**STATE OF MICHIGAN**
**IN THE SUPREME COURT**
(Appeal from the Court of Appeals)
(O,Connell, P.J., Servitto, J.J., and Cavanagh, J.J.)

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FRANK ANTHONY SCOLA,

Plaintiff/Appellant,

v

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

Defendant/Appellee.

Supreme Court No. 158903

Court of Appeals No. 338966

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

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# PLAINTIFF/APPELLANT FRANK SCOLA'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

**ORAL ARGUMENT REQUESTED**

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## 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Here, the Court of Appeals issued its unpublished per curiam opinion on October 4, 2018. [Appx 2, Ex. 2, COA Unpub Opn]. Scola filed a timely motion for reconsideration of that non-unanimous ruling on October 25, 2018. But, his motion for reconsideration was subsequently denied on November 20, 2018. [Appx 11, Ex. 3, COA Order re Recon Den'd].

Scola filed a timely application for leave to appeal to this Court, which ordered that oral argument be scheduled on his leave application under MCR 7.305(H)(1). It also further ordered the parties to file a supplemental brief addressing "whether the Court of Appeals erred in holding that the appellant's claim sounded in premises liability rather than ordinary negligence." See *Scola v J P Morgan Chase Bank*, ___ Mich ___, 929 NW2d 281 (2019).

## OPINION AND ORDERS APPEALED FROM

Plaintiff/Appellant, Frank Scola, seeks leave to appeal from (or peremptory reversal of) the non-unanimous unpublished per curiam opinion issued by the Court of Appeals in this case on October 4, 2018. [Appx 2, Ex. 2, COA Unpub Opn]. In the majority opinion, 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). [Appx 2, Ex. 2, COA Unpub Opn, at p 1].

The trial court previously dismissed Scola's claims on the same grounds as those stated by the majority opinion. [Appx 12, Ex. 4, Order re MSD Grt'd]. In short, the trial court concluded that Scola's claim was a premises liability claim, not an ordinary negligence claim, and no duty was owed to Scola because the danger was "open and obvious" and no "special aspects" made it "unreasonably dangerous". [Appx 14, Ex. 5, SD Mtn Hrg, pp 14-15]. Scola's reconsideration motion was denied. [Appx 39, Ex. 6, Order Recon Den'd].

On appeal, the majority opinion held, as the trial court did, that: 1) Scola's claims "sounded in premises liability" because "his injuries occurred from a condition on land, namely, "lack of signage" that would have warned motorists exiting as instructed not to turn the wrong-way onto a one-way street; 2) "the lack of signage [informing motorists that the 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 "unreasonably dangerous or effectively unavoidable" and it did not pose "a uniquely high likelihood of harm or severity of harm". [Appx 5-6, Ex. 2, COA Maj Opn, at pp 4-5].

The dissent agreed that the case was a premises claim, not an ordinary negligence claim, but disagreed 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." [Appx 10, Ex. 2, COA Dis Opn, p 3]. The dissenting judge held that 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 evidence in this case. [Appx 10, Ex. 2, COA Dis Opn, p 3]. Scola sought reconsideration, but was denied. Again, it was a split decision. [Appx 11, Ex. 3, COA Order Recon Den'd].

## QUESTIONS PRESENTED

This Court has asked the parties to address whether "the Court of Appeals erred in holding that appellant's claim sounds in premises liability, not ordinary negligence". [Appx 1]. Plaintiff/Appellant, Frank Scola, incorporates by reference his statement of "Questions Presented" in seeking leave to appeal to this Court. See Plaintiff/Appellant Frank Scola's Application for Leave to Appeal, at p vii. He also asks the Court to address whether Chase Bank had a duty to use due care to protect motorists like Frank Scola from being harmed because it increased the hazard for motorists exiting its parking lot by instructing them to exit onto a busy one-way street without also warning them not to turn the wrong-way when exiting (or otherwise ensuring that motorists would not turn the wrong way when exiting).

## 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).

## INTRODUCTION

In ordering supplemental briefing in this case, this Court asked the parties to address specifically "whether this case sounds in premises liability or ordinary negligence". Under Michigan's common law, as it currently stands, it is the right question to be asking.

But, it is also important to understand that the common law in Michigan is truly unique when it comes to premises liability cases. It is not the same as the Restatement of Torts, 2d. See generally, *Lugo v Ameritech Corp*, 464 Mich 512, 517-518, 629 N2d 384 (2001).[1] And, it also is not the "unitary" standard adopted by the Restatement of Torts, 3d.[2]

Instead, under *Lugo*, it is the open and obvious danger doctrine that typically determines in Michigan whether a premises liability claim survives summary disposition. Thus, whether a claim "sounds" in premises liability is now a pivotal question in Michigan.

In Michigan, the common law "distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *James v Alberts*, 464 Mich 12, 18-19, 626 NW2d 158 (2001). And, the open and obvious danger doctrine does not apply to ordinary negligence claims. *Laier v Kitchen*, 266 Mich App 482, 702 NW2d 199 (2005).

Before the *Lugo* case was decided, however, few cases actually hinged on whether the plaintiff brought an ordinary negligence claim or a premises liability claim. Traditionally, in Michigan, as in other common law jurisdictions, the "heightened duty" of care owed by a possessor of land to invitees made a premises liability claim more promising than an ordinary negligence claim. That changed after this Court issued its seminal ruling in *Lugo*.

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[1]See also, *Stitt v Holland Abundant Life Fellowship*, Mich. 591, 607, 614 N.W.2d 88 (2000); *Fultz v Union-Commerce Assocs*, 470 Mich 460, 471, 683 NW2d 587 (2004).

[2]Rest Torts 3d §51 employs a general duty of care that is similar to an ordinary negligence claim in Michigan. It provides, in pertinent part, that "a land possessor owes a duty of reasonable care to entrants on the land with regard to . . . . conduct by the land possessor that creates risks to entrants on the land". [Scola MSC Lv App, Ex. 7].

