STATE OF MICHIGAN

IN THE SUPREME COURT

FRANK ANTHONY SCOLA,

Plaintiff-Appellant,

v

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

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, and JP MORGAN CHASE & CO.,

Defendants-Appellees,

and

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

Defendants.
_____/

**DEFENDANTS-APPELLEES' SUPPLEMENTAL ANSWER TO APPLICATION FOR LEAVE TO APPEAL**

**** ORAL ARGUMENT REQUESTED ****

**DEFENDANTS-APPELLEES' APPENDIX (VOLUMES I-III)**

**PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE**

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## COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellees, JP Morgan Chase Bank, National Association and JP Morgan Chase & Co. ("Defendants") refer this Court to the corresponding section in their Answer to Application for Leave to Appeal dated February 27, 2019.

## THE FAILURE TO ESTABLISH THE NEED FOR SUPREME COURT REVIEW

Defendants refer this Court to the corresponding section in their Answer to Application for Leave to Appeal dated February 27, 2019.

## COUNTER-STATEMENT OF THE QUESTIONS PREVIOUSLY 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 BECAUSE 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.

Plaintiff-Appellant Frank Anthony Scola ("Plaintiff") filed this personal injury action against Defendants-Appellees, JP Morgan Chase Bank, National Association and JP Morgan Chase & Co ("the Chase Defendants") claiming that he was injured while riding as a passenger in a car being driven by his mother, Kathleen Scola, on June 27, 2003. Kathleen Scola, who was running late for an appointment and needing to head east on Michigan Avenue, failed to turn onto westbound Michigan Avenue after passing it while on southbound Wayne Road.[1] She then decided to cut through the Chase Defendants' parking lot to get back onto Michigan Avenue, and upon exiting the parking lot turned right – the wrong way onto one-way westbound Michigan Avenue. Ms. Scola's vehicle collided with a vehicle driven by Co-Defendant John Brown, who was traveling in the proper direction on westbound Michigan Avenue. Once he reached adulthood, Plaintiff then decided to pursue litigation against various parties.

Plaintiff's First Amended Complaint alleges that the Chase Defendants were negligent in failing to place traffic control signs and signals on their premises warning those using the Chase Defendants' parking lot of the dangers associated with turning the wrong way onto a one-way road and warning that Michigan Avenue was a one-way road. (Plaintiff's First Amended Complaint, ¶¶ 43-54, Plf Appx 149-170). The Chase

[1] Apparently, Plaintiff did not notice that the portion of Michigan Avenue she passed was a one-way westbound street.

Defendants filed a motion for summary disposition based upon several legal defenses, including the open and obvious danger doctrine. The Honorable John Murphy of the Wayne County Circuit Court granted summary disposition in favor of the Chase Defendants. The trial court determined that the allegations contained in Plaintiff's First Amended Complaint sounded in premises liability, and that the Chase Defendants owed no duty of care to Plaintiff based upon the open and obvious danger doctrine. The trial court also found that no special aspects existed in the case.

Plaintiff appealed by right, challenging *inter alia* the finding of premises liability rather than ordinary negligence. The Michigan Court of Appeals affirmed the grant of summary disposition with each of the three assigned judges finding premises liability as the appropriate theory of recovery. (Majority and Dissenting Opinions, Plf Appx 2-10). The Court split on whether summary disposition was proper under the open and obvious doctrine. 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, white lines on the roadway, and the absence of signs in the Chase Defendants' parking lot. (Majority Opinion, pp 3, 5, Plf Appx 4, 6). 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 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 this Court's decision in *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 that there was a question of fact as to whether the Chase Defendants had a duty to warn drivers exiting their parking lot that they must only turn left (i.e., with traffic on the one-way street). (*Id*. at p 3, Dissenting Opinion, Plf Appx 10). "[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. (Plf Appx 39). Plaintiff then filed his application for leave to appeal with this Court

This Court has granted oral argument on the application and asked the parties to specifically address the issue of whether the Court of Appeals erred in holding that Plaintiff's claim sounded in premises liability rather than ordinary negligence. It is the Chase Defendants' position that the Court of Appeals did not so err. Plaintiff's claim arises from the Chase Defendants' alleged failure to take measures to make their property safe. Plaintiff complains of the condition on the premises. Plaintiff does not allege, and the facts do not support, a claim that Plaintiff's alleged injury was caused by an overt act of the Chase Defendants arising from a contemporaneous negligent activity on their property. Regardless of whether the nature of the action is determined solely

based upon the allegations contained in Plaintiff's First Amended Complaint, or on the factual record developed in this matter, this is a premises liability case.

**B. Material facts.**

**1. Plaintiff's First Amended Complaint.**

Plaintiff's First Amended Complaint asserts that the Chase Defendants assumed responsibility for placement of traffic control signs, lane markings, channelization, and all other matters relating to the design, construction, and maintenance of their parking lot/driveway where it meets West Michigan Avenue so that entering West Michigan Avenue would be reasonably safe and convenient for public travel. (Plaintiff's First Amended Complaint, ¶ 43, Plf Appx 162). Labeled as "Negligence," Plaintiff alleged that the Chase Defendants owed Plaintiff the following duties:

- A duty to maintain the transition from its private driveway/parking lot to West Michigan Avenue. (Plaintiff's First Amended Complaint, ¶ 44, Plf Appx 162-163).

- A duty to post signs and other traffic control devices and warnings in their parking lot/driveway where it meets West Michigan Avenue and in such other positions and places on their property so as to give adequate warning of the dangers created when a driver is entering the roadway from their private driveway. (Plaintiff's First Amended Complaint, ¶ 46, Plf Appx 163).

