STATE OF MICHIGAN

IN THE SUPREME COURT

FRANK ANTHONY SCOLA,

Plaintiff-Appellant,

v

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, and JPMORGAN CHASE & CO.,

Defendants-Appellees,

and

KATHLEEN SCOLA and ESTATE OF JOHN BARROW BROWN (DECEASED), and CITY OF WAYNE, jointly and severally,

Defendants.

SC No. 158903
COA No. 338966
LC No. 15-002804-NI
(Wayne Circuit Court)

_____/

DEFENDANTS-APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellees, JP Morgan Chase Bank, National Association and JP Morgan Chase & Co. state that the Statement of Appellate Jurisdiction of Plaintiff-Appellant Frank Anthony Scola is complete and accurate.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFF'S CLAIM SOUNDS IN PREMISES LIABILITY AND FAILS BECAUSE THE ALLEGED CONDITION ON THE CHASE DEFENDANTS' PROPERTY WAS OPEN AND OBVIOUS AND HAD NO SPECIAL ASPECTS?

Plaintiff-Appellant says, "No."

Defendants-Appellees say, "Yes."

The Wayne County Circuit Court says, "Yes."

The Michigan Court of Appeals says, "Yes."

II.

ALTERNATIVELY, WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE CHASE DEFENDANTS WHERE PLAINTIFF CANNOT SUSTAIN AN ORDINARY NEGLIGENCE CLAIM BECAUSE THE CHASE DEFENDANTS OWED NO DUTY TO PLAINTIFF TO WARN OF THE PRESENCE OF A ONE-WAY STREET AND PLAINTIFF FAILED TO OTHERWISE ESTABLISH PROXIMATE CAUSE?

Plaintiff-Appellant says, "No."

Defendants-Appellees say, "Yes."

The Wayne County Circuit Court was presented with but did not address this question.

The Michigan Court of Appeals affirmed on a different basis and did not address this question.

III.

ALTERNATIVELY, WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE CHASE DEFENDANTS ON ANY CLAIM BASED ON DEFECTIVE DESIGN OF THE PARKING LOT WHERE PLAINTIFF FAILED TO PRESENT SUFFICIENT EXPERT TESTIMONY REGARDING MAGNITUDE OF THE RISK AND REASONABLENESS OF AN ALTERNATIVE DESIGN?

Plaintiff-Appellant says, "No."

Defendants-Appellees say, "Yes."

The Wayne County Circuit Court was presented with but did not address this question.

The Michigan Court of Appeals affirmed on a different basis and did not address this question.

COUNTER-STATEMENT OF FACTS

A. Introduction.

This is a personal injury action brought by Plaintiff-Appellant, Frank Anthony Scola ("Plaintiff"), against Defendants-Appellees, JP Morgan Chase Bank, National Association, and JP Morgan Chase & Co. ("the Chase Defendants"), arising from a June 27, 2003 accident that occurred when Kathleen Scola ("Ms. Scola"), Plaintiff's mother, drove the wrong way on a one-way stretch of Michigan Avenue in the City of Wayne, Michigan. Plaintiff, who was a minor passenger in Ms. Scola's vehicle, filed suit against the Chase Defendants and others, alleging that the Chase Defendants had a "duty to maintain the transition from [their] private driveway/parking lot to West Michigan Avenue in a condition safe and fit for public travel" and that the lack of proper signage, traffic control devices, or warnings "was an unsafe and defective condition." (**Exhibit A**, First Amended Complaint, ¶¶44-45). On the Chase Defendants' motion for summary disposition, the Honorable Prentis Edwards of the Wayne County Circuit Court granted summary disposition on one of the several grounds presented (the remaining grounds left unaddressed and presented here as alternative arguments to deny leave to appeal). The trial court found the claim sounded in premises liability, and the Chase Defendants owed no duty of care to Plaintiff under the open and obvious doctrine, applicable here without any special aspects.

The Michigan Court of Appeals affirmed in a split decision. (**Exhibit Q**, Majority and Dissenting Opinions). The Majority Opinion (O'Connell, P.J., and Servitto, J.)

determined that the cause of action sounded in premises liability, not ordinary negligence, and that an average person with ordinary intelligence would have discovered upon casual inspection the traffic signs at the intersection and white lines on the roadway upon casual inspection and the absence of signs in the parking lot. (**Exhibit Q**, Majority Opinion, pp 3, 5). The Majority Opinion also found that, although Plaintiff did not assert the existence of any special aspects in the lower court or in the Michigan Court of Appeals, none existed in this case because "[a]n exit from a business without one-way warning signs is a typical hazard that does not constitute a limited extreme situation," *Id*. at 5, citing *Hoffner v Lanctoe*, 492 Mich 450, 472; 821 NW2d 88 (2012).

The Dissenting Opinion (Cavanagh, J.) agreed with the Majority Opinion that the cause of action sounded in premises liability, not ordinary negligence, but found there was a question of fact on whether the Chase Defendants had a duty to warn drivers existing the parking lot that they must only turn left (i.e., with traffic on the one-way street). (*Id*. at p 3, Dissenting Opinion). "[I]t 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." *Id*. at 3. The Court of Appeals subsequently denied Plaintiff's motion for reconsideration, 2-1.

The Chase Defendants request this Court deny leave to appeal because the trial court correctly determined that Plaintiff's claims sound in premises liability and the lack of signage warning of the presence of a one-way street is an open and obvious danger

with no special aspects. In the alternative, any claim for ordinary negligence fails because Plaintiff cannot establish a duty on the part of the Chase Defendants to warn of the presence of a one way street and Plaintiff's causation evidence is purely speculative. Further, any design defect claim fails for the additional reason that Plaintiff presented insufficient expert testimony on the magnitude of the risk and the reasonableness of alternative designs.

B. Material facts.

1. Kathleen Scola drove the wrong way on a one-way street.

According to Ms. Scola, on June 27, 2003, she was driving a 1996 Ford Taurus station wagon with seven people in the car, including Plaintiff, who was seven years old at the time. (**Exhibit B**, Deposition of Kathleen Scola ("Scola dep") pp 11-12; **Exhibit A**, First Amended Complaint, ¶¶ 9, 14-15). Ms. Scola testified that she was on her way to a testing center in the city of Wayne, Michigan, related to a job for which she had applied. Ms. Scola's sister, who was going to babysit for her, as well as five other kids, were with her in the car. (**Exhibit B**, Scola dep, pp 14-16).

Ms. Scola was traveling south on Wayne Road and needed to proceed east on Michigan Avenue in order to get to the testing center. (**Exhibit B**, Scola dep, pp 18-19). Ms. Scola claimed that, while traveling south on Wayne Road, she did not realize that she passed Michigan Avenue until after she done so. (*Id*., pp 21-23). Ms. Scola denied noticing the one-way sign and no left turn signs present in the intersection of Wayne Road and Michigan Avenue (*id*, pp 21, 86). The presence of this signage at the time of

the accident was confirmed by responding officer, Lieutenant Robert Puckett (see **Exhibit C**, Photo; **Exhibit D**, Deposition of Lieutenant Robert Puckett, pp 16-17).

After passing through the intersection of Wayne Road and Michigan Avenue, Ms. Scola decided to turn into the then Bank One parking lot and cut through the parking lot for the sole purpose of getting onto Michigan Avenue. (**Exhibit B**, Scola dep, pp 23-24). Ms. Scola had never been a customer of Bank One or Chase Bank and had no intention of doing any banking or other business at Bank One as she turned into its parking lot. (*Id*., pp 23-24, 45,). After entering the parking lot and proceeding to parking lot's exit to westbound Michigan Avenue and before turning onto Michigan Avenue, Ms. Scola testified that she "paused," was not sure if she put her turn signal on, looked both ways onto Michigan Avenue. Instead of making a left turn to proceed with the one-way traffic, Ms. Scola turned right – the wrong way – into oncoming traffic on westbound Michigan Avenue. (*Id*., pp 24-25).