As interpreted in *Lugo*, the open and obvious danger doctrine limited significantly the number of cases where that heightened duty of care still applied. Effectively, *Lugo* and its progeny elevated the question of whether the plaintiff failed to protect himself from harm to a status reminiscent of contributory negligence rules long since jettisoned in Michigan. See generally, *Blackwell v Franchi*, 502 Mich App 918, 921-922, 914 NW2d 900 (2018).

Not surprisingly, after *Lugo*, there was an increase in the number of cases where plaintiffs would contend that a personal injury claim sounded in ordinary negligence, not premises liability. Before *Lugo*, there were basically no appellate cases addressing that point. That trend has only escalated with each tightening of the screw after *Lugo*. Thast is especially true since this Court's ruling in *Hoffner v Lanctoe*, 492 Mich 450, 456, 821 NW2d 88 (2012), which further limited liability under *Lugo*, by holding that the "special aspects" exception for "effectively unavoidable" conditions was limited to "inherently dangerous hazard[s] that a person is inescapably required to confront under the circumstances". Id.

In *Buhalis v v Trinity Cont Care Servs*, 296 Mich App 685, 692, 822 NW2d 254 (2012), the Court of Appeals, citing *James, supra,* 464 Mich at 18-19, affirmed that "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence". *Buhalis* further affirmed that "this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." Id, citing *James*, supra. But, neither *Buhalis* nor *James* involved a plaintiff injured, not on the defendant's land, but after he or she exited from it.[3]

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[3]This Court cited *Buhalis, supra,* in its order reversing the Court of Appeals' holding in *Compau v Pioneer Res Co, LLC*, 498 Mich 928, 871 NW2d 210 (2015). But, as in *Buhalis*, the plaintiff was injured by a dangerous condition on the defendant's land, specifically, a railroad tie that she tripped on after having seen it when she first entered.

In concluding that this case sounded in premises liability, not ordinary negligence, the Court of Appeals downplayed both the fact that the hazard for exiting motorists was not on land possessed and controlled by Chase Bank and that Scola was not injured on its land. Instead, the Court read Scola's complaint as supporting its conclusion that the hazard was "lack of signage" in the bank's parking lot, not the hazard posed to motorists exiting from its parking lot by motor vehicles traveling on a busy adjoining one-way street.

Here, Scola was not alleging that a lack of warning signs on the premises failed to protect him from a dangerous condition on the land, such as delivery trucks backing up in a loading dock area. He was not struck by a vehicle while he was in the bank's parking lot. He was instead involved in a head-on motor vehicle collision after his mother mistakenly turned right into traffic when exiting from the Chase Bank parking lot onto a one-way street.

Specifically, Scola alleged that Chase Bank failed to warn him about the hazard posed to motorists exiting from its parking lot onto a busy adjoining one-way street like westbound Michigan. He alleged that Chase Bank "assumed a responsibility" for the safety of motorists exiting from its parking lot by designing, constructing and maintaining it. He further alleged that Chase Bank breached its duty to use ordinary care in designing, constructing and maintaining its parking lot areas, so as to protect him from being harmed.

To the extent that Scola may have suggested in his Complaint that "lack of signage"[4] in the Chase Bank parking lot was "a dangerous condition", he was simply saying that the bank's parking lot, as "constructed, designed, and maintained" not only failed to address the hazard posed to motorists exiting from the bank's parking lot onto a busy one-way

[4]The phrase "lack of signage" was used by the Court of Appeals in its majority opinion. It is not a phrase used Scola in his Complaint. But, in fairness, Scola did allege that the "signage" in Chase Bank parking lot was inadequate and misleading.

street like Michigan, it increased the risk of harm for exiting motorists by misleading them into thinking that they could turn either way when exiting from the parking lot onto Michigan.

The Court of Appeals' majority erred by holding that Scola's claim was a premises claim, not an ordinary negligence claim. It further erred by holding that the hazard posed to motorists exiting from the Chase Bank parking lot onto Michigan was open and obvious. Further, even if it was open and obvious, there were special aspects that made the hazard posed to exiting motorists by the busy adjoining one-way street unreasonably dangerous, namely, the increased likelihood of harm or severe harm due to a hazard that it created.

This Court should peremptorily reverse the Court of Appeals' majority ruling in this case, because Scola's claim against Chase Bank is an ordinary negligence claim, not a premises liability claim, and thus, it should not have been dismissed on "open and obvious" grounds. Alternatively, this Court should grant leave to appeal in this case in order to address whether this case should have been dismissed on "open and obvious" grounds.

## STATEMENT OF FACTS

On June 27, 2003, Kathleen Scola was driving her station wagon to a job interview at a testing center in Wayne, Michigan. Her children (including Frank, age 7), her sister, and her sister's children were also in the station wagon. [Appx 44-45, Ex. 9, Scola, 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 as she drove southbound on Wayne Road. [Appx 45-47, Ex. 9, Scola, 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 Avenue. Believing she missed her turn, she immediately pulled into the Chase Bank parking lot. [Appx 45-47, Ex. 9, Scola, pp 16-24].

After pulling in, Ms. Scola continued eastbound in the Chase Bank parking lot. She was looking for a way to get back to Michigan Avenue. As she drove behind the Chase Bank building, she saw that the bank's teller lanes to her left exited onto Michigan. She turned towards Michigan. As she drove past the teller lanes, she saw a blue sign that marked the exit from the parking lot onto Michigan. [Appx 44-47, Ex. 9, Scola, pp 16-24].

There was only one sign near that easternmost exit from the Chase Bank parking lot onto Michigan. It was a large blue sign belonging to Chase Bank that said "Exit Only". [Appx 40, Ex. 7, 2003 Photograph, Exit onto Michigan]. 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 instructing motorists exiting near the teller lanes to go straight in order to exit onto Michigan. [Appx 41, Ex. 8, Yellow Arrow 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. [Appx 53, Ex. 9, Scola, pp 49-50]. Not recognizing she was exiting onto a one-way street, Ms. Scola turned right onto westbound Michigan. She (and her family) were then involved in a head-on vehicle collision. [Appx 48-49, Ex. 9, Scola, pp 28-29]. Her son, Frank, age 7, was seriously injured in that collision. [Appx 60-61, Ex. 9, Scola, pp 78-79].