- A continuing duty to inspect and maintain the intersection where their parking lot/driveway meets West Michigan Avenue with reasonable signage and other traffic control devices and warnings so that entering West Michigan Avenue for the Chase Defendants parking lot would be reasonably safe and fit for travel. (Plaintiff's First Amended Complaint, ¶ 48, Plf Appx 163).

Plaintiff alleged that the Chase Defendants violated these alleged duties and were "negligent" in the following ways:

- The Chase Bank premises lacked traffic control signs and devices controlling their private parking lot/driveway in and around the area where it meets West Michigan Avenue. (Plaintiff's First Amended Complaint, ¶ 45, ¶ 50(a), ¶¶ 51-52, Plf Appx 162, 165).

- The Chase Defendants failed to post signs, other traffic control devices, and warnings on their premises warning the public that West Michigan Avenue travels westbound only and not to turn right when exiting the Chase Bank premises. (Plaintiff's First Amended Complaint, ¶ 47, Plf Appx 163).

- The Chase Defendants failed to properly design, construct, and maintain the intersection of where their parking lot/driveway meets West Michigan Avenue. (Plaintiff's First Amended Complaint, ¶ 49(a), Plf Appx 164-165).

- The Chase Defendants failed to properly consider and install stop signs, signals, no right turn signs/signals, or signs/signals warning others that West Michigan Avenue is a one-way road. (Plaintiff's First Amended Complaint, ¶ 49(b), Plf Appx 164).

**2. Kathleen Scola's version of events.**[2]

Kathleen Scola, Plaintiff's mother, testified that on June 27, 2003, she was driving a 1996 Ford Taurus station wagon with seven people in the car, including Plaintiff. (Kathleen Scola's dep, pp 11-12, Plf Appx 44). Ms. Scola was on her way to a testing

[2] The Chase Defendants contend the nature of Plaintiff's action should be determined only by the terms of Plaintiff's First Amended Complaint. *See Trowell v Providence Hospital and Medical Centers, Inc*, 502 Mich 509, 525; 918 NW2d 645 (2018) (Viviano, J., concurring). In the event this Court disagrees and allows the meaning of the First Amended Complaint to be altered or even affected by the evidence, this factual summary is provided. This factual summary is relevant for purposes of applying and then deciding the propriety of the open and obvious doctrine.

center in Wayne related to a job for which she had applied and had her sister, who was going to babysit for her, as well as five other kids in the car. (Kathleen Scola's dep, pp 14-16, Plf Appx 45).

Prior to the accident, Ms. Scola was traveling south on Wayne Road and needed to proceed east on Michigan Avenue to get to the testing center. (Kathleen Scola's dep, pp 18-19, Plf Appx 46). While traveling south on Wayne Road, Ms. Scola claims that she crossed Michigan Avenue and did not realize that she was passing by Michigan Avenue until after she had done so. (Kathleen Scola's dep, pp 21-23, Plf Appx 47). While she denied noticing the one-way sign and no left turn signs located at the intersection of Wayne Road and Michigan Avenue, Ms. Scola admitted that if there were directional signs in the intersection, she did not notice them. (Kathleen Scola's dep, pp 21, 86, Plf Appx 47, 63).

After passing through the intersection of Wayne Road and Michigan Avenue, Ms. Scola decided to turn into the Chase Defendants' parking lot and cut through the parking lot for the sole purpose of getting onto Michigan Avenue. (Kathleen Scola's dep, pp 23-24, Plf Appx 47). She has never been a customer of the Chase Defendants and had no intention of doing any banking or other business at Bank One as she turned into its parking lot. (Kathleen Scola's dep, pp 23-24, 45, Plf Appx 47, 53).

After entering the Chase Defendants' parking lot 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, and turned the wrong way onto Michigan Avenue. (Kathleen Scola's dep, pp 24-25, Plf Appx 47-48). As she pulled into the second lane of 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. (Kathleen Scola's dep, p 28, Plf Appx 48). Ms. Scola then braced herself for impact because she realized that she was going to be hit by another car and was, in fact, hit. (Kathleen Scola's dep, p 29, Plf Appx 49). 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. (Kathleen Scola's dep, pp 40-41, Plf Appx 51-52).

During her deposition, Ms. Scola admitted:

- She was in the Chase Defendants' parking lot for less than 30 seconds. (Kathleen Scola's dep, p 48, Plf Appx 53).

- She did not look for any directional signage on the bank's property and indicated that she simply looked left and right down Michigan Avenue to see what traffic was doing. (Kathleen Scola's dep, pp 48, 86, Plf Appx 53, 63).

- She did not even realize that there was no one-way sign or other directional signs on the bank property until about 24 hours after her accident. (Kathleen Scola's dep, pp 45-46, 51-52, Plf Appx 53-54).

- She was in a "rush" to get to her test, was "stressed" when she realized that she had driven through the intersection of Wayne Road and Michigan Avenue, and the bank parking lot was the first turn that she was able to make to cut over to Michigan Avenue. (Kathleen Scola's dep, pp 46-47, Plf Appx 53).

- She was unaware of any evidence to show that the bank ever assumed any type of obligation to put signs up on its property. (Kathleen Scola's dep, pp 53-54, Plf Appx 55).

- There were no one-way signs across the street from the bank on Michigan Avenue. (Kathleen Scola's dep, p 69, Plf Appx 59).

- She was responsible for the occurrence of the accident. (Kathleen Scola's dep, p 80, Plf Appx 61).