Ms. Scola conceded that she was in a rush to get to her test and was stressed when she realized that she had driven through the intersection of Wayne Road and Michigan Avenue. The Chase Defendants' parking lot was the first turn that she was able to make in order to cut across to Michigan Avenue. (**Exhibit B**, Scola dep, pp 46-47). Ms. Scola was in the parking lot for less than 30 seconds and did not look for any

directional signage on the bank's property – she simply looked left and right down Michigan Avenue to see what traffic was doing. (*Id*., pp 48, 86).[1]

As she pulled out eastbound into the second lane of westbound Michigan Avenue, Ms. Scola saw three cars approaching her, decided to move her car to the right lane, and then attempted to stop her car. (**Exhibit B**, Scola dep, p 28). Ms. Scola then braced herself for impact because it was clear that she was going to be hit by another car and was, in fact, hit by a 1990 Lincoln driven by John Barrow Brown. (**Exhibit B**, Scola dep, p 29; **Exhibit A**, First Amended Complaint, ¶ 22). As a result of the accident, Ms. Scola was given a ticket, went to court to fight the ticket, and was found responsible for causing the accident. (**Exhibit B**, Scola dep, pp 40-41; **Exhibit D**, Puckett dep, p 13; **Exhibit G**, Police Report and Ticket).

2. The Chase Defendants' parking lot was not in violation of any standard, code, ordinance, or statute.

Lieutenant Puckett has been employed with the City of Wayne Police Department for over 20 years. He held the rank of patrol officer on the date of the accident. (**Exhibit D**, Puckett dep, p 6). One of Lieutenant Puckett's job duties as a patrol officer

[1] Susan Seibert, Ms. Scola's sister who was present in the car with her, verified that Ms. Scola had been "frazzled" right before the accident because she was running late for her appointment. (**Exhibit E**, Deposition of Susan Seibert ("Seibert dep"), pp 7, 19). Like Ms. Scola, Ms. Seibert was not looking for directional signs as they cut through the bank parking lot, but rather, Ms. Seibert was looking at the traffic on Michigan Avenue as Ms. Scola was pulling out. (*Id*., pp 18-19). Likewise, Plaintiff, who was seven years old at the time of the accident, remembered that his mother cut through the parking lot of the bank. He did not otherwise see the actual collision. (**Exhibit F**, Plaintiff's dep, pp 2-28).

was to investigate automobile accidents and prepare police reports. (*Id*.). According to Lieutenant Puckett, at the time of the accident, there was a one-way sign right above the Michigan Avenue sign at the intersection of Wayne Road and Michigan Avenue, as well as signs posted on Michigan Avenue. (*Id*., pp 16-17. See also **Exhibit C**, Photograph). There was also a no left turn sign in that same intersection. (**Exhibit D**, Puckett dep, p 17). Lieutenant Puckett confirmed that there is no requirement that the Chase Defendants' place any warning signs or other directional signs on its property. (*Id*., p 25).

Likewise, Walter Cygan, one of Plaintiff's accident reconstructionist, agreed that there is no statute, ordinance, code, or standard that would have required the Chase Defendants to have placed directional or warning signs on the driveway to warn drivers not to the turn the wrong way on to a one-way street or that doing so could be dangerous. (**Exhibit H**, Walter Cygan's Opinion Letter; **Exhibit I**, Deposition of Walter Cygan ("Cygan dep"), pp 70-72, 86).

C. Course of proceedings.

1. The allegations.

On March 4, 2015, Plaintiff filed a complaint (subsequently amended) against the Chase Defendants, Ms. Scola, and the Estate of John Barrow Brown (deceased) in Wayne County Circuit Court. (**Exhibit A**, First Amended Complaint). As against the Chase Defendants, Plaintiff asserted negligence and successor liability based on their "assumed responsibility for placement of traffic control signals, lane markings,

channelization, and all other matters relating to the design, construction, and maintenance of its parking lot/driveway . . . ." (*Id*., ¶ 43). Plaintiff asserted that the Chase Defendants had a "duty to maintain the transition from [their] private driveway/parking lot to West Michigan Avenue in a condition safe and fit for public travel" and that the lack of proper signage or traffic control devices "was an unsafe and defective condition." (*Id*., ¶¶ 44-45). Plaintiff concluded that a failure to perform these duties proximately caused the accident resulting in the damages he sustained. (*Id*., ¶¶ 49-52, 55). Count VI asserted res ipsa loquitur against the Chase Defendants. (*Id*., ¶ 66). The Chase Defendants answered the complaint and amended complaint, denying liability and asserting affirmative defenses.

2. Motion for summary disposition.

After discovery took place, the Chase Defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). The Chase Defendants first argued that Plaintiff could not establish that they owed him any duty under the circumstances because they had no legal duty to place signs on their private property. (Motion for Summary Disposition, pp 5, 7). Additionally, the Chase Defendants argued that they owed no duty to Plaintiff or Ms. Scola because Plaintiff and Ms. Scola were neither invitees nor licensees, but were trespassers on their property – only using it to cut through to Michigan Avenue. (*Id*., p 7).

The Chase Defendants next argued that the open and obvious doctrine applied to all theories of liability advanced in Plaintiff's complaint, including any allegation of an

alleged design defect on Plaintiff's premises. (Motion for Summary Disposition, p 10). The Chase Defendants contended that any danger associated with turning the wrong way onto a one-way street is an open and obvious danger to an average person with ordinary intelligence and is a condition faced by drivers every single day – not one with special aspects. (*Id*., p 11). The Chase Defendants also argued that Plaintiff failed to establish that a dangerous or defective condition existed and thus could not show that the premises were defectively designed, unreasonably dangerous, or constituted any type of nuisance because he presented no expert testimony to support his allegations. (*Id*., p 12).

The Chase Defendants further asserted that any suggestion that directional or warning signs would have prevented Ms. Scola's accident was based on pure speculation and conjecture and could not support Plaintiff's claims. (Motion for Summary Disposition, p 15). Ms. Scola admitted that she did not look for signs on the bank's property and that she did not notice the one-way signs and no left turn signs at the intersection of Wane and Michigan Avenue. (*Id*., pp 16-17).

Finally, the Chase Defendants argued that there existed no factual or legal basis for Plaintiff's nuisance claims and that the res ipsa loquitur claim was subject to dismissal because it could not stand as a separate count but was merely an alternate method of proving negligence. (Motion for Summary Disposition, pp 17-19).

Plaintiff responded that the open and obvious doctrine is not a defense to an ordinary negligence claim and thus not a factor in determining whether the failure to provide a warning here was negligence. (Plaintiff's Response to Chase Defendants' Motion for Summary Disposition, p 10). Plaintiff then contended that the doctrine did not apply regardless because a neighboring business owner often had observed people turning the wrong way out of the parking lot and the investigating police officer allegedly commented that "this happens all the time there." (*Id*., p 13).

With respect to ordinary negligence, Plaintiff argued that the Chase Defendants owed him a duty because, among other reasons, it was foreseeable that there could be injury from a motor vehicle crash caused by a person exiting the driveway and turning the wrong way and because the Chase Defendants allegedly had knowledge that vehicles often turned the wrong way out of the driveway. (Plaintiff's Response to Chase Defendants' Motion for Summary Disposition, pp 14-20).