Ms. Scola was not the first, nor the last, person to turn the wrong way onto Michigan when exiting from the Chase Bank parking lot. David Zuckerman, a store owner whose shop is across the street from Chase Bank on Michigan, testified that he saw motorists turn right "almost daily" when exiting from that parking lot onto Michigan. [Appx 77, Ex. 10, Zuckerman, pp 29-30]. Before 2003, he told the bank as much, but nothing ever changed. [Appx 77-79, Ex. 10, Zuckerman, pp 32-38]. Robert Puckett, the police officer that investigated the crash confirmed what Zuckerman said about it being common for motorists to mistakenly turn right onto westbound Michigan. [Appx 93, Ex. 11, 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". [Appx 96, Ex. 12, 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. [Appx 128, Ex. 13, Cygan, p 126]. Timothy Robbins, an accident reconstruction expert knowledgeable about signs, agreed with Cygan that the lack of signs warning motorists that Michigan was a one-way street increased the risk for motorists when exiting. [Appx 142, Ex. 14, Robbins, 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 signs instructing motorists to exit onto westbound Michigan, warned motorists not to turn left because it is a one-way street.

Count III of the amended complaint that was filed by Scola on December 28, 2015 included the allegations against Chase Bank. At no point did it identify the status of Scola or his mother, Kathleen, who was driving that day, as visitors on Chase Bank's premises. Scola did not allege that he was an invitee or a licensee in his Complaint. He also did not allege, as a 7 year old, that he was owed a heightened duty, even if he was trespassing.

Instead, Scola alleged that Chase Bank "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 . . . ". [Appx 162, Ex. 15, Complaint,, ¶43]. He further alleged in that same paragraph that Chase Bank did so for the express purpose of ensuring "that entering West Michigan Avenue would be reasonably safe and convenient for public travel." [Appx 162, Ex. 15, Complaint, ¶43].

Scola next alleged that "[t]he traffic signs and devices which control the flow of traffic at the Intersection and the condition in which those signs and devices are maintained directly relates to [Chase Bank's] duty to maintain the transition from the private driveway/parking lot to West Michigan Avenue in a condition safe and fit for public travel".[Appx 162-163, Ex. 15, Complaint, ¶44]. In short, he alleged that Chase Bank had a duty to protect motorists exiting from its parking lot onto a busy adjoining one-way street like westbound Michigan, because it undertook the responsibility of controlling the traffic flow in its parking lot with exit signs, lane markings, slanted parking, and pavement arrows.

Having alleged that Chase Bank owed him a duty, because of its undertaking, Scola identified ways in which Chase Bank breached its duty to use due care to protect motorists exiting from its parking lot from being harmed by turning the wrong-way on a busy one-way street like westbound Michigan. [Appx 163, Ex. 15, Complaint, ¶¶45-48]. He also alleged that Chase Bank's failure to safely "design, construct, and maintain" its parking lot was "[a]

proximate cause of the collision." [Appx 164, Ex. 15, Complaint, ¶¶49]. Further, he named numerous ways in which Chase Bank breached its "common law duty" by failing to protect exiting motorists from the danger posed by a busy adjoining one-way street when it took steps to direct them when exiting the parking lot. [Appx 164, Ex. 15, Complaint, ¶¶49a-b].

Lastly, Scola summarized his claim by alleging that Chase Bank "created a dangerous condition which had a natural tendency to cause driver confusion and error and to promote collisions on West Michigan Avenue by heading eastbound against westbound traffic." [Appx 165, Ex. 15, Complaint, ¶51]. In so doing, however, Scola identified the "dangerous condition" that was created by Chase Bank as being the danger of vehicles colliding, not in its parking lot, but, on westbound Michigan, after mistakenly turning right.

When discovery ended, Chase Bank moved for summary disposition based on Michigan's version of the open and obvious danger doctrine, citing *Lugo*, supra. It argued that Scola had brought a premises liability claim, not an ordinary negligence claim. Scola responded that his claim against Chase Bank was an ordinary negligence claim, not a premises liability claim. He further argued that even if his claim was a premises liability claim, it should not be summarily dismissed because the danger that was posed to motorists exiting from the parking lot onto westbound Michigan was not open and obvious.

At the summary disposition hearing, Scola's trial counsel argued that there was conduct on the part of Chase Bank that supported his ordinary negligence claim, because it put up an exit only sign, but did so negligently. [Appx 24, Ex. 5, SD Mtn Hrg, p 11]. He also argued that many other factors supported his claim that a duty existed under the circumstances, including foreseeability of harm. [Appx 24-25, Ex. 5, SD Mtn Hrg, p 10-11]

The trial court disagreed, stating that "[e]ven if we assume Plaintiff was an invitee this Court finds that the action sounds in premises liability." [Appx 27, Ex. 5, SD Mtn Hrg,

p 14]. It dismissed Scola's claims against Chase Bank, holding that the danger of turning the wrong-way onto a one-way street when exiting the bank's parking lot onto Michigan was "open and obvious", and no "special aspects" made it "unreasonably dangerous". [Appx 27-28, Ex. 5, SD Mtn Hrg, pp 14-15]. In sum, the trial court held that "[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." [Appx 28, Ex. 5, SD Mtn Hrg, p 15]. Scola sought reconsideration, but was denied. [Appx 39, Ex. 6, Order Recon Den'd].

