. Instead, Chase Bank, having been notified that exiting motorists often turned the wrong way onto Michigan, simply opted to do nothing about the situation.

Clearly, there was sufficient evidence in this case to create a material fact question as to whether the danger of oncoming westbound vehicles was "open and obvious" to motorists exiting as instructed from the Chase Bank parking lot onto Michigan. Therefore, the lower courts erred by dismissing this negligence case on open and obvious grounds. See *Blackwell v Franchi*, 318 Mich App 573, 899 NW2d 415 (2017) (genuine issue of material fact existed as to whether step in dark room was open obvious danger to guests), remanded to Court of Appeals on other grounds, 502 Mich 918, 914 NW2d 900 (2018).

B. Even if the danger was "open and obvious", the potential for harm was unreasonably high because being injured in a motor vehicle collision and suffering severe harm in this case were both very likely to happen.

Here, there was "sufficient evidence" to establish that the danger posed by the exit from the Chase Bank parking lot onto westbound Michigan was not "open and obvious". But, even assuming that the danger posed was "open and obvious" to exiting motorists, this case should not have been summarily dismissed. Here, the risk of exiting motorists turning the wrong way onto a one way street, and thus, encountering on-coming vehicles and running the substantial risk of a likely motor vehicle collision, posed such a high likelihood of harm (or severe harm) that it was an "unreasonably dangerous" condition.

As both Officer Puckett and David Zuckerman testified, motorists often turn the wrong way onto Michigan. It happens daily on Michigan (according to Puckett), and "almost daily" for vehicles exiting from the Chase Bank parking lot onto Michigan (according to Zuckerman). Upon doing so, vehicles turning the wrong way onto westbound Michigan immediately encounter oncoming westbound traffic on Michigan where there are multiple lanes of travel due to the high volume of motor vehicles that use that busy street.

Clearly, the likelihood of being injured after mistakenly turning right onto westbound Michigan is very high. Furthermore, the likelihood of severe harm is also very high because turning the wrong-way onto a busy one-way street often results in a high-impact collision.

Here, the lower courts erred by focusing myopically on whether the exit from the Chase Bank parking lot onto westbound Michigan was "something out of the ordinary" (or "special") as the primary means of determining whether it contained "special aspects" that made it unreasonably dangerous despite its being open and obvious as discussed in Lugo.

The focus on whether an exit onto a one-way street from a parking lot is "out of the ordinary" and therefore, "special", is not what the Lugo Court was concerned about. In *Lugo*, the Court made it clear that the concern is whether the condition, despite being open and obvious, poses "a uniquely high likelihood of harm or severe harm." Thus, the test is not whether other examples of similarly dangerous conditions can be identified. The test is whether there is "a uniquely high likelihood" that persons will be harmed, or alternatively, whether it is highly likely that "severe harm" will result if someone happens to be injured.

The Court of Appeals, in its majority opinion, acknowledged that Scola "incurred a serious injury to his kidney" and then correctly disregarded it because the test is not whether Scola sustained severe harm, it is whether the likelihood was "uniquely high" that either harm would result or that severe harm would result if a person turned right onto Michigan. Even an open and obvious condition is unreasonably dangerous if the likelihood is unduly high that someone will be harmed by it, or alternatively, it is highly likely that if someone is harmed, that person will be severely harmed. In this instance, both are true.

Unfortunately, that test was not applied when the lower courts assessed whether the potential for harm in this case was enough to make it unreasonably dangerous for motorists exiting from the parking lot onto Michigan. Instead, the lower courts engaged in a subjective assessment of whether the danger that oncoming westbound vehicles posed to motorists exiting the parking lot onto Michigan was "out of the ordinary", i.e., "special" (or a "typical" hazard that motorists encounter when exiting from a business parking lot).

Clearly, going the wrong-way on a busy one-way street presents very high odds of severe harm to motorists (and passengers) because it results in high-impact motor vehicle collisions. It also was very likely to happen in this case, as evidenced by the testimony from

the jewelry shop owner, David Zuckerman, that it happened "almost daily". Consequently, the likelihood of harm to motorists exiting the Chase Bank parking lot was also very high. Thus, there was also a material fact question here as to whether the potential for harm was so high that the condition was unreasonably dangerous, even if it was open and obvious.