The Chase Defendants filed a reply brief, first reiterating that they had no legal duty to place directional or warning signs on their private property, as even Plaintiff's own expert agreed, and Plaintiff presented no legal authority to the contrary. (Chase Defendants' Reply Brief in Support of Motion for Summary Disposition, pp 3-4). Since there existed no legal duty, the Chase Defendants contended that it mattered not whether this was a premises or ordinary negligence case. (*Id*., p 4). However, the Chase Defendants further pointed out that Plaintiff's amended complaint (as well as his

response to the motion for summary disposition) demonstrated that Plaintiff's theory sounded in premises liability. (*Id*., pp 4-5). The Chase Defendants also emphasized that they disputed the existence of a dangerous condition and did not raise a notice issue, and therefore, Plaintiff's notice argument was irrelevant. (*Id*., p 6). Finally, the Chase Defendants pointed out that Plaintiff failed to respond to their arguments regarding an unsupported design defect claim, lack of proximate cause (because of speculation and conjecture), and failure to state a nuisance or res ipsa loquitur claim. (*Id*.).

3. The hearing on summary disposition.

On January 13, 2017, the trial court held a hearing on the Chase Defendants' motion as well as motions brought by Ms. Scola in which the Brown Estate concurred.[2] The trial court granted summary disposition to the Chase Defendants, explaining:

> Even if we assume Plaintiff was an invitee this Court finds that the action sounds in premises liability. Premises possessor does not owe a duty to protect against dangerous conditions that are open and obvious unless the risk of harm unreasonable -- is unreasonable despite the open and obvious danger.
>
> In order to be considered unreasonably dangerous there must be something out of the ordinary, special about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. *A one-way lane is an everyday occurrence that all drivers face everyday. We assume a reasonable driver would take appropriate care for one's own safety*.

[2] The City of Wayne also moved for summary disposition and was dismissed from the case on January 5, 2017. Defendant Kathleen Scola's motion for summary disposition was denied (1/20/17 Order). Later, the trial court entered stipulated orders of dismissal with respect to Ms. Scola (4/13/17 Order) and the Brown Estate (6/6/17 Order).

> In terms of, of the nuisance issue this Court finds that the type of nuisance Plaintiff could conceivably claim existed in this matter could -- would be a public nuisance. Plaintiff cannot maintain a claim for a public nuisance in this matter because there is no unreasonable interference with the common right enjoyed by the general public in this case. Defendant's parking lot was not open to the general public. For this reason alone Plaintiff's nuisance claim, whether they may be a nuisance per se or in fact is dismissed as well. Chase's motion for summary is granted.

Tr 1-13-17, pp 14-15 (emphasis added). The trial court entered a corresponding order on January 31, 2017. (**Exhibit J**).

Plaintiff then moved for reconsideration, first arguing that the open and obvious doctrine could not apply to this case because, in Plaintiff's view, the defective condition was a failure to warn and "Michigan Avenue is not a condition on the premises." (Plaintiff's Motion for Reconsideration, p 4). Even if the doctrine did apply, Plaintiff maintained that the one-way nature of Michigan Avenue was not open and obvious. (*Id*.). Plaintiff also insisted that the Chase Defendants owed him a duty. (*Id*., pp 5-9). The trial court entered an order on February 27, 2017 finding no palpable error and denying Plaintiff's motion for reconsideration. (**Exhibit K**, Order Denying Motion for Reconsideration).

4. The Court of Appeals decision.

Plaintiff's appeal followed, in which he challenged the dismissal of his premises counts, only, without any challenge to the dismissal of his nuisance and res ipsa loquitur claims. In his appellate brief, Plaintiff did not raise the issue of "special aspects" either as a separate question or anywhere in the body of the appellate brief. This echoed

Plaintiff's failure to raise "special aspects" anywhere in his lower court response brief in opposition to the Chase Defendants' motion for summary disposition.

After the Chase Defendants filed their brief and oral argument was held, the Court of Appeals issued its Majority Opinion and Dissenting Opinion. In the Majority Opinion, the appellate court acknowledged that Plaintiff had argued that the case presented as one for ordinary negligence, not premises liability, but concluded that the activity or conduct of which Plaintiff complained was a condition of the land, namely the lack of placement of traffic and control signals, lane markings, channelization, or other matters relating to the design, construction and maintenance of the Chase Defendants' parking lot/driveway where that driveway met West Michigan Avenue. (**Exhibit Q**, Majority Opinion, p 3). The Majority Opinion specifically noted that Plaintiff did not allege in his complaint that the one-way nature of Michigan Avenue itself was a dangerous condition, but rather argued that the failure of the Chase Bank Defendants to place warning signs at the exit of the parking lot at Michigan Avenue was the alleged defect. *Id*. at 4. Then the Majority Opinion found that the lack of signage regarding the one-way nature of Michigan Avenue was open and obvious, and that "[a]n average person with ordinary intelligence would have discovered that Michigan Avenue was one-way at the exit of the bank parking lot upon casual inspection without signs present." *Id*. at 4. As support, the Majority Opinion noted that Lieutenant Puckett testified at his deposition that there were one-way signs at the intersection of Wayne

Road and Michigan Avenue (through which Ms. Scola had driven passed), and that Timothy Robbins, one of Plaintiff's experts, testified that there were only white lines on the roadway of Michigan Avenue, indicating that it was a one-way street. *Id*. at 4-5. "An average person with ordinary intelligence would have discovered the traffic signs at the intersection and the white lines on the roadway upon casual inspection in the absence of signs in the parking lot." *Id*. at 5. Quoting the trial court, "A one-way lane is an everyday occurrence that all drivers face every day [sic]." *Id*.

Next, the Majority Opinion found that "[a]lthough Plaintiff did not assert the existence of any special aspects in the lower court or on appeal," none existed here. *Id*. "An exit from a business without one-way warning signs is a typical hazard that does not constitute a limited extreme situation." *Id*. The Majority Opinion further found that the alleged hazard was not effectively unavoidable because the driver, Kathleen Scola, could have turned around in a different business locale, or taken other roads to reach east bound Michigan Avenue, but that she chose the bank parking lot because it was the first available drive to turn into after she accidently drove through the intersection. *Id*. at 6. The Majority Opinion specifically noted that "there were other exist driveways in the bank parking lot," but that Kathleen Scola drove the drive-thru teller driveway that exited on to Michigan Avenue but could have used another parking lot exit on to Michigan Avenue, thus indicating that she was not required to confront the alleged hazard under these circumstances presented. *Id*.

As previously explained, the Dissenting Opinion agreed that the case sounded in premises liability, and thus subject to the open and obvious doctrine. (**Exhibit Q**, Dissenting Opinion, p 1). However, the Dissenting Opinion found that there was a genuine issue of material fact as to whether the Defendants had a duty to warn the drivers exiting the parking lot at the intersection that there was a one-way, westbound road, finding that it was not open and obvious as "evidenced by the fact that drivers turned in the wrong direction from the Defendants' parking lot on almost a daily basis." *Id*. The Dissenting Opinion concluded that the open and obvious doctrine was inapplicable because the 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." *Id*.

Plaintiff then filed a motion for reconsideration. Taking his lead from the Dissenting Opinion, Plaintiff argued that the condition described in the Majority Opinion was not open and obvious because other persons than Kathleen Scola had also turned the wrong way on the one-way street of Michigan Avenue. Plaintiff also argued that the condition – lack of signage – posed a uniquely high likelihood of harm and thus constituted a "special aspect" to be resolved by the jury. Finally, Plaintiff argued once again that the case presented was one for ordinary negligence rather than premises

liability, notwithstanding that all three judges on the Michigan Court of Appeals panel disagreed with this proposition.

Through an order dated November 20, 2018, the motion for reconsideration was denied. (Plaintiff's Exhibit 2). Plaintiff's application followed.

THE FAILURE TO ESTABLISH THE NEED FOR SUPREME COURT REVIEW

Plaintiff contends the issues presented warrant Supreme Court review for several reasons, none of which has merit. *First*, Plaintiff contends that this case presents a good opportunity for this Court to resolve the outstanding question of whether cases such as this should be considered premises liability or ordinary negligence cases. Yet, there was no dissent from the Michigan Court of Appeals on this point. Equally important, Plaintiff fails to earmark a published Court of Appeals decision contrary in logic and result to this decision, such that there is a conflict that needs to be resolved by this Court. Nor does Plaintiff identify a decision from this Court that is contrary to the appellate decision in this case.