Scola appealed, but the Court of Appeals, in a majority ruling, affirmed the trial court's decision to summarily dismiss Scola's claims against Chase Bank on "open and obvious" grounds. [Appx 2, Ex. 2, COA Maj Opn, p 1].[5] Quoting the trial court's ruling, the majority opinion concluded similarly that the danger posed to motorists exiting from the Chase Bank parking lot onto westbound Michigan was "open and obvious", when it stated:

> . . . . 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. As the trial court noted, "A one-way lane is an everyday occurrence that all drivers face everyday [sic]." Therefore, the trial court did not err when it determined that the lack of signage indicating that Michigan Avenue was one-way was open and obvious.

The majority also agreed with the trial court that there were no "special aspects" that made it "unreasonably dangerous" for motorists to exit the parking lot onto westbound Michigan.

Again noting that the trial court found nothing "out of the ordinary" or "special" about the danger posed to motorists exiting from the bank's parking lot, the majority concluded:

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[5]The dissent agreed with the majority that Scola brought a premises claim, but disagreed that the danger posed to motorist exiting from the Chase Bank parking lot onto westbound Michigan was open and obvious. [Appx 10, Ex. 2, COA Dis Opn, p 3].

> There were no special aspects removing the bank parking lot driveway exiting onto one-way Michigan Avenue from the open and obvious danger doctrine. An exit from a business without one-way warning signs is a typical hazard that does not constitute a limited extreme situation. Although plaintiff incurred a serious injury to his kidney, "even the most unassuming situation can often be dangerous under the wrong set of circumstances." *Hoffner,* 492 Mich at 472. The driveway onto Michigan Avenue did not pose a uniquely high likelihood of harm or severity of harm and the condition must be more than theoretically or retrospectively dangerous to fall outside the doctrine. Id. [Appx 7, Ex. 2, COA Maj Opn, at p 5].

Unlike the trial court, the majority opinion actually discussed the allegations that Scola made against Chase Bank in his complaint before dismissing his claim. It first noted that he identified Count III as a negligence claim. [Appx 4, Ex. 2, COA Maj Opn, at p 3] It then quoted the first paragraph in which Scola alleged that Chase Bank did the following:

> [Chase Bank] 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 where it meets West Michigan Avenue so that entering West Michigan Avenue would be reasonably safe and convenient for public travel. [Appx 4].

But, having noted that Scola alleged that Chase Bank undertook the responsibility of designing, constructing and maintaining its parking areas so that motorists exiting onto westbound Michigan would not be endangered upon entering that busy adjoining one-way street, the majority then focused largely on Scola's allegation that "the lack of traffic control devices in the 'transition' was an "an 'unsafe and defective condition'". [Appx 163, Ex. 15, Complaint, ¶45]. It then mistakenly concluded that Scola alleged that "lack of signage" was "a dangerous condition", when, in fact, he had merely said that Chase Bank "created a dangerous condition" that cause[d] cause driver confusion and error" and as such, Chase Bank promote[d] collisions" on westbound Michigan. [Appx 165, Ex. 15, Complaint, ¶51].

The majority opinion also responded to Scola's argument that his claim was not a premises claim because the dangerous condition that injured him was not on Chase Bank's land. It first observed that Scola had not alleged that "the one-way nature of Michigan Avenue itself was the dangerous condition." Instead, according to its reading, he alleged only that "the failure of Chase Bank defendants to place warning signs at the exit of the parking lot at Michigan Avenue was the alleged defect." [Appx 4, Ex. 2, COA Maj Opn, at p 3] It then held that "the alleged dangerous condition, the lack of warning signage at the exit driveway, was located (or should have been located) on the bank's premises" and that the trial court correctly applied the "open and obvious doctrine to the lack of signage regarding the one-way nature of Michigan Avenue." [Appx 4, Ex. 2, COA Maj Opn, at p 3].

Scola sought leave to appeal from this Court, arguing that the Court of Appeals erred by concluding that his claim against Chase Base was a premises liability claim, and not an ordinary negligence claim. He also argued that the majority erred by concluding that the danger posed to motorists exiting from the parking lot onto westbound Michigan was "open and obvious" and without "special aspects" that made it "unreasonably dangerous". He argued that the Court of Appeals' decision could not be reconciled with this Court's decision to deny leave in *Fowler v Menard, Inc,* 500 Mich 1025, 897 NW2d 166 (2017).

This Court agreed to hear oral argument on whether to grant leave to appeal or take other peremptory action in this case. This Court instructed the parties to address whether the Court of Appeals erred in holding that Scola's claim "sounded in premises liability rather than ordinary negligence." Scola now asks this Court to either peremptorily reverse, because this case should be treated as an ordinary negligence claim, or grant leave to appeal to address whether it should have been dismissed on "open and obvious" grounds.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED BY CONCLUDING THAT SCOLA'S CLAIM WAS NOT AN ORDINARY NEGLIGENCE CLAIM.

#### A. Scola was not injured on land that Chase Bank possessed/controlled.

A premises liability claim can be brought only against the possessor of land. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). If the defendant did not have "possession and control" of the land when the plaintiff was injured on it, there is no viable premises claim. Stated differently, there is no viable premises claim if the dangerous condition is not on the land that the defendant possessed and controlled.

Here, Chase Bank admittedly possessed and controlled its own parking lot areas, including the parking lot that exited onto westbound Michigan Avenue. It did not own, nor did it possess or control, Michigan Avenue, because it is a public road, not a private road. Michigan Avenue is state trunkline highway that is part of US-12 which runs across the state of Michigan. In Wayne, Michigan, where this accident occurred, there is roughly one-mile stretch where westbound and eastbound Michigan are divided by several city blocks.

Frank Scola was not injured while his mother was in the process of exiting the bank's parking lot in her station wagon. To the contrary, she had already exited and turned right onto westbound Michigan. She also briefly traveled eastbound on Michigan, before she realized that she was going the wrong-way and stopped driving. The collision occurred on westbound Michigan when a westbound motor vehicle struck her station wagon. Simply put, no one involved in that collision was on the bank's premises when the crash occurred.