**3. Lieutenant Robert Puckett's testimony regarding the accident and lack of duty on the part of the Chase Defendants.**[3]

Lieutenant Robert Puckett has been employed with the City of Wayne Police Department for over twenty years and held the rank of patrol officer on the date of the accident. (Lt Robert Puckett's dep, p 6, Plf Appx 89). One of his job duties as a patrol officer was to investigate automobile accidents and prepare police reports. (Lt Robert Puckett's dep, p 6, Plf Appx 89). As a result of the accident at issue, Lieutenant Pickett gave Kathleen Scola a ticket for going the wrong way on Michigan Avenue. (Lt Robert Puckett's dep, p 13, Plf Appx 91).

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 westbound Michigan Avenue, as well as signs posted on Michigan Avenue. (Lt Robert Puckett's dep, pp 16-17, Plf Appx 91-92). There was also a no left turn sign in that same intersection. (Lt Robert Puckett's dep, p 17, Plf Appx 92). Lieutenant Puckett testified

[3] *See* footnote 2, *supra*.

that there was no requirement that the Chase Defendants place any warning signs or other directional signs on their property. (Lt Robert Puckett's dep, p 25, Plf Appx 94).

**4. Walter Cygan's testimony regarding the lack of duty on the part of the Chase Defendants.**[4]

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 their driveway or parking lot to warn drivers not to the turn the wrong way on to a one-way street or that doing so could be dangerous. (Walter Cygan's Opinion Letter, Plf Appx 95-96); (Walter Cygan's dep, pp 70-72, 86, Plf Appx 114, 118).

**C. Court proceedings.**

**1. 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).[5] 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, Def Appx 000008b, 000010b). Additionally, the Chase Defendants argued that they owed no duty to Plaintiff or Ms. Scola because neither was

[4] *See* footnote 2, *supra*.

[5] *See* footnote 2, *supra*, for the reasons why the motion was brought under both MCR 2.116(C)(8) and (10).

an invitee or licensee, but rather trespassers on the property – only using it to cut through to Michigan Avenue. (*Id*., p 7; Def Appx 000010b).

The Chase Defendants next argued that the open and obvious doctrine applied to all theories of liability advanced in Plaintiff's First Amended Complaint, including any allegation of an alleged design defect on Plaintiff's premises. (Motion for Summary Disposition, p 10, Def Appx 000013b). The Chase Defendants contended that any danger associated with turning the wrong way onto a one-way street was an open and obvious danger to an average person with ordinary intelligence and was a condition faced by drivers every day – and not one with special aspects. (*Id*., p 11; Def Appx 000014b). 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; Def Appx 000015b).

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, Def Appx 000018b). 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 Wayne and Michigan Avenue, where she had just

passed through around 30 seconds before pulling out of the Chase Defendants parking lot onto westbound Michigan Avenue. (*Id*., pp 16-17; Def Appx 000019b-000020b).

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, Def Appx 000020b-000022b).[6]

Plaintiff responded that the open and obvious doctrine was not a defense to an ordinary negligence claim, and therefore not a factor in determining whether the failure to provide a warning here constituted negligence. (Plaintiff's Response to Chase Defendants' Motion for Summary Disposition, p 10, Def Appx 000013b). Plaintiff argued 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; Def Appx 000016b).

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

[6] Plaintiff did not contest the grant of summary disposition of his nuisance and *res ipsa loquitur* claims which present no issues on appeal.

vehicles often turned the wrong way out of the driveway. (Plaintiff's Response to Chase Defendants' Motion for Summary Disposition, pp 14-20, Def Appx 000151b-000157b).

The Chase Defendants filed a reply brief, 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, Def Appx 000293b-000294b). 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; Def Appx 000294b). However, the Chase Defendants further pointed out that Plaintiff's First 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; Def Appx 000294b-000295b). 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; Def Appx 000296b). Finally, the Chase Defendants explained 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*.).

**2. The hearing on summary disposition.**

On January 13, 2017, the trial court held a hearing on the Chase Defendants' Motion for Summary Disposition, as well as motions brought by Ms. Scola in which the

Brown Estate concurred.[7] 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 every day. We assume a reasonable driver would take appropriate care for one's own safety*.

Tr 1-13-17, pp 14-15 (emphasis added) (Plf Appx 27-28). The trial court entered a corresponding order on January 31, 2017. (Order, Plf Appx 12-13).

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, Def Appx 000345b). 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; Def Appx 000346b-000350b). The trial court entered an order on February

[7] 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).

27, 2017, finding no palpable error and denying Plaintiff's motion for reconsideration. (Order Denying Motion for Reconsideration, Plf Appx 39).

**3. The Court of Appeals decision.**

Plaintiff's appeal of right followed, in which he challenged the dismissal of his premises liability 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 was consistent with 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, previously discussed. In the Majority Opinion, the Court of Appeals acknowledged that Plaintiff had argued that the case presented was one 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. (Majority Opinion, p 3, Plf Appx 4). The Majority Opinion specifically noted that Plaintiff did not allege in his First Amended 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, Plf Appx 5). 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 for its open and obvious ruling, 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, Plf Appx 5-6). "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, Plf Appx 6). 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, Plf Appx 7). The Majority Opinion specifically noted that "there were other exit 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*.).

The Dissenting Opinion agreed that the case sounded in premises liability, and thus subject to the open and obvious doctrine. (Dissenting Opinion, p 1, Plf Appx 8). 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 persons other 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 position.

Through an order dated November 20, 2018, the motion for reconsideration was denied. (Order, Plf Appx 11). Plaintiff's application to this Court followed.