Plaintiff argues there is a conflict between this case and that of the unpublished Court of Appeals decision in *Fowler v Menard, Inc*, 2015 WL 5436725 (Mich App, September 15, 2015) (Unpublished) (Supreme Court Docket No. 152519, orders dated April 29, 2016 and June 30, 2017) (also found at Plaintiff's Exhibit 8). This is a curious argument because this Court's April 29, 2016 order in *Fowler* asked those parties to address whether there were "special aspects" that could create liability for even an open and obvious hazard. "Special aspects" are academic and do not apply unless, in the first instance, there is a finding that the open and obvious doctrine applies, which in turn requires a finding that a premises liability case was involved. Review of the Court of Appeals decision in *Fowler* reveals no debate, let alone resolution, on whether the case involved premises liability or ordinary negligence. Instead, the Court talked of a

special aspect, specifically acknowledging that it applies "[w]hen an activity or condition on an owner's land creates a risk that is unreasonably dangerous." *Fowler*, 2015 WL 5436725 at *4.

As earlier indicated in this Answer, "special aspects" were not even raised in the lower court level or by Plaintiff at the Court of Appeals level. So Plaintiff is wrong on each front. *Fowler* does not involve the question of premises liability versus ordinary negligence. Instead, *Fowler* involved an issue – "special aspects" – that was not even argued by plaintiff in the trial court or in the Michigan Court of Appeals. This is hardly the right case for Supreme Court review.

Plaintiff cites *Balcer v Forbes*, 188 Mich App 509; 470 NW2d 453 (1981) as an example of where a "similar tort claim involving a vehicle traveling the wrong-way" constitutes an ordinary negligence claim. Plaintiff's application, p 11, fn 5. Notably, this 1991 decision not only failed to discuss open and obvious/premises liability, but was decided well-before *Buhalis* in 2012, the seminal case involving premises liability versus ordinary negligence.

<u>*Second*</u>, and in related fashion, Plaintiff cites to a law review article and the Restatement of Torts 3d arguing that whether a case is premises liability or ordinary negligence needs to be considered for the evolution of continuing tort law. This argument lacks merit because Michigan law is steadfast with respect to what constitutes a premises liability versus an ordinary negligence case. In essence, the "evolution"

Plaintiff desires is simply a change in Michigan law on facts which do not warrant this Court's review. As indicated in the previous paragraph, none of the Court of Appeals judges had difficulty finding that this was a premises liability case, thus subject to the open and obvious doctrine.

Third, Plaintiff argues that the ruling that this case sounds in premises liability is "clearly erroneous," such that Supreme Court review is required. Yet Plaintiff fails to explain away his own allegations contained in the First Amended Complaint that the Chase Bank Defendants assumed responsibility for "placement of traffic control signals, lane markings, channelization, and all other matters relating to the design, construction, and maintenance *of its parking lot/driveway*… ." Plaintiff is clearly complaining of a situation involving the premises of the Chase Bank Defendants, and accordingly the Court of Appeals decision is not only correct but anything but "clearly erroneous."

For all these reasons, Plaintiff has failed to make a convincing case that this Court's review is justified under any of the criterion found in MCR 7.305(B)(1)(6).

ARGUMENT I

THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFF'S CLAIM SOUNDS IN PREMISES LIABILITY AND FAILS BECAUSE THE ALLEGED CONDITION WAS OPEN AND OBVIOUS AND HAD NO SPECIAL ASPECTS.

A. Standard of review and supporting authority.

The Court reviews de novo a trial court's decision on a motion for summary disposition. *Dybata v Wayne Co*, 287 Mich App 635, 638; 791 NW2d 499 (2010). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). In evaluating a motion under MCR 2.116(C)(8), a court considers only the pleadings and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition is appropriate "only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 119 (citation and quotation marks omitted).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 343 (2004). The Court reviews a motion brought under this rule by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate if there is no genuine issue

regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the non-moving party. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Additionally, "[t]his Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration." *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. Introduction – summary.

Plaintiff alleged that the Chase Defendants' driveway lacked warning signs, directional signs, or other traffic control devices to inform Ms. Scola of the one-way nature of West Michigan Avenue, and that this condition caused the accident and Plaintiff's injuries. Such assertions constitute allegations of a dangerous condition on the land, i.e., on the Chase Defendants' driveway, and therefore, Plaintiff's claim sounds in premises liability and is subject to the open and obvious doctrine. Here, any alleged dangerous condition in a driveway that opens onto a one-way street but which has no directional or warning signs is open and obvious because an average user with ordinary intelligence knows of the potential risk and danger of being hit by a car if driving the wrong way on a one-way street and, most importantly, an average driver with ordinary intelligence would have been able to discover the danger and the risk presented upon

casual inspection. Plaintiff did not preserve the question of "special aspects" and even had he done so, the only special aspect asserted here – unreasonably dangerous – is inapplicable under the facts presented. The trial court thus properly granted summary disposition to the Chase Defendants.

C. Governing law.

In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty owed depends on the plaintiff's status. "Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000), as amended (Sept. 19, 2000). "A 'trespasser' is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by willful and wanton misconduct." *Id*. (citation and quotation marks omitted). "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of

inspection or affirmative care to make the premises safe for the licensee's visit." *Id*. (citations omitted). With respect to an "invitee," this Court has explained:

> "An 'invitee' is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception. The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law."

Id. at 596–597.

The trial court decided the case by assuming that Plaintiff was an invitee.[3] Absent special aspects, a landowner's duty to an invitee "generally does not require the owner to protect an invitee from open and obvious dangers." *Benton*, 270 Mich App at 440–441. If "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 harm despite knowledge of it on behalf of the invitee." *Ververis v Hartfield Lanes*, 271 Mich App 61, 64; 718 NW2d 382 (2006) (citation omitted).

[3] As noted by the Majority Opinion, the trial court did not determine the status of Plaintiff while he was on the premises of the Chase Defendants. (**Exhibit Q**, Majority Opinion, p 3). In the unlikely event this case returns for further trial, analysis of the open and obvious question assuming Plaintiff was an invitee is not an admission or a concession that Plaintiff has established such status.

When determining if a condition is open and obvious, this Court considers whether "it is reasonable to expect that an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Hoffner*, 492 Mich at 461. "This is an objective standard, calling for an examination of the objective nature of the condition of the premises at issue." *Id*. (citation omitted). Indeed, "[t]he objective standard recognizes that a premises owner is not required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land. This standard thus provides predictability in the law." *Id*. at n 15.

Finally, it is well established that "even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury," "the action sounds in premises liability rather than ordinary negligence," and is thus subject to the open and obvious doctrine. *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691-92; 822 NW2d 254, app den 493 Mich 901(2012).

D. Argument.

1. Plaintiff alleged that the lack of signage in the Chase Defendants' driveway was a defect and constituted a dangerous condition on the premises, and therefore, his claim sounds in premises liability.

Plaintiff's amended complaint alleges that a defect on the Chase Defendants' property – a lack of directional signs, warnings, or other traffic control devices related to the one-way nature of Michigan Avenue – caused Ms. Scola's accident and thus

Plaintiff's injuries. Plaintiff has alleged a dangerous condition on the land, meaning that his claim sounds in premises liability and is subject to the open and obvious doctrine.

Plaintiff protests that the "one-way nature of Michigan Avenue" is a dangerous condition but it is not present on Plaintiff's land, and therefore, his claim is not one that sounds in premises liability but ordinary negligence. (Plaintiff's Application, pp 11-13). However, "[t]he gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (quotation marks and citations omitted).