So, in sum, unlike a typical premises liability case, here, the plaintiff was not on the defendant's land when he was injured and the plaintiff was injured not by a dangerous condition on the defendant's land, but a motor vehicle collision on westbound Michigan.

In fact, if not for Michigan's unique "open and obvious" danger rule under *Lugo*, supra, Chase Bank presumably would be arguing that the heightened duty of care that is traditionally owed to invitees in a premises liability case should not be applied in this particular case, because it is not a premises liability case as the plaintiff was not injured on its land and it did not possess and control the land where the dangerous condition existed.[6]

**B. The hazard for motorists exiting from the Chase Bank parking lot onto westbound Michigan was not a dangerous condition on land that Chase Bank possessed and controlled.**

The hazard that was posed to motorists exiting the Chase Bank parking lot was not a "condition" per se, because it changed depending on whether vehicles were traveling westbound on Michigan when a motorist mistakenly turned the wrong-way while exiting. But, in a premises liability case, the "dangerous condition" does not change moment to moment depending on what other actors are doing. It does not appear suddenly and then disappear just as suddenly. A hole in the ground is a hole in the ground. That hole in the ground poses a trip hazard for those persons walking on the land where it is located. But, that hole in the ground does not open up and close depending on what others are doing.

The word "condition" is typically defined as "a state of being". See generally, www.merriam-webster.com/condition/definition. A "condition on the land", presumably is just the "state" that the land is in. Clearly, the hazard posed to motorists by traffic on westbound Michigan is not the street's condition. Its "condition" is the physical state that

[6]Or alternatively, the defense would be focusing its argument instead on Scola's status as a visitor on its land. But, with the open and obvious rule that was formulated in *Lugo*, arguments over whether a plaintiff is an invitee, licensee or trespasser, as in this case, are secondary to seeking summary disposition on "open and obvious" grounds.

street is in. It is not the danger that traffic on that street may pose to motorists entering it. Its condition presumably concerns whether the street is well-paved and free of defects.[7]

Furthermore, Scola never claimed in this case that Chase Bank created a "dangerous condition on the land". Scola simply said that motorists exiting from the Chase Bank parking lot onto a busy adjoining one-way street like westbound Michigan – with no warning that its traffic ran westbound only – "created a dangerous condition". [Appx 165, Ex. 15, Complaint, ¶51]. He could just as easily have said that Chase Bank created a dangerous "situation" for motorists exiting from its parking lot onto westbound Michigan.[8]

Similarly, when Scola used words like "unsafe and defective condition", he used them not to describe the Chase Bank parking lot, or the busy adjoining one-way street, i.e. westbound Michigan, but to describe where exiting motorists were forced to make the critical decision whether to turn right or turn left. [Appx 163, Complaint, ¶45]. In his Complaint, Scola used those words "unsafe and defective condition" only to describe the problem with what he called the "[i]ntersection", a term that he defined as "where the parking lot/driveway meets West Michigan Avenue". [Appx 162, Ex. 15, Complaint, ¶43a].

The Court of Appeals nonetheless held that this case "sounded in premises liability" because, according to the majority opinion, it was based on a claim that there was a "dangerous condition on the land" that resulted from the "lack of signage" informing

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[7]In Michigan, the government's duty to maintain public roads in a "reasonably safe" condition is limited to the "improved portion of the roadway designed for vehicular travel" under MCL 691.1402(1) and it does not extend to road design or traffic control devices. See generally, MCL 691.1402(1) *Nawrocki v Macomb Co Road Comm'n*, 463 Mich 143, 162, 615 NW2d 702 (2000); *Grimes v MDOT*, 475 Mich 72, 79, 715 NW2d 275 (2006) (the statutory duty to maintain public roads is limited to the "traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel").

[8]The word "situation" is a common synonym for "condition". "Situation" is often defined as "a set of circumstances or conditions. See also www.merriam-webster.com.

motorists exiting onto Michigan that it was a one-way 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.

"[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711, 742 NW2d 399 (2007). Here, the Court of Appeals obviously was free to ignore the "negligence" label that Scola placed on his claim against Chase Bank in Count III of his amended complaint. But, it was not entitled to simply reinterpret his allegations and re-label his claim as a premises claim so that it could then be dismissed on "open and obvious" grounds under Lugo.

Here, no one identified a prior Michigan case applying the "open and obvious" danger doctrine to a situation where a plaintiff injured, not on the defendant's land, by an intermittently dangerous condition like oncoming traffic on a busy adjoining one-way street, was nonetheless analyzed as a premises liability claim, not an ordinary negligence claim. Absent such a precedent in Michigan, this case clearly is not a premises liability claim, regardless of what Scola alleged. He can no more turn his claim into a premises case by inartful pleading than he can make it a ordinary negligence claim through clever pleading.

### C. Michigan common law recognizes that personal injury claims like Scola's tort claim against Chase Bank are ordinary negligence claims.

Long this Court decided *Lugo*, supra, the Court of Appeals reviewed a factually similar situation to this one in a case called *Langen v Rushton*, 138 Mich App 672, 360 NW2d 270 (1984). In *Langen*, the plaintiff similarly was injured in a vehicular collision after he collided with motor vehicle that exited from a shopping center parking lot and pulled in front of him. He sued not only the motorist that struck him, but also the shopping center that the vehicle exited immediately before the collision occurred. The trial court dismissed his claim against the shopping center, but the Court of Appeals reversed. This Court denied leave to appeal and let that Court of Appeals' ruling stand. 422 Mich 967 (1985).

In *Langen*, the Court of Appeals held that "[i]mposition of a duty upon defendant to develop and maintain its shopping center, including the parking area, so as not to injure a motorist traveling on adjacent highways is a logical outgrowth of the settled duty of a landowner toward passing-by-foot travelers." In support of that underlying duty, the Court in *Langen* relied upon a standard jury instruction, SJI 2d 19.09, which is the same as the current jury instruction in Michigan. See generally, M Civ JI 19.09, Duty of Possessor of Land, Premises, or Place of Business to Persons Traveling along Adjacent Street or Way.