## ARGUMENT I

**THE TRIAL COURT AND COURT OF APPEALS CORRECTLY DETERMINED THAT THE ALLEGATIONS CONTAINED IN PLAINTIFF'S FIRST AMENDED COMPLAINT SOUND IN PREMISES LIABILITY AND NOT ORDINARY NEGLIGENCE.**

### A. Introduction – summary.

This Court's June 21, 2019 order directs the parties to address whether the Michigan Court of Appeals erred in holding that the claim filed by Plaintiff sounds in premises liability rather than ordinary negligence. Plaintiff's First Amended Complaint contends that the Chase Defendants had a "duty to post signs and other traffic-controlled devices and warnings in a parking lot/driveway where it meets West Michigan Avenue to give adequate warning of the dangers created when a driver is entering the roadway from its private driveway." (First Amended Complaint, ¶ 46, Plf Appx 163). Plaintiff contends that this duty arises from the responsibility of the Chase Defendants for the 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.* at ¶ 43, Plf Appx 162). Plaintiff further asserts that breach of this alleged duty caused injury to Plaintiff when his mother, Kathleen Scola, turned the wrong way on West Michigan Avenue, a one-way street, causing the ensuing vehicular accident and injury to Plaintiff.

In several cases, this Court has found that a plaintiff alleging injury by a condition of the land is asserting a claim exclusively in premises liability, whereas a plaintiff

pursing a claim for the overt acts of a premises owner on his or her premises is asserting an ordinary negligence claim. *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010) (Order) ("[A]n injured person may pursue a claim for ordinary negligence for the overt acts of a premises owner on his or her own premises"); *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001) (plaintiff trips on a partially-buried cable while digging a trench on the landowner's property) ("Jones contends that it [alleged injury] arose out of a condition on the land, not out of the activity itself." ); *McMaster v DTE Electric Company*, Supreme Court Docket No. 159062, September 27, 2009 (Order) ("the open and obvious doctrine is applicable to a claim that sounds in premises liability: 'the question is whether *the condition of the premises* at issue was open and obvious . . . ,'" *quoting Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523; 629 NW2d 384 (2001)). *See generally*, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (a premises possessor owes a duty of care to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land). Here, Plaintiff's injury is not the result of a contemporaneous negligent activity arising out of an overt act by the Chase Defendants. Instead, Plaintiff complains of the lack of certain warnings which created an allegedly dangerous condition on the Chase Defendants' premises. This condition included the failure to place traffic control signs, lane markings, channelization, and other matters relating to the design, construction and maintenance of the Chase

Defendants' parking lot/driveway. Plaintiff's claim is properly categorized as premises liability because Plaintiff is complaining of conditions – the lack of these measures – on the premises of the Chase Defendants.

Premises liability and negligence claims are based on independent theories of recovery, and accordingly they are not interchangeable. As one court has noted, underpinning the distinction between these claims is the principle that "negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that causes the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *United Scaffolding, Inc v Levine*, 537 SW3d 463, 471 (Texas 2019), *quoting Del Lago Partners, Inc v Smith*, 307 SW3d 762, 776 (Texas 2010). When the injury is the result of a contemporaneous negligent activity, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises liability principles apply. *United Scaffolding, Inc*, 537 SW3d at 471. This reasoning is consistent with and bolstered by this Court's reasoning to date that ordinary negligence requires that injury arise out of an overt act of the premises owner.

The Chase Defendants contend that the terms of Plaintiff's First Amended Complaint govern a determination of the nature of the claim. *See Trowell v Providence Hospital and Medical Centers, Inc*, 502 Mich 509; 918 NW2d 645 (2018), discussed *infra*. Even if this Court were to examine information developed during the course of

discovery in addition to the terms of Plaintiff's First Amended Complaint, the conclusion is the same: this is a premises liability claim because Plaintiff complains of the Chase Defendants' failure to take measures to make the premises safe, and concomitantly does not contend that his injury is the result of an overt, contemporaneous negligent act of the Chase Defendants. Where the injury is the result of the property's condition rather than an activity on the premises, premises liability principles apply.

**B. Applicable law.**

**1. The nature of a claim.**

The court determines the type of a claim by the nature of the action. *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997); *Wheeler v Iron County Road Com'n,* 173 Mich App 542, 544; 434 NW2d 188 (1988); *Randall v Harrold,* 121 Mich App 212, 217; 328 NW2d 622 (1982); 1 CJS Actions, 35 - *Necessity and Mode of Determining Form*. The gravamen of an action is determined by a reading of the claim as a whole and looking beyond the labels of a claim to determine the exact nature of the claim. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). Courts are not bound by the labels a plaintiff attaches to the claim. *Wood v Michigan Air Line R Co*, 81 Mich 358, 363; 45 NW 980 (1890) ("The plea which the pleader chooses to insert in the declaration does not determine the nature or class of actions to which it belongs"); *Thrift v Haner*, 286 Mich 495, 497; 282 NW 219 (1938); *Jahnke v Allen,* 308 Mich App 472, 475; 865 NW2d 49 (2014). The character of an action is determined from the facts stated in, and the issues raised by, the plaintiff's

complaint. It is determined from the substance of the entire pleading, the nature of the grievance, and the relief sought, rather than from the language employed or the form of the pleadings. 1 Am Jur 2d, Actions, § 37, *Classification of Actions:*

> "The name or designation given an action by the parties is not binding before the Court, but it is the duty of the Courts to look to substance, the record made, and disregard the mere name given to the action."

*Genardini v Kline,* 173 P 882, 884; 19 Ariz 558 (1918). *See also Hubbard v Baker*, 24 NYS2d 289, *aff'd* 23 NYS2d 198; 260 App Div 901 (1940).

The nature of a claim does not depend on the sufficiency of evidence but rather upon the sufficiency of the pleadings. *Trowell,* 502 Mich at 528 (Viviano, J., concurring). The chief objective of a complaint is to apprise the other party of the cause of action, and the claim of the plaintiff. *Baker v Gushwa,* 354 Mich 241, 246; 92 NW2d 507 (1958).