For example, in *Buhalis*, a cyclist filed a negligence complaint against a nursing home after she had slipped and fell on ice in the patio area of the nursing home. Plaintiff argued that the property design allowed ice to form on the patio. In an attempt to avoid the open and obvious doctrine, by which no duty of care extends to protect a plaintiff from an open and obvious condition, the plaintiff pled that her action sounded in negligence, and therefore was not subject to the open and obvious doctrine. The trial court agreed and denied the nursing home's motion for summary disposition. The Court of Appeals reversed, rejecting the plaintiff's argument that a negligence claim could be maintained under the theory that the employees caused the dangerous condition at issue. "[T]his allegation does not transform the claim into one for ordinary negligence." *Buhalis*, 296 Mich App at 692. The *Buhalis* court reasoned that the plaintiff had

specifically alleged that she was injured when she slipped and fell on ice, "that is, she alleged that she was injured when she encountered a dangerous condition on Trinity's premises." Thus the claim was one for premises liability, not ordinary negligence, and subject to the open and obvious danger doctrine.

The *Buhalis* rule was followed in *Holcomb v GWT, Inc*, No. 325410, 2016 WL 805635 (Mich App March 1, 2016), app den 500 Mich 866; 885 NW2d 254 (2016) (unpublished) (**Exhibit L**), which, like this case, involves an accident that occurred as a vehicle exited a parking lot. In *Holcomb*, the plaintiff was riding his bike down a sidewalk when a patron of the defendant restaurant pulled out of the establishment's driveway and hit the plaintiff. The driver contended that his view of the sidewalk was obstructed by trees planted at the intersection of the driveway and parking lot. The Court of Appeals affirmed the trial court's conclusion that the claim sounded in premises liability. Relying on *Buhalis*, the Court explained,

> "[The plaintiff's] claim is based on a condition of the land. He asserted that the existing landscaping obscured the line of sight between southbound travelling pedestrians and vehicles exiting via the driveway. This is similar to the claim in *Buhalis* that the property design allowed ice to accumulate on the patio. Accordingly, the claim sounded in premises liability. The claim was not converted into one for ordinary negligence simply because [the plaintiff] alleged that [the restaurant] created the condition by failing to adequately maintain the trees."

Id. at *3. See also *Campbell v HJ Larson, Inc*, 2013 WL 2360544 at *2 (Mich App No. 308496, May 30, 2013) (unpublished) (**Exhibit M**), citing this Court's opinion of *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001) (The plaintiff's claim that she tripped

on a folded serving tray stand leaning against the wall at a Holiday Inn "plainly directly emanates from the Holiday Inn's duty as the owner, possessor, or occupier of the property," and therefore, the claim sounded in premises liability, not negligence.)

The same result must follow here. Plaintiff based his "negligence" claim on the Chase Defendants' design and maintenance of their driveway, i.e., their premises, and expressly states that a dangerous condition existed thereon. Specifically, the amended complaint asserts that the Chase Defendants "assumed responsibility for placement of traffic control signals, lane markings, channelization, and all other matters relating to *the design, construction, and maintenance of [the Bank One's] parking lot/driveway* . . . ." (**Exhibit A**, First Amended Complaint, ¶ 43 (emphasis added)). Further, Plaintiff asserted that the Chase Defendants had a "duty to maintain *the transition from its private driveway/parking lot* to West Michigan Avenue *in a condition safe and fit* for public travel" and that the lack of proper signage or traffic control devices "*was an unsafe and defective condition*." (*Id.*, ¶¶ 44-45 (emphasis added)).

These allegations – that the Chase Defendants created a dangerous condition (by failing to install proper signage) on the land (i.e., the Bank One's driveway), which caused Plaintiff's alleged injuries – are properly considered premises liability in nature. Plaintiff is alleging that the Chase Defendants' liability "arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis*, 296 Mich App at 692. The rule articulated in *Buhalis* defeats Plaintiff's argument here that the dangerous

condition on the Chase Defendants' property which caused an accident on Michigan Avenue somehow transforms the claim from premises liability to ordinary negligence, and insulates Plaintiff's liability theories from the open and obvious doctrine. Therefore, the trial court correctly determined that Plaintiff's claim is one of premises liability, not ordinary negligence, and the open and obvious doctrine applies.[4]

2. Plaintiff's claim fails because any dangerous condition in a driveway that opens onto a one-way street but which has no directional or signs is open and obvious.

As discussed, the duty a premises owner owes to an invitee does not extend to open and obvious dangers. *Ververis*, 271 Mich App at 64. "[T]he open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 385 (2001). "[U]nder 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 conditions

[4] As can be gleaned from the language in the amended complaint, Plaintiff's allegations also encompass design defect claims. See (**Exhibit A,** First Amended Complaint, ¶ 43) (the Chase Defendants "assumed responsibility for placement of traffic control signals, lane markings, channelization, and all other matters relating to *the design*, construction, and maintenance *of its parking lot/driveway* . . . ."). Any separate design defect claim is likewise subject to the open and obvious doctrine. See *Palmer v Cendant Corp*, 2002 WL 31105278, at *3 (Mich App No. 234006, September 20, 2002) (**Exhibit N**), citing *Milliken v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999) and *Joyce v Rubin*, 249 Mich App 231, 235-237; 642 NW2d 360 (2002), ("Because plaintiffs' design defect claim concerned a condition on the land, the open and obvious doctrine applies.").

foolproof." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995) (internal punctuation omitted, emphasis added). Here, the Chase Defendants were not required to make their driveway foolproof for inattentive and distracted drivers.

In this case, any dangerous condition inherent in a driveway that opens onto a one-way street but which has no directional signs or warnings is open and obvious because an average driver with ordinary intelligence knows of the potential risk and danger of being hit by a car if driving the wrong way on a one-way street. Most importantly, such a driver "would have been able to discover the danger and the risk presented upon casual inspection." *Hoffner*, 492 Mich at 461. Specifically, the driver would have noted (and legally, is charged with reading) the "one way" signs and "no left turn" signs when she drove through the intersection at Wayne Road and Michigan Avenue just moments before entering the Chase Defendants' parking lot. (**Exhibit C**, Photo of intersection; **Exhibit D**, Puckett dep, pp 16-17. Likewise, a person using reasonable care for her own safety would have observed road markings and traffic when she exited the parking lot. The photos attached to Plaintiff's application plainly depict a roadway with only broken white lines – but no solid yellow center line – thus indicating one way travel. (See **Exhibit R,** photos - overhead view; Plaintiff's Exhibit 16, Deposition of Timothy Robbins, pp 24, 38).

In sum, the average driver would not have attempted to turn the wrong way out of the Chase Defendants' parking lot despite the lack of any directional signs or warnings. That Ms. Scola was lost and frazzled and failed to observe the one way signs in the intersection she had driven through moments before or otherwise notice that Michigan Avenue was a one-way street when she pulled out, does not render Defendants' driveway unreasonably dangerous. Again, the open and obvious standard is an objective standard not a subjective one. *Hoffner*, 492 Mich at 461. Indeed, "[t]he objective standard recognizes that a premises owner is not required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land. This standard thus provides predictability in the law." *Id*. at n 15. Accordingly, any danger presented by the lack of signage or warnings in the Chase Defendants' driveway was open and obvious and Plaintiff's claim fails as a matter of law

3. The Chase Defendants' driveway does not exhibit special aspects that remove it from the open and obvious doctrine.

At pages 15-18 of his Application, Plaintiff contends that the potential for harm here when turning into one-way traffic was unreasonably high, thus invoking the "unreasonably dangerous" special aspects exception to open and obvious. There are several reasons why this argument lacks merit and should not be reviewed by this Court. First, as found by the Majority Opinion, "plaintiff did not assert the existence of any special aspects in the lower court or on appeal… ." (**Exhibit Q**, Majority Opinion, p 5). Issues that are not briefed and argued in a party's brief are considered abandoned on

appeal. *Maciejewski v Breitenbeck*, 162 Mich App 410; 413 NW2d (1987). To the extent that "special aspects" is somehow buried in Plaintiff's trial court brief in opposition or Court of Appeals' appellate brief (searches of the word "special" reveal otherwise), the argument was nonetheless waived at the Court of Appeals level because it was not contained in the statement of the questions involved. *People v Schwartz*, 171 Mich App 364; 429 NW2d 905 (1988). In turn, there can be no error with respect to an argument resting on a legal theory or facts which could have been pled or argued prior to the original decision. *Woods v SLB Prop Mgmt, LLC*, 272 Mich App 622, 630; 750 NW2d 208 (2008) (applied in the context of a motion for reconsideration).