In sum, the Court of Appeals in *Langen* concluded that "[w]e cannot subscribe to a rule of law which would relieve the modern urban landowner from responsibility for foreseeable consequences caused by activity which poses an unreasonable risk of harm." Id, at pp 680-681. In *Langen*, the plaintiff's allegation was that a tree planted on the shopping center's land obstructed the view of motorists exiting from its parking lot onto a busy adjoining street. Here, Scola has alleged that Chase Bank increased the hazard for

motorists exiting from its parking lot onto westbound Michigan, not only by failing to warn them, but also by its design, construction, and maintenance of parking areas on its land.

In rejecting the shopping center's contention that no duty was owed under the common law in Michigan, the Court of Appeals in *Langen,* at p 681, also said the following:

> We disagree with defendant that the duty we have imposed converts landowners into insurers of the safety of adjacent highway travelers. **Landowners who fail to make use of recent technological improvements or 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.** Moning [v Alfono, 400 Mich 425, 438-439; 254 NW2d 759 (1977)] supra, p 450. The outcome of that balancing will depend on the circumstances presented in a given case. In this case, the drawing of that balance results in our determination 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. [Emphasis added].

Clearly, the same can be said in this case. While no longer binding precedent under MCR 7.215(J)(1), because it was not issued before November 1, 1990, the Court of Appeals' holding in *Langen* nonetheless should be very persuasive authority for this Court, particularly since leave was denied by this Court when the defendant sought to challenge it. More importantly, nothing has changed under Michigan's common law for cases like this one that are factually similar to Langen, unlike with premises claims based on dangerous conditions on land that is possessed and controlled by the defendant in the post-*Lugo* era.

As in *Langen*, supra, Scola contended in this case that a busy adjoining street like westbound Michigan posed a danger to motorists exiting from the Chase Bank parking lot, not that "lack of signage" did. Quite simply, the danger in *Langen*, was the same as in this case – it was the danger of a head-on vehicle collision. But, unlike this case, the legal issues were not confused in the *Langen* case by analyzing it as a premises liability claim.

Clearly, it was understood in *Langen* that the tort claim alleged against the shopping center, albeit against a possessor of land, was an ordinary negligence claim, because the danger posed to motorists like the plaintiff was not on the defendant's land nor was the plaintiff injured on the defendant's land.[9] This Court should reach the same conclusion.

Instead, the Court of Appeals confused in this case the danger posed to motorists exiting (as instructed) from the parking lot with steps that Chase Bank could have taken to ameliorate the risk to motorists exiting onto a busy one-way street like westbound Michigan. Here, Scola simply did not make the claims that the Court of Appeals concluded that he did. To the contrary, Scola argued that the design, construction, and maintenance of its parking areas, including its inadequate and misleading signs and markings, 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.

Because the "dangerous condition" in this case was not on land possessed and controlled by Chase Bank, nor was Scola injured on Chase Bank's premises, the lower courts clearly erred by analyzing this case as a premises liability claim, instead of an ordinary negligence claim. Here, as in *Langen*, supra, the claim asserted by Scola was an ordinary negligence claim and the open and obvious danger rule thus had no application.

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[9]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. Balcer is binding precedent under MCR 7.215(J)(1), as it was issued on April 15, 1991.

## II. CHASE BANK OWED A DUTY TO SCOLA BECAUSE IT KNEW ABOUT THE HAZARD POSED TO MOTORISTS EXITING ONTO MICHIGAN AND ITS CONDUCT INCREASED THE RISK OF HARM.

It is for the court to determine whether "an actionable legal duty" is owed by the defendant to the plaintiff "after assessing the competing policy considerations" and "weighing whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Miller v Ford Motor Co (In re Certified Question)*, 479 Mich 498, 505, 740 NW2d 206 (2007) citing *Buczkowski v McKay*, 441 Mich 96, 100-101, 490 NW2d 330 (1992). "Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hill v Sears, Roebuck and Co*, 492 Mich 651, 661, 822 NW2d 190 (2012), citing *Miller v Ford (In re Certified Question)*, supra, 479 Mich at 505.

As this Court has said, "[i]t is axiomatic that there can be no tort liability unless [a] defendant owed [a] duty to a plaintiff.'" *Hill*, supra, at p 661, citing *Fultz,* supra, p 463. Generally, "there is no duty that obligates one person to aid or protect another." *Loweke v Ann Arbor Ceiling & Partition Co, LLC,* 489 Mich 157, 164, 809 NW2d 553 (2011). But, [e]very person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others. *Loweke*, supra, citing *Clark v Dalman*, 379 Mich 251, 26, 150 NW2d 755 (1967). "Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law, as plaintiffs allege in this case." *Hill*, supra, citing *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 95, 485 NW2d 676 (1992).

In Michigan, the common law duty that is owed by a possessor of land in generally "ends at the boundary of his or her premises". *Stevens v Drekich*, 178 Mich App 273, 276,

443 NW2d 401 (1989). But, an adjacent landowner may be held liable for a condition in a public right-of-way if he or she has physically intruded upon the road in some manner, has increased an existing hazard in the roadway, or has created a new hazard. See generally, *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132, 463 NW2d 442 (1990).