A plaintiff speaks through the complaint, and therefore, what claims a plaintiff is asserting can only be determined by reviewing the allegations contained in his or her complaint. *Trowell, supra* at 531. A plaintiff articulates a claim and the supporting legal theory in the complaint, not in the evidentiary record. (*Id.* at 532).

**2. Premises liability versus ordinary negligence.**

In a case where negligence has been alleged, the theory of liability pled by the plaintiff determines that nature of the duty owed to a plaintiff. *See* authorities previously cited; *Laier v Kitchen,* 266 Mich App 482, 493; 702 NW2d 1999 (2005). Liability for a premises liability claim arises solely from the defendant's duty as an owner, possessor, or occupier of land. *Laier,* 266 Mich App at 493. In a premises

liability claim, liability emanates from a defendant's duty or obligation as the possessor or occupier of land, whereby an ordinary negligence claim emanates from one's conduct. *Id.* at 490. When an action develops from a condition of the premises, rather than from an activity, the action is one of premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

Premises liability cases typically are based upon one or more of three theories of liability: (1) failure to warn; (2) negligent maintenance; or (3) defective physical structure. *Milkin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 496; 595 NW2d 152 (1999). Alleging that a defendant created a certain condition does not transform a premises liability claim into an ordinary negligence claim. *Buhalis v Trinity Continuing Care Servs,* 296 Mich App 685, 692; 822 NW2d 254 (2012).

**C. Analysis.**

The trial court and the Court of Appeals properly determined that Plaintiff's claim sounds in premises liability rather than ordinary negligence.

The allegations contained in Plaintiff's First Amended Complaint determine the nature of the case and what Plaintiff's claims sounds in. There is no dispute that Plaintiff has simply labeled his surviving claim against the Chase Defendants as "Negligence." Plaintiff's First Amended Complaint does not expressly state whether his claim for "Negligence" is one based upon premises liability or one based upon ordinary negligence. Therefore, the next step is to determine what the allegations contained in Plaintiff's First Amended Complaint involve or "sound in."

Plaintiff's First Amended Complaint alleges that the Chase Defendants owed Plaintiff the following duties: (1) a duty to maintain their parking lot (Plaintiff's First Amended Complaint, ¶ 44, Plf Appx 162-163); (2) a duty to inspect their parking lot to ensure that it was reasonably safe and fit for travel (Plaintiffs First Amended Complaint, ¶ 48, Plf Appx 163); and (3) a duty to warn users of their parking lot of the fact that one of the exits from the parking lot lead to a one-way street (Plaintiffs First Amended Complaint, ¶ 46, Plf Appx 163). Each of these alleged duties involves a condition of the land (or lack thereof) possessed and controlled by the Chase Defendants. Each of the duties that Plaintiff claims the Chase Defendants owed Plaintiff sound in premises liability, not ordinary negligence.

The claimed breaches of duties also support the conclusion that this is a premise liability claim. Plaintiff alleges that the Chase Defendants breached the duties allegedly owed to Plaintiff in the following ways: (1) failed to have signs and controls in their parking lot controlling the same (Plaintiffs First Amended Complaint, ¶ 45, ¶ 50(a); ¶¶ 51-52, Plf Appx 163-165); (2) failed to have warning signs or other warning devices in the parking lot letting users know of the presence of a one-way street and not to turn the wrong way onto the one-way street (Plaintiffs First Amended Complaint, ¶ 47, Plf Appx 163); (3) failed to design, construct, and maintain their parking lot (Plaintiffs First Amended Complaint, ¶ 49(a), ¶ 49(b), Plf Appx 164); (4) failed to consider and install warning signs in the parking lot regarding the existence of a nearby one-way road

(Plaintiffs First Amended Complaint, ¶ 49(b), Plf Appx 164); and (5) failed to consider or construct traffic control (Plaintiffs First Amended Complaint, ¶ 49(a), Plf Appx 164). Noticeably absent is any assertion that the Chase Defendants' employees engaged in any overt act or conduct that lead to or contributed to the accident in this matter.

This is not a case in which the Chase Defendants used a parking lot attendant or security guard whose duties would include directing traffic out of the parking lot and onto Michigan Avenue. Arguably, this may satisfy the "overt act" requirement and constitute a contemporaneous activity resulting in the complained-of injury. However, these are not the facts or allegations. Instead, Plaintiff points to the condition of the premises based on the Chase Defendants' alleged failure to take measures – traffic signs, lane markings and channelization – as the genesis of his injury.

Since Michigan law requires this Court to look to Plaintiff's First Amended Complaint, not any record that has developed throughout the course of discovery, to determine the "gravamen" or nature of Plaintiff's claim, the only exhibit that this Court need consider in determining the sole issue in this matter is Plaintiff's First Amended Complaint. Plaintiff's First Amended Complaint not only "sounds in" premises liability, but is solely based upon the condition of the Chase Defendant's premises (its parking lot). The sole focus of Plaintiff's First Amended Complaint, as to the Chase Defendants, involves what was present or what was absent from their parking lot.

## ARGUMENT II

### PLAINTIFF'S ARGUMENTS RAISED IN HIS SUPPLEMENTAL BRIEF DO NOT PROVIDE ANY BASIS TO CATEGORIZE HIS PREMISES LIABILITY CASE AS AN ORDINARY NEGLIGENCE CASE.