Nor does the argument have merit. On application, Plaintiff invokes only the "unreasonably dangerous" prong of the special aspects doctrine.

A premises possessor owes no duty to protect an invitee from dangers that are "open and obvious" unless special aspects exist that make the situation unreasonably dangerous. *Lugo*, 464 Mich at 517; *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). "[O]nly 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*, 464 Mich at 519. The lack of signage or warnings in the Chase Defendants' driveway lacks special aspects because the area is not unreasonably dangerous – it is common for parking lots to lack traffic signs.

Lugo provided two oft-cited examples of special aspects. First, the Court discussed a commercial building with only one exit for the general public where the floor is covered with standing water. This Court explained, "[w]hile the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable." *Lugo*, 464 Mich at 519. This Court then referenced "an unguarded thirty foot deep pit in the middle of a parking lot" as an example of a condition that posed an unreasonably high risk of severe harm. *Id*. The Court acknowledged that "[t]he condition might well be open and obvious, and one would likely be capable of avoiding the danger," however, "this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken." *Id*.

In contrast to these effectively unavoidable and unreasonably dangerous situations, the *Lugo* court distinguished conditions such as an ordinary pothole, which do not give rise to special aspects. "The condition does not involve an especially high likelihood of injury. Indeed, an 'ordinarily prudent' person would typically be able to see the pothole and avoid it. Further, there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo*, 464 Mich at 519.

In *Hoffner*, this Court elaborated on its holding in *Lugo*. The Court held that ice on the sidewalk in front of the only entrance to a fitness center was an avoidable, open and obvious danger. In so doing, the Court explained:

> "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."

Hoffner, 492 Mich at 455-456 (emphasis added). The Court further explained that "effectively unavoidable" was a narrow exception to the open and obvious rule:

> "Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome. . . . Accordingly, the standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so."

Id. at 468-69 (emphasis in original). In sum, "neither a common condition nor an avoidable condition is uniquely dangerous." *Hoffner*, 492 Mich at 463.

Indeed, as is relevant to this case, which involves an accident allegedly due to a condition in a parking lot driveway, the Court of Appeals has observed that "it is typical for parking lots outside businesses to lack signs or other traffic controls. A common condition is not uniquely dangerous and, therefore, does not give rise to an unreasonable risk of harm." *Richardson v Rockwood Ctr*, 275 Mich App 244, 248–49; 737 NW2d 801 (2007) (citations omitted). In *Richardson*, the plaintiff was in the

defendant shopping center's parking lot, walking across the traffic lanes that separated a store from the rows of parking spaces and was struck by a vehicle in the travel lane. *Id*. at 245. The driver claimed that she did not see the plaintiff because the sun was in her eyes. *Id*. The Court of Appeals commented that, "a person pushing a shopping cart across a vehicle's path is a rather obvious 'sign' that the vehicle should stop and yield to the pedestrian. Equally obvious is that a pedestrian in a parking lot should look both ways before crossing the driving lane to ensure that he or she is not about to be struck by a vehicle." *Id*. at 249. Thus, the plaintiff had no basis for a premises liability claim against the shopping center. *Id*.

Richardson had relied on the earlier unpublished case of *Kirejczyk v Hall*, No. 233708, 2002 WL 31474441, at *1 (Mich App November 5, 2002) (unpublished) (**Exhibit O**), which involved a parking lot collision between two vehicles. In addition to noting that parking lots typically lacked signs and other traffic controls, the Court of Appeals observed that "[d]rivers are expected to simply rely on traffic laws and customary practices while driving in such parking lots." *Id*. at *1.

In this case, Plaintiff insists that the driveway was not open and obvious because a neighboring business owner alleged that drivers regularly turned the wrong way out of the driveway. (Plaintiff's Application, p 14).[5] But the lack of signage or warnings in the

[5] Plaintiff claims that Lieutenant Puckett gave similar testimony (Plaintiff's Brief on Appeal, p 21), but in reality, Lieutenant Puckett stated that <u>*generally*</u> it was "pretty typical we have people that go the wrong way on Michigan Avenue daily. It's not

Chase Defendants' driveway is, as this Court has held, a common condition, and it lacks special aspects because the area is neither unreasonably dangerous nor effectively unavoidable. The driveway here was not unreasonably dangerous because the average driver would have engaged in "customary practices" when exiting on the road, that is, such a driver would carefully observe surroundings before pulling out into traffic. While no one-way signs were posted in the Chase Defendants' driveway or on Michigan Avenue itself in that area, photographs of the area plainly depict a roadway with only broken white lines – but no solid yellow center line – thus indicating one way travel. (**Exhibit R**, Photos; Plaintiff's Exhibit 16, Deposition of Timothy Robbins, pp 24, 38).

Avoiding this Court's instructions and examples in *Hoffner* and *Lugo*, Plaintiff instead argues that "the potential for harm must be considered in determining whether the open and obvious rule precludes a claim." (Plaintiff's application, p 17). Plaintiff misinterprets law from this Court. A condition is "unreasonably dangerous" if it "present[s] an extremely high risk of severe harm… where there is no sensible reason for such an inordinate risk of severe harm to be presented." *Lugo*, 464 Mich at 519 n2. A condition is not automatically characterized as unreasonably dangerous "merely because a particular open and obvious condition has some potential for severe harm" or

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common to have a lot of accidents but we do catch people that will pull out on to Michigan Avenue and catch themselves going the wrong way." (**Exhibit D**, Puckett dep, p 24). But Lieutenant Puckett did not identify where on Michigan Avenue this occurred, and when asked specifically if these frequent wrong-way drivers came from the Chase Defendants' parking lot, Lieutenant Puckett answered, "I don't know that." *Id*.

a situation in which severe harm could occur can be imagined. *Id*. Rather, only "unusual" conditions where the "risk of harm… is so unreasonably high" that its presence is "inexcusable" will rise to this level. *Hoffner*, 492 Mich at 562; *Lugo*, 464 Mich at 518-519 n2.

Plaintiff focuses on the severity of a potential injury in a vehicular collision to argue that turning the wrong way into a one-way street is unreasonably dangerous. But the danger associated with a one-way street is not unusual or uncommon. It certainly does not rise to the level of a danger posed by a "unguarded 30-foot deep pit in the middle of a parking lot," *Lugo*, 464 Mich at 518, or an unrailed second-story balcony at the only entrance to a residential apartment. *Woodbury v Buckner (On Remand)*, 248 Mich App 684, 694; 650 NW2d 343 (2001). On the contrary, this case involves a run-of-the-mill situation. Persons are encountering one-way streets every day in metropolitan areas, both as drivers and pedestrians. By focusing on the potential for severe injury, Plaintiff excises the word "unreasonable" from the term "unreasonably dangerous." Moreover, severity of injury, standing alone, is not the test. The potential injury must be balanced against the utility of the situation, here undoubtedly the beneficial use of one-way streets that crisscross metropolitan areas throughout Michigan and the United States.