Unlike westbound Michigan Avenue, Chase Bank did possess and control the parking areas on its land. It decided where to designate parking spots for vehicles, as well as to establish travel lanes for using the drive-up tellers on the eastbound side of its building where Ms. Scola exited. Those lanes exited onto Michigan Avenue where Chase Bank had a blue sign that stated: Exit Only. There was also a yellow arrow on the asphalt pavement of the parking lot past the teller lanes and close to the sidewalk, which instructed motorists to exit onto Michigan, but did not inform them that Michigan is a one-way street.[10]

In *Loweke,* supra, this Court affirmed that a legal duty that supports a tort cause of action can arise not only from the common law based on a special relationship between the parties, as with traditional premises liability claims, but also, because there exists a "generally recognized common-law duty to use due care in undertakings" in Michigan. Id, 489 Mich at 169-170. Simply put, "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Fultz,* supra, at p 465. But, as was also discussed in *Fultz*, the duty to use due care when

[10]In contrast, on the west side of its building, Chase Bank has two lanes of angled parking – one running northbound and one southbound. Unlike by the teller lanes, that exit is divided so that exiting motorists turn left onto westbound Michigan and vehicles entering the parking lot from westbound Michigan are steered into the angled parking lane closest to the building. [Appx 171, Ex. 17, Aerial View of Chase Bank].

acting is not unlimited. Nonfeasance typically is not enough to create a legal duty that would support a tort cause of action, absent aspecial relationship between the parties. Id.

Clearly, this is not a situation where Chase Bank can claim that it did nothing. The parking lot from which Ms. Scola exited onto westbound Michigan was not unimproved. It was not as if she turned into a vacant lot at the corner of Wayne Road and Michigan Avenue and drove through it before she turned right onto Michigan. If Chase Bank merely owned vacant, unimproved land where vehicles sometimes parked, it presumably could make a compelling argument that this case is truly a nonfeasance case. But, here, Chase Bank operated a business on the land at the corner of Wayne road and Michigan Avenue. And, in so doing, it designed and maintained a parking lot that instructed motorists to exit onto westbound Michigan Avenue without also cautioning them that it was left turn only.

Timothy Robbins, an accident reconstruction and signs expert, opined that using a yellow pavement arrow to instruct exiting motorists to go straight ahead was misleading, given the lack of signs in the parking lot warning them that it was a one-way street.[Appx 143, Robbins, pp 38-39]. Similarly, Walter Cygan, a safety engineering expert, said 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. [Appx 128, Ex. 13, Cygan, at p 126]. See dissenting opinion, Appx 9, Ex. 2, COA Dis Opn, p 2.

Scola also offered ample evidence 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. [Appx 77, Ex. 10, Zuckerman, pp 29-30]. Similarly, police officer, Robert Puckett, said that it was

"pretty typical" for motorists to turn the wrong way onto Michigan. He attested that "we have people go the wrong way on Michigan Avenue daily". [Appx 93, Ex. 11, Puckett at p 24].

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. [Appx 77-79, Ex. 10, Zuckerman, pp 32-38]. Evidently, no changes were made to that exit from the parking lot onto Michigan. Instead, Chase Bank, having been notified that motorists exiting from its parking lot onto Michigan, opted to do nothing about the problem.

In *Langen*, supra, the Court of Appeals discussed whether the defendant shopping center owed a duty to motorists injured on the adjoining one-way street after exiting its premises. Specifically, it focused on the nature and forseeability of the harm posed to exiting motorists, and also, the burden on the defendant to ameliorate that risk of harm. In reaching its conclusion that a common law duty was owed, the Court in Langen stated that:

> We cannot subscribe to a rule of law which would relieve the modern urban landowner from responsibility for foreseeable consequences caused by activity which poses an unreasonable risk of harm. If, upon exiting from defendant's shopping center parking lot, the view of the road is completely blocked and a motorist must enter the road before oncoming traffic can be seen, the condition of the exitway presents a serious risk of harm that is relatively foreseeable. On the other hand, the utility of a tree placed on the land for aesthetic purposes is minimal. If we assume that the allegations in plaintiff's complaint are true, defendant has failed to conform to a legal standard of reasonable conduct. Id, at pp 680-681.

Because the risk of harm created by the parking lot here is not identical to *Langen*, the factors relevant to whether a common law duty is owed presumably must be assessed. That assessment must be based on the circumstances in this case, not those in *Langen*. But, here, the case for Chase Bank having a duty to use due care to protect motorists exiting from its parking lot onto westbound Michigan is even more compelling than *Langen*.

. Here, foreseeability of harm is much stronger than in *Langen*. In this case, there was evidence that another business owner had told them repeatedly that motorists were turning the wrong-way onto westbound Michigan when exiting. Here, Chase Bank took steps to address the problem of vehicles turning the wrong-way onto westbound Michigan on the west side of the building, by using channelized entrance/exit lanes, but did not address the danger for motorists exiting on the east side of its building by the teller lanes.

Furthermmor, the burden on Chase Bank is clearly minimal. Correcting its inadequate, misleading sign and yellow pavement arrows and adding a "No Right Turn" sign is hardly a significant burden. Even installing curbs designed to channel vehicles to turn left only is not arduous, especially as it did exactly that on the west side of the building. The nature of the risk for exiting motorists – a possible head-on motor vehicle collision – is obviously significant, because not only is there a high likelihood that a motorist turning the wrong-way will be harmed, but severe harm is also very likely in a vehicular collision.

Presumably, Chase Bank will contend that no duty should be owed because the relationship between it and Scola was not a "special relationshp." While it is true that Scola (and his mother) had no existing relationship with Chase Bank – they did not bank there and they did not plan on banking that day when they entered the parking lot – this factor should not be the key determining factor when a business increased the risk of harm to motorists exiting from its parking lot onto a busy adjoining street like westbound Michigan.

Clearly, Scola and his family memers were not prohibited from entering the Chase Bank parking lot to turn around and drive in another direction. Chase Bank opened up its parking lot to visitors and that included Scola. Here, the other factors clearly outweigh relationship of the parties as a factor in determining whether a common law duty existed.

## III. EVEN ASSUMING THIS CASE IS A PREMISES LIABILITY CLAIM, CHASE BANK STILL HAD A DUTY TO PROTECT FRANK SCOLA FROM BEING HARMED BECAUSE THE DANGER POSED TO MOTORISTS EXITING FROM ITS PARKING LOT ONTO A BUSY ONE-WAY STREET LIKE WESTBOUND MICHIGAN WAS NOT OPEN AND OBVIOUS AND IT HAD SPECIAL ASPECTS.