Surprisingly, few post-*Lugo* cases have addressed potential for harm as a "special aspect" capable of rendering even an open and obvious condition unreasonably dangerous. By and large, the focus in post-*Lugo* cases has been on whether condition was "effectively unavoidable". But, this Court has recognized that the potential for harm must be considered in determining whether the open and obvious rule precludes a claim.

While most post-*Lugo* cases are unpublished, and thus, not precedential, this Court has found the potential for harm to be the deciding factor as to whether a tort claim is barred by the open and obvious rule in several published post-*Lugo* opinions. See generally, *Woodbury v Bruckner,* 248 Mich App 684; 650 NW2d 343 (2001) (10 foot high unguarded balcony was unreasonably dangerous, even though open and obvious), *Jimkoski v Shupe*, 282 Mich App 1, 763 NW2d 1 (2008) (frozen straw bale that dislodged when lifted up on a forklift and fell on the plaintiff who was working below it had "special aspects" that made it unreasonably dangerous; *O'Donnell v Garasic*, 259 Mich App 569, 676 NW2d 213 (2003) (multiple "inadequacies" made stairway unreasonably dangerous).

To reiterate, the outcome in this case is not consistent with this Court's holding in *Lugo*. In *Lugo,* this Court recognized that even open and obvious dangers contain "special aspects", and thus, are unreasonably dangerous, if the potential for harm is unduly high. Here, the lower courts erred by holding that the danger of turning right onto westbound Michigan from the Chase Bank parking lot did not pose "a uniquely high likelihood of harm

or severe harm", because "an exit from a business without one-way warning signs is a typical hazard", and thus, not "out of the ordinary" or "special". But, in this case, there was no assessment of the potential harm in making this determination as required by Lugo. Instead, the lower court judges simply took notice in this case that it was a "typical hazard".

This Court should reverse the outcome in this case, even if the open and obvious rule is applied, and adopt the dissenting judge's opinion, which found that there was a material fact question in this case with regard to whether the exit from the Chase Bank parking lot onto Michigan was unreasonably dangerous under the circumstances because exiting motorists were not informed that Michigan Avenue is a one-way westbound street.

CONCLUSION

In Michigan, the issue of whether a tort claim is a premises liability claim or an ordinary negligence claim often determines whether a claim survives summary disposition. Clearly, this Court's decision in *Lugo* was the catalyst for legal analysis shifting in Michigan to whether a tort claim fits within the "premises liability" or the "ordinary negligence" box.

In Michigan, judges must disregard the labels used in the complaint, discern what is actually being claimed in a case, and then put that case into the correct box. While more often than not such cases (in Michigan) end up being resolved as premises claims, and thus, the open and obvious rule as defined by Lugo is applied, the results where there is a dispute over the essence of the legal claim asserted are neither consistent nor uniform.

This case is but one example of a case that seemingly straddles the line between what is considered a premises liability claim and what is viewed as an ordinary negligence claim. The issues here are pretty typical (but not identical obviously) to other disputes that have arisen since *Lugo* was decided in 2001 over the nature of the claims being asserted.

This Court should review this case not simply because, as Scola contends, it was wrongly decided, but also because, as things currently stand in Michigan, judges are being routinely asked to make determinations that are better left to the jury as factual questions. Nationally, the trend in tort law clearly has moved in the opposite direction from Michigan.

Yet, the legal analysis now used for ordinary negligence claims in Michigan is the same (or similar) to how all such claims are assessed under the Restatement of Torts 3d. This case, as Scola contends, is an ordinary negligence claim, and not a premises claim. Thus, it presents an opportunity for this Court to reevaluate the common law in such cases.

RELIEF REQUESTED

Plaintiff/Appellant, Frank Scola, requests that this Court grant leave to appeal to address whether this case is an ordinary negligence claim or a premises liability claim and whether the danger posed to motorists exiting the Chase Bank parking lot onto Michigan was open and obvious and without special aspects that made it unreasonably dangerous. Alternatively, he asks this Court to peremptorily reverse the trial court's decision to summarily dismiss this case on open and obvious grounds (and in so doing, also reverse the majority decision affirming that ruling on appeal) and if appropriate, adopt the dissenting judge's opinion as its own in this case. He further requests that this case be remanded to the trial court for further proceedings, including a jury trial, on his claim, whether viewed by this Court as a premises liability claim or an ordinary negligence claim.

Respectfully submitted:

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/s/ Steven A. Hicks

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