If, as Plaintiff contends, the potential for severe injury is the litmus test for unreasonably dangerous, then virtually every situation that carries the potential for

severe injury would satisfy the test. In this sense, the unreasonably dangerous exception via special aspects would consume the general rule of open and obvious. As this Court stated in *Hoffner* with regard to an unreasonably dangerous condition, the hazard "must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances." 492 Mich at 472.

ARGUMENT II

IN THE ALTERNATIVE, THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE CHASE DEFENDANTS BECAUSE PLAINTIFF CANNOT SUSTAIN AN ORDINARY NEGLIGENCE CLAIM WHERE THE CHASE DEFENDANTS OWED NO DUTY TO PLAINTIFF TO WARN OF THE PRESENCE OF A ONE-WAY STREET AND PLAINTIFF FAILED TO OTHERWISE ESTABLISH PROXIMATE CAUSE.

A. Standard of review and supporting authority.

Please see the standard of review set forth in Argument I. A.

B. Introduction – summary.

Any claim sounding in ordinary negligence fails because the Chase Defendants owed no duty to Plaintiff to place directional or other signs in their driveway to indicate or warn that Michigan Avenue was a one-way street, and further, Plaintiff's contention that directional signs would have prevented the accident is purely speculative and thus cannot establish proximate cause.

C. Governing law.

To establish a prima facie case of negligence, including failure to warn, a plaintiff must prove (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Quinto v Woodward Detroit CVS, LLC*, 305 Mich App 73, 75; 850 NW2d 642 (2014), *Warner v Gen Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984).

D. Argument.

1. Plaintiff's negligence claim fails because the Chase Defendants owed no duty to Ms. Scola to warn her of the presence of a one-way street.

There can be no tort liability unless a defendant owes a duty to the plaintiff. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). See also *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004) ("The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff."). In determining whether to impose a duty, the court "evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). See also *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006) (internal citation and punctuation omitted) (considering additional factors such as the moral blame attached to the conduct and the policy of preventing future harm). "The determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 506; 740 NW2d 206 (2007). As to foreseeability, the court considers "whether it is foreseeable that the conduct may create a risk of harm to the victim and whether the result and intervening causes were foreseeable." *Ross v Glaser*, 220 Mich App 183, 187; 559 NW2d 331 (1996). Finally, "determining whether a duty should be imposed involves balancing the social

benefits of imposing a duty with the social costs of imposing that duty . . . ." *Id*. at 518-19.

Plaintiff contends that the Chase Defendants owed a duty to place warning signs on its property to avoid accidents from turning the wrong way. A land owner may have a general duty "to design, develop and maintain a parking area so as to prevent an unreasonable risk of harm to motorists traveling on adjacent highways," *Langen v Rushton*, 138 Mich App 672, 678; 360 NW2d 270, 273 (1984), but "[l]andowners who . . . fail to minimize the possibility of accidents at parking lot exits or entrances would only be held liable if their challenged conduct is unreasonable, i.e., the risk of injury engendered by their conduct outweighs its utility." *Id*. at 681. "The outcome of that balancing will depend on the circumstances presented in a given case." *Id*. at 681. In *Langen*, the plaintiff was driving a motorcycle when a patron of a shopping center pulled out of the parking lot in front of him, causing an accident, allegedly due to a tree in a median area controlled by the defendant. The Court noted that "as a matter of law, defendant has a duty to the traveling public to provide motorists leaving its parking lot with an unobstructed view of oncoming traffic on North Maple Street." *Id*. at 681. In that case, the court further found a question of fact as to whether the duty had been breached.

On the other hand, in *Erhart v McLean*, No. 314208, 2014 WL 1234160 (Mich Ct App March 25, 2014) (**Exhibit P**), where an auto accident occurred as a patron pulled

out of a working farm that held public events, the plaintiff alleged that the defendant farm had a duty to construct a proper turn lane or shoulder on the public road "to allow vehicles to more easily enter and exit the driveway" because "it was foreseeable that the driveway's narrow width would cause traffic accidents." *Id*. at *2. The Court rejected the imposition of a duty there because, among other reasons, "the law establishes that the governmental authority that has jurisdiction over [the adjacent road], not [the defendant farm], had a legal duty to make the public roadway safe for motorists." *Id*., citing MCL 691.1402(1).

Similarly here, according to Michigan law, the state highway commission may designate any highway or any separate roadway under state jurisdiction for one-way traffic and "***shall*** erect appropriate signs giving notice thereof. MCL 257.641. Indeed, as Lieutenant Puckett and Plaintiff's own alleged expert testified, there is no ordinance, statute, code, or standard that creates a duty on the part of the Chase Defendants to post signs, traffic control devices, or other warnings in their private parking lot alerting drivers that West Michigan Avenue was a one-way street and to not turn the wrong way onto the one-way street. (**Exhibit H**, Walter Cygan's Opinion Letter; **Exhibit I**, Cygan dep, pp 70-72, 86; **Exhibit D**, Puckett dep, p 25). See also *Grier v Bankers Land Co*, 539 So 2d 552, 554 (Fla Dist Ct App 1989) ("there is no duty imposed upon the landowner to foresee and protect the traveling public from" a driver's negligent acts); *Balcer v Forbes*, 188 Mich App 509, 513; 470 NW2d 453 (1991) (Finding it "wholly unreasonable" to

charge parking lot owners "with anticipating that one of their patrons would turn the wrong way on a one-way street, that the patron would then proceed in this fashion for a full city block, that he would unexpectedly turn into the path of a high-speed chase, that a collision would result, and that one of the speeding vehicles would be propelled in such a manner as to strike the Balcers as they were crossing the street."). Accordingly, the Chase Defendants had no duty to place directional or other signs in their driveway warning of the one-way nature of Michigan Avenue. Plaintiff is thus unable to meet the threshold element of establishing duty, *Fultz v*, 470 Mich at 463, and therefore, any negligence claim fails as a matter of law.

2. Plaintiff cannot establish proximate cause where his theory that the presence of directional or warning signs would have prevented the accident in this matter is pure speculation and conjecture.

To establish the proximate cause element of a negligence claim, a plaintiff must prove both cause in fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The "causation-in-fact" portion of the analysis examines whether or not the plaintiff would have been injured "but for" the defendant's conduct. *Derbeck v Ward*, 178 Mich App 38, 44; 443 NW2d 812 (1989). To establish cause-in-fact, a plaintiff must "present ***substantial*** evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997) (emphasis added).

"Legal cause" involves an examination of the foreseeability of the consequences, and whether a defendant should be held responsible for those consequences. *Skinner*, 445 Mich at 162-163. In order for an injury to be proximately caused by a defendant's actions, "the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act." *Dawe v Bar–Levav & Assoc (On Remand)*, 289 Mich App 380, 393-394; 808 NW2d 240 (2010). "Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). Unless a plaintiff is able to establish the existence of cause-in-fact, however, legal or proximate cause never becomes an issue. *Skinner*, 445 Mich at 163.

"Cause in fact may be established by circumstantial evidence, but such proof must 'facilitate reasonable inferences of causation, not mere speculation.'" *Genna v Jackson*, 286 Mich App 413, 417-418; 781 NW2d 124 (2009), citing *Skinner*, 445 Mich at 164. A causation theory that is purely speculative "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Kaminski v. Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (citation omitted). On the other hand, a causation theory is not speculative

when it is based on established fact and permits reasonable inferences to be drawn from the evidence. *Skinner*, 445 Mich at 164. It is not "sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id*.