### A. Applicable law.

In order to bring a negligence claim, a plaintiff must prove four elements: (1) duty; (2) breach of duty; (3) causation; and (4) damages. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 281; 807 NW2d 407 (2011). This is true in cases involving premises liability and ordinary negligence. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006); *Lawrence v Tippens,* 53 Mich App 461, 465; 219 NW2d 461 (1974).

In a matter involving premises liability, liability arises solely upon a defendant's duty as an owner, possessor, or occupier of land. *Buhalis,* 296 Mich App at 692. A premises possessor owes a duty to an invitee, absent certain defenses, to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the premises possessor's land. *Lugo v Ameritech Corp, Inc*, 462 Mich 512, 516; 629 NW2d 384 (2001). A breach of duty can occur on one's premises even though the *situs* of a plaintiff's injury is off the premises. *Schneider v Nectarine Ballroom, Inc*, 204 Mich App 1, 3-4, 7; 514 NW2d 486 (1991). In an ordinary negligence case, liability arises based upon the action or conduct of a defendant. *James,* 464 Mich at 18-19.

**B. Analysis.**

**1. Plaintiff's argument that this is an ordinary negligence claim because his injury did not occur on the Chase Defendants' premises lacks merit.**

Plaintiff argues his claim sounds in ordinary negligence because his claimed injury occurred on Michigan Avenue and not the Chase Defendants' premises. Plaintiff asserts there can be no finding of premises liability because the Chase Defendants were not in possession and control of the location where the accident occurred. This argument lacks merit. First, the duties and alleged breach of duties for which Plaintiff claims the Chase Defendants are liable for all, according to Plaintiff's First Amended Complaint, involve and took place on the Chase Defendants' premises. Logically, the Chase Defendants can only be held responsible for what occurs or fails to occur within the envelope of their property. A premises possessor's duty starts and stops within that confine. Second, a breach of duty can occur on one's premises even though the *situs* of a plaintiff's injury is off the premises. *Schneider, supra*.

Plaintiff's First Amended Complaint reveals that the entire basis for his negligence claim involves what was and was not present in the Chase Defendants' parking lot. This is where the various duties allegedly owed originated from and where these duties were allegedly breached. Accordingly, where Plaintiff ended up allegedly being injured is irrelevant to whether the nature of Plaintiff's claim is a one of premises liability or ordinary negligence.

Additionally, Plaintiff's position would create anomalous results. Assume hypothetically that there is loose board on the roof a building which is not considered to be open and obvious. A worker trips over that board, tumbles over the side of the building, and lands on the adjacent property owner's premises. Under Plaintiff's view, this would not be a premises liability claim, but rather an ordinary negligence claim, because the injury occurred off the premises. Yet, the condition itself is one found on the premises, which is the litmus test for whether the case is one for premises liability or ordinary negligence.

**2. Plaintiff's argument that the alleged hazard for motorists exiting the Chase Defendants' parking lot was not a dangerous condition on the land that the Chase Defendants possessed and controlled lacks merit.**

Next, Plaintiff argues that the "hazard" that he encountered was not present on the Chase Defendants' premises, but instead was a "state of being" that would depend on whether a motorist exiting the Chase Defendants' parking lot turned the right way or the wrong way on to Michigan Avenue while exiting the Chase Defendants' parking lot. This makes no legal or logical sense. First, the Chase Defendants are only legally responsible for "hazards" which exist on their premises. They are not in possession and control of Michigan Avenue. Second, going back to Plaintiff's First Amended Complaint, a simple review reveals that the "dangerous" or "hazardous" conditions for which Plaintiff attempts to hold the Chase Defendant liable for involve signs and warnings *on*

*their premises, or a lack thereof*, as well as how their parking lot was designed, operated, and maintained. Plaintiff's "hazard" argument is belied by his own pleading.

**3. Plaintiff's argument that Michigan common law has recognized personal injury claims similar to that alleged by Plaintiff as ordinary negligence claims lacks merit.**

The first ordinary negligence case which Plaintiff tries to analogize to his case is *Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (2001). In *Langen*, there was a collision between a motorcyclist driving down a road and a motor vehicle operator exiting the defendant's shopping center. There was a median with a small tree on the defendant's property. The plaintiff claimed that the small tree obstructed the view of oncoming traffic and the plaintiff. The Court of Appeals held that the premises owner had a duty to design, develop, and maintain the parking areas of its shopping center so as to prevent an unreasonable harm to motorists travelling on adjacent highways. *Langen, supra* at 678. The Court of Appeals in *Langen* simply decided that Plaintiff has stated a claim upon which relief could be granted. (*Id.* at 681-682). There was no discussion or determination of whether the claim was one for premises liability or ordinary negligence.

Next, Plaintiff cites *Balcer v Forbes*, 188 Mich App 509; 470 NW2d 453 (1991), and argues that while the Court of Appeals found no duty existed on the part of the premises possessor as to the injured parties, who happened to be pedestrians a full city block away from the premises at issue, the case clearly involved an ordinary negligence claim, not a premises liability claim. However, Plaintiff has provided no support for his

mere conclusion, and the *Balcer* decision does not support Plaintiff's conclusion. In fact, the court in *Balcer* held that a private premises owner is under no duty to warn others of the presence of a one-way street. *Balcer, supra* at 510-511.

Plaintiff has not, and presumably cannot, locate any legal authority in Michigan which would transform his case from a premises liability case to an ordinary negligence case. Plaintiff cites two cases which are factually and legally distinct from the one at issue. Neither case dealt with a duty that was allegedly owed to one that was on the actual property of the defendant. In this case, Plaintiff is claiming that based upon his relationship with the Chase Defendants and the condition of their premises, certain duties were owed to him. In both *Langen and Balcer*, the plaintiffs had a different legal relationship with the defendant premises possessor. As this Court is well aware, the issue of duty is based upon the relationship between the actor and the injured person and whether that relationship gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Moning v Alfano,* 400 Mich 425, 436-437; 254 NW2d 759 (1977).