### A. This Court's decision to deny leave to appeal in *Fowler v Menard* supports Scola's alternative claim that a duty was nonetheless owed even if this Court concludes that he asserted a premises liability claim.

This Court recently denied leave to appeal in *Fowler v Menard, Inc*, 500 Mich 1025, 897 NW2d 166 (2017). In agreeing to hear oral argument on whether to grant leave to appeal or take other action in *Fowler*, supra, this Court asked the parties to address "whether the crosswalk installed by the defendant had a special aspect that could create liability for even an open and obvious hazard, and whether such a special aspect can exist if the condition is not unreasonably dangerous." *Fowler v Menard, Inc,* 499 Mich 908, 877 NW2d 873 (2016). It cited *Lugo* and *Hoffner*, supra, as a basis for asking those questions.

Ultimately, however, leave was denied by this Court, thus letting stand the Court of Appeals' decision to affirm the trial court's denial of the defendant's motion for summary disposition on "open and obvious" grounds. The Court of Appeals held that a duty existed because the crosswalk that the defendant created for pedestrians to use when exiting from the store was a "special aspect", and therefore, a duty was owed to the plaintiff that was not precluded by the open and obvious danger rule. *Fowler v Menard, Inc*, unpublished per curiam opinion of the Court of Appeals, Docket No. 310890, dated September 25, 2015.

But, in holding that "special aspects" existed, the Court of Appeals, in its majority opinion, noted that a common law duty to use due care is created when a defendant "voluntarily undertakes to perform an act, having no prior obligation to do so." *Fowler*,

supra, slip op at p 9, citing *Fultz*, supra, at 465 and *Clark*, supra, at 260-261. Clearly, the same must hold true in this case if it is viewed by this Court as a premises liability claim.

That being said, the fundamental difference between these two cases is that Fowler was injured while she was still in the Menard's parking lot. And, if there is one consistent thing about traditional premises liability law in Michigan, it is that it applies only when the plaintiff is injured on land possessed and controlled by the defendant. But, even assuming that premises liability law does indeed applies in this case, the outcome in *Fowler*, supra, supports Scola's claim that a duty existed in this case to protect Scola from being harmed because, as stated previously, Chase Bank increased the risk posed to exiting motorists.

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

For brevity's sake, Plaintiff/Appellant, Frank Scola, will not restate the arguments that he previously made on this point in seeking leave to appeal. Instead, he incorporates by reference, his prior arguments regarding whether the danger posed to motorists exiting from the Chase Bank parking lot onto westbound Michigan Avenue was open and obvious. See Plaintiff/Appellant's Application for Leave to Appeal, Argument II-A, at pp 12-14.

**C. 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.**

Plaintiff/Appellant, Frank Scola, also will not restate the arguments that he previously made on this point in seeking leave to appeal. For brevity's sake, he instead incorporates by reference, his previously stated arguments under *Lugo* that the risk of harm to exiting motorists was unreasonably high in this case because being injured in a motor vehicle collision and suffering severe harm in such a crash were both very likely to happen. See Plaintiff/Appellant's Application for Leave to Appeal, Argument II-B, pp 15-18.

## CONCLUSION

In seeking leave to appeal, Plaintiff/Appellant, Frank Scola, asked this Court to address whether this case is a premises claim, as the lower courts held, or an ordinary negligence claim. He also asked this Court to consider whether drawing lines in cases like this one – where there may be confusion about how a tort claim should be labeled – is the best legal analysis in such cases or whether such line drawing no longer serves the common law's broader purpose of protecting individuals from unreasonable risks of harm.

In Michigan, the Legislature modified the comparative fault rules 25 years ago. See MCL 600.2959. It did so in order to ensure that those who caused harm in Michigan were held responsible to the degree that each caused the resulting harm – no more and no less.

In other jurisdictions, the adoption of comparative fault rules has led to changes in the common law so that a unitary standard of negligence is applied – and not a standard that depends on line-drawing – whether it be line-drawing based on the injured person's status as a visitor on land or line-drawing based on how the claim alleged is characterized.

Such line-drawing now routinely determines whether a particular tort claim survives summary disposition in Michigan. If the claim sounds in premises liability, and not ordinary negligence, summary disposition will be granted more often than not based on the open and obvious danger doctrine as it was interpreted in *Lugo* and the case will be dismissed.

The defense sees no problem with the current state of the common law in Michigan. That is not surprising because the common law in Michigan currently allows possessors of land to escape responsibility for harm that is caused by a dangerous condition on land – even if the possessor of land knows about it and is best positioned to ameliorate the risk.

The defense now further asks this Court to expand the scope of premises liability law in Michigan to include dangerous conditions outside the boundaries of the land, so long as the duty allegedly breached stems from something the possessor of land did (or did not do) on its land that resulted in other persons encountering a hazard after exiting its land.

This Court should reject the defense's efforts to apply the open and obvious danger doctrine not just to ordinary negligence claims but to dangers not on the defendant's land. It should reverse the lower court's decision to dismiss this claim on open and obvious grounds, because this case clearly is ordinary negligence claim, and not a premises claim.

Respectfully, this Court should also consider whether to adopt a unitary standard of care in Michigan, so as to ensure that Michigan law protects both injured persons and possessors of land and holds them both responsible for resulting harm as the Legislature envisioned when it adopted (and later amended) the comparative fault rules in Michigan.

## RELIEF REQUESTED

Plaintiff/Appellant, Frank Scola, asks this Court to peremptorily reverse the Court of Appeals' ruling that his claim against Chase Bank was a premises liability claim that was precluded by the open and obvious danger doctrine as interpreted by this Court in *Lugo*. Alternatively, he requests that this Court grant leave to appeal so as to address the issues presented in this case, including whether this Court should adopt a unitary standard of care for such tort claims like other common law jurisdictions. See generally, Rest Torts 3d, §51.

Respectfully submitted:

Dated: August 30, 2019

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