Plaintiff's claim that Ms. Scola would have followed directional or warning signs if they had been present in the Chase Defendants' driveway and thus avoided the accident which caused Plaintiff's injuries is entirely speculative. See Plaintiff's Brief on Appeal, pp 18-19.[6] There is no evidence, let alone substantial evidence, from which a jury could conclude that more likely than not, but for the lack of signage, the accident would have been avoided. *Weymers*, 454 Mich at 647-648. In fact, the evidence strongly suggests the polar opposite conclusion. Ms. Scola drove through the intersection at Wayne Road and Michigan Avenue only moments before entering the Chase Defendants' parking lot, but claims she did not see the directional and warning signs which were in plain view. (**Exhibit B**, Scola dep, pp 21-23, 86; **Exhibit C**, Photograph of intersection; **Exhibit D**, Deposition of Lieutenant Robert Puckett, pp 16-17). Ms. Scola also conceded that she was on the Chase Defendants' property for only 30 seconds and was not looking for directional signage in the driveway, rather, she was merely looking up and down Michigan avenue to observe traffic – all while she was stressed and frazzled because she was late for her appointment. (**Exhibit B**, Scola dep, pp 46-48; 86). And even though

[6] Plaintiff is not actually making a proximate cause argument at this point in his application, but is instead contending that there is a close connection between the lack of a sign and the accident so as to establish a duty.

Ms. Scola claimed to be observing the roadway, she also failed to take note of the white lines and lack of a yellow center line which indicated one-way travel. (**Exhibit R**, Photos; Plaintiff's Exhibit 16, Deposition of Timothy Robbins, pp 24, 38). Thus, even if it could still be considered plausible that Ms. Scola would have observed directional or warning signs had they been present on the Chase Defendants' property in light of her admitted inattentiveness, it is equally plausible that she would have missed them like she did the signs in the intersection and the markings on the road itself. Accordingly, Plaintiff's evidence of causation is entirely speculative, and therefore, even if his claim sounds in negligence, it fails as a matter of law. *Skinner*, 445 Mich at 166.

ARGUMENT III

ALTERNATIVELY, THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION TO THE CHASE DEFENDANTS ON ANY CLAIM BASED ON DEFECTIVE DESIGN OF THE PARKING LOT BECAUSE PLAINTIFF FAILED TO PRESENT SUFFICIENT EXPERT TESTIMONY REGARDING MAGNITUDE OF THE RISK AND REASONABLENESS OF AN ALTERNATIVE DESIGN.

A. Standard of review and supporting authority.

Please see the standard of review set forth in Argument I.A.

B. Introduction – summary.

Plaintiff's expert testimony – if it could even be considered expert testimony – did not address magnitude of the risk or reasonableness of the alternative design of the Chase Defendants' driveway, and thus he cannot sustain a claim for design defect.

C. Governing law.

"[P]roduct liability design defect analysis is appropriately applied in cases alleging defective design of a building where the ultimate inquiry is the safety of the overall design." *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435; 542 NW2d 612 (1995) (internal punctuation omitted), citing *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 397; 491 NW2d 208 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). The law does not merely require that a plaintiff prove the existence of a safer alternative, rather, a plaintiff must establish the unreasonableness of the design in question: "a plaintiff who claims that a product was defectively designed has the burden of producing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other

factors concerning the unreasonableness of the risk of a particular design." *Id*., citing *Owens v Allis-Chalmers Corp*, 414 Mich 413, 429-432; 326 NW2d 372 (1982) (emphasis added). A plaintiff must produce expert testimony to establish that the contested design constitutes an unreasonable risk. *Id*. In determining whether such a defect exists, "the trier of fact must balance the risk of harm occasioned by the design against the design's utility." *Lawrenchuk*, 214 Mich App at 435-436. As explained in *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001):

> "A prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product."

D. Argument.

To the extent that the amended complaint can be read to advance a design defect claim[7], Plaintiff failed to proffer sufficient evidence to support any claim that the

[7] As noted above, Plaintiff's allegations also encompass design defect claims. (See **Exhibit A,** Amended Complaint, ¶ 43) (the Chase Defendants "assumed responsibility for placement of traffic control signals, lane markings, channelization, and all other matters relating to *the design*, construction, and maintenance *of its parking lot/driveway* . . . ."). Plaintiff does not make any argument specific to a design defect claim in his brief on appeal.

Chase Defendants' driveway was defectively designed. For example, in *Lawrenchuk*, the plaintiff fell while stepping down from the rink area onto a carpet at the defendant's roller-skating rink. The plaintiff alleged that the rink was defectively designed. The trial court granted summary disposition because the plaintiff did not provide expert testimony that the step and lack of handrails constituted a defect. The plaintiff appealed the dismissal of her design defect claim. The Court of Appeals affirmed the dismissal of that claim, holding that the plaintiff failed to produce expert testimony regarding: (1) the magnitude of the risk posed by the design; and (2) the reasonableness of the proposed alternative designs. *Lawrenchuk*, 324 Mich App at 435-436.

Similarly, in *Owens*, the administrator of a forklift operator's estate brought a products liability action against the forklift manufacturer, alleging negligent or defective design of the forklift in which her husband was killed. She sought to prove that the design of the forklift was defective for failing to provide some sort of factory-installed driver restraint that would have prevented the decedent's ejection during a rollover accident. *Owens*, 414 Mich at 417. Her expert testified that the subject forklift's overhead protective guard was a proper safety device, but that "when it is used[,] some sort of driver restraint should be utilized to keep the driver from being ejected through the open sides of the forklift in the event of a rollover." *Id*. at 419. He gave four examples of potentially effective driver restraints. *Id*. As is directly relevant here, the expert in *Owens* testified that "he was not aware of any law, safety regulation, standard,

or policy that required or suggested the use of driver restraints on forklifts." *Id.* The Court held that the plaintiff failed to present a prima facie case of design defect due to the "lack of evidence concerning both the magnitude of the risks involved and the reasonableness of the proposed alternative design." *Id*., at 429-30.

In this case, neither of Plaintiff's alleged experts is an expert in building design or traffic control – each is an accident reconstructionist who spent much of the time discussing the actual accident, not proper signage. (**Exhibit I**, Cygan dep, p 33; Plaintiff's Exhibit 4 on Appeal, Robbins dep, p 38). Mr. Robbins merely stated that the "issue" with respect to wrong-way drivers could be remedied by posting signs, but he offered no discussion of the magnitude of the risk or reasonableness of the alternative design. (Plaintiff's Exhibit 4 on Appeal, Robbins dep, p 39). Mr. Cygan, although admittedly not an expert in the relevant area, believed himself qualified to give an opinion regarding the bank's parking lot design based on his mere observations of the scene and "common sense," not on scientific principles or any actual evidence. He simply stated that the bank should have used directional signs – without any elaboration as to the magnitude of the risk or the reasonableness of the proposed alternative design. Moreover, like the expert in *Owens*, Mr. Cygan agreed that there is no statute, ordinance, code, or standard that would have required the Chase Defendants to have place directional or warning signs on their private property to warn drivers not to the turn the wrong way

onto a one-way street or that doing so could be dangerous. (**Exhibit H**, Walter Cygan's Opinion Letter; **Exhibit I**, Cygan dep, pp 70, 72, 86).[8]

This testimony falls far short of establishing a prima facie case of design defect based on the omission of a safety device, which again requires "a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident." *Cacevic*, 248 Mich App at 680. Lacking the requisite expert testimony, Plaintiff's design defect claim fails as a matter of law.

[8] Lieutenant Puckett confirmed that that there was no requirement that Bank One place any warning signs or other directional signs on its property. (**Exhibit D**, Puckett dep, p 25).

RELIEF

WHEREFORE, Defendants-Appellees, JP Morgan Chase Bank, National Association, and JP Morgan Chase & Co., request this Court deny leave to appeal from the trial court's January 31, 2017 order granting their motion for summary disposition, the February 27, 2017 order denying Plaintiff-Appellant's motion for reconsideration, the Court of Appeals October 4, 2019 Majority Opinion, and grant such other relief as is warranted in law and equity, together with the recovery of all costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

PLUNKETT COONEY

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