**4. Plaintiff's argument that the Chase Defendants owed a duty to Plaintiff because they knew about motorists exiting onto Michigan Avenue and their conduct increased the risk of harm lacks merit.**

Plaintiff attempts to shift this Court's attention by arguing that based upon alleged knowledge of some people allegedly turning the wrong way out of the Chase Defendants' parking lots at times, some special non-premises liability duty existed on the part of the Chase Defendants to warn users of their parking lot of the dangers of

turning the wrong way out of their parking lot. First, Plaintiff has not cited one code, ordinance, standard, statute, law, or case that would support. In fact, the two witnesses who Plaintiff appears to be relying upon for alleged expertise, Police Officer Robert Puckett and Walter Cygan, have each testified that the Chase Defendants did not owe Plaintiff the legal duties that he claims were owed to him in this matter. There are countless residential and commercial properties throughout the State of Michigan whose parking lots empty onto one way roads. Plaintiff has not shown that these properties have any warning signs or signals warning the users of their parking lots of the obvious. The logical extension of Plaintiff's argument is that all private landowners would have to assume the mantle of the governmental entity responsible for traffic control devices for a street or highway, contrary to MCL 257.615:

> Sec. 615. (a) Except with authority of a statute or of a duly authorized public body or official, no person shall place, maintain, or display along any highway or upon any structure in or over any highway any sign, signal, marking, device, blinking, oscillating or rotating light or lights, decoration or banner which is or purports to be or is in imitation of or resembles or which can be mistaken for a traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any traffic control device or any railroad sign or signal, and no person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising.

And suddenly the scope of such an obligation would entail consideration of over 60 traffic control devices.

> Section 2B.06 STOP Sign Applications
>
> Section 2B.07 Multi-Way Stop Applications

Section 2B.08 YIELD Sign (R1-2)

Section 2B.09 YIELD Sign Applications

Section 2B.10 STOP Sign or YIELD Sign Placement

Section 2B.11 Yield Here To Pedestrians Signs and Stop Here For Pedestrians Signs (R1-5 Series)

Section 2B.12 In-Street and Overhead Pedestrian Crossing Signs (R1-6, R1-6a, R1-9, and R1-9a)

Section 2B.13 Speed Limit Sign (R2-1)

Section 2B.14 Truck Speed Limit Plaque (R2-2P)

Section 2B.15 Night Speed Limit Plaque (R2-3P)

Section 2B.16 Minimum Speed Limit Plaque (R2-4P)

Section 2B.17 Higher Fines Signs and Plaque (R2-6P, R2-10, and R2-11)

Section 2B.18 Movement Prohibition Signs (R3-1 through R3-4, R3-18, and R3-27)

Section 2B.19 Intersection Lane Control Signs (R3-5 through R3-8)

Section 2B.20 Mandatory Movement Lane Control Signs (R3-5, R3-5a, R3-7, and R3-20)

Section 2B.21 Optional Movement Lane Control Sign (R3-6)

Section 2B.22 Advance Intersection Lane Control Signs (R3-8 Series)

Section 2B.23 RIGHT (LEFT) LANE MUST EXIT Sign (R3-33)

Section 2B.24 Two-Way Left Turn Only Signs (R3-9a, R3-9b)

Section 2B.25 BEGIN and END Plaques (R3-9cP, R3-9dP)

Section 2B.26 Reversible Lane Control Signs (R3-9e through R3-9i)

Section 2B.27 Jughandle Signs (R3-23, R3-24, R3-25, and R3-26 Series)

Section 2B.28 DO NOT PASS Sign (R4-1)

Section 2B.29 PASS WITH CARE Sign (R4-2)

Section 2B.30 KEEP RIGHT EXCEPT TO PASS Sign (R4-16) and SLOWER TRAFFIC KEEP RIGHT Sign (R4-3)

Section 2B.31 TRUCKS USE RIGHT LANE Sign (R4-5)

Section 2B.32 Keep Right and Keep Left Signs (R4-7, R4-8)

Section 2B.33 STAY IN LANE Sign (R4-9)

Section 2B.34 RUNAWAY VEHICLES ONLY Sign (R4-10)

Section 2B.35 Slow Vehicle Turn-Out Signs (R4-12, R4-13, and R4-14)

Section 2B.36 DO NOT DRIVE ON SHOULDER Sign (R4-17) and DO NOT PASS ON SHOULDER Sign (R4-18)

Section 2B.37 DO NOT ENTER Sign (R5-1)

Section 2B.38 WRONG WAY Sign (R5-1a)

Section 2B.39 Selective Exclusion Signs

Section 2B.40 ONE WAY Signs (R6-1, R6-2)

Section 2B.41 Wrong-Way Traffic Control at Interchange Ramps

Section 2B.42 Divided Highway Crossing Signs (R6-3, R6-3a)

Section 2B.43 Roundabout Directional Arrow Signs (R6-4, R6-4a, and R6-4b)

Section 2B.44 Roundabout Circulation Plaque (R6-5P)

Section 2B.45 Examples of Roundabout Signing

Section 2B.46 Parking, Standing, and Stopping Signs (R7 and R8 Series)

Section 2B.47 Design of Parking, Standing, and Stopping Signs

Section 2B.48 Placement of Parking, Stopping, and Standing Signs

Section 2B.49 Emergency Restriction Signs (R8-4, R8-7, R8-8)

Section 2B.50 WALK ON LEFT FACING TRAFFIC and No Hitchhiking Signs (R9-1, R9-4, R9-4a)

Section 2B.51 Pedestrian Crossing Signs (R9-2, R9-3)

Section 2B.52 Traffic Signal Pedestrian and Bicycle Actuation Signs (R10-1 through R10-4, and R10-24 through R10-26)

Section 2B.53 Traffic Signal Signs (R10-5 through R10-30)

Section 2B.54 No Turn on Red Signs (R10-11 Series, R10-17a, and R10-30)

Section 2B.55 Photo Enforced Signs and Plaques (R10-18, R10-19P, R10-19aP) Section Deleted

Section 2B.56 Ramp Metering Signs (R10-28 and R10-29)

Section 2B.57 KEEP OFF MEDIAN Sign (R11-1)

Section 2B.58 ROAD CLOSED Sign (R11-2) and LOCAL TRAFFIC ONLY Signs (R11-3 Series, R11-4)

Section 2B.59 Weight Limit Signs (R12-1 through R12-5)
Section 2B.60 Weigh Station Signs (R13 Series)
Section 2B.61 TRUCK ROUTE Sign (R14-1)
Section 2B.62 Hazardous Material Signs (R14-2, R14-3)
Section 2B.63 National Network Signs (R14-4, R14-5)
Section 2B.64 Headlight Use Signs (R16-5 through R16-11)

Chapter 2B. Regulatory Signs, Barricades, and Gates, Manual on Uniform Traffic Control Devices. The burden to decide and post such traffic control measures is onerous and indeed impractical. Placing such obligations upon a private landowner is against public policy, which in turn mitigates against imposition of such a duty. *Sizemore v Smock*, 430 Mich 283, 293; 422 NW2d 666 (1988); *see also Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (Supreme Court considers the burdens and consequences of imposing a duty and the resulting liability). Moreover, it is the obligation of the statutorily – charged governmental unit to so decide and provide such measures on the subject roadway. *See generally Adamski v Burdell*, 363 So2d 1316, 1319-1320 (La App 1978).

Plaintiff argues that the failure to recognize a duty of care placed upon the possessor or occupier of premises will result in situations in which those persons or entities will not keep in good repair the condition of their premises. Plaintiff's inference is that the only motivation for an owner or possessor of premises to keep the premises in good condition is to avoid civil liability. This myopic view ignores the simple fact that landowners and businesses generally are not to be presumed irresponsible. If for no

other reason, this would be "bad business." Nor has Plaintiff considered the ramifications of what is essentially the rejection of the open and obvious doctrine under Michigan law. When a condition is open and obvious or known to the invitee or licensee (here, Plaintiff was a trespasser), the land owner is not in a better position to discover it. In turn, when such persons are aware or charged with being aware of the alleged dangerous condition upon casual observation, the condition will, in most cases, no longer pose an ***unreasonable*** risk. This is because the law presumes that persons will take reasonable measures to protect themselves against known risks. Indeed, the concept of reasonable care "only requires attending to the foreseeable risks in light of the then-extant environment, including foreseeable precautions by others." Restatement (Second) of Torts § 343 cmt. B (1965). Stated otherwise, Plaintiff fails to distinguish between conditions that pose an unreasonable risk (those not subject to the open and obvious doctrine) from those that pose a reasonable risk, in the sense that persons on the premises will take reasonable measures to protect themselves against such known and obvious risks.

To the extent Plaintiff argues that the availability of comparative negligence justifies the abandonment of the open and obvious doctrine, Plaintiff is mistaken. A similar argument was made to and rejected by this Court in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

## ARGUMENT III

**SINCE THIS CASE IS A PREMISES LIABILITY CASE, THE OPEN AND OBVIOUS DANGER DOCTRINE IS AVAILABLE UNDER MICHIGAN LAW APPLIES UNDER THE FACTS OF THIS CASE, WITH NO SPECIAL ASPECTS BEING PRESERVED OR ESTABLISHED.**

Plaintiff concludes his arguments by stating that if this case is in fact a premises liability case, then the open and obvious danger doctrine does not apply. Next, he argues that if the allegedly dangerous condition in this matter is found to be open and obvious, then a special aspect exists which would prohibit the use of the open and obvious danger defense. This Court has not asked the parties to re-litigate whether the open and obvious danger doctrine defense is applicable in this case. These arguments have been rejected by the trial court, the Court of Appeals, and have no basis in fact or law. They are also addressed in the Chase Defendants' Answer to Application.

To distance himself from the open and obvious doctrine, Plaintiff now argues that the Chase Defendants did something to increase the risk of harm posed to motorists exiting from one area of their parking lot. However, Plaintiff fails to explain or demonstrate what the Chase Defendants did or did not do that *unreasonably* increased the risk of harm. Plaintiff has argued that motorists using the particular exit that Kathleen Scola chose to use were forced to make a critical decision whether to turn right or turn left. This appears to be a decision that just about every motorist or pedestrian is forced to make whenever he or she exits one's property. The Chase Defendants did not make the decision to make Michigan Avenue a one-way road or

where to put the one-way road signs or other directional sign on the public road. These are decisions which were made by and the responsibility of the State of Michigan Highway Commission. MCL 257.641.

Plaintiff has not articulated why the potential harm in turning the wrong way onto a one-way road is anything but an open and obvious danger, as was the absence of signs on the Chase Defendants' property. As both the trial court and Court of Appeals has correctly recognized, no special aspects existed in this matter.

## ARGUMENT IV

**WHETHER PLAINTIFF'S CLAIM SOUNDS IN PREMISES LIABILITY OR ORDINARY NEGLIGENCE, MICHIGAN LAW DOES NOT PLACE A DUTY ON A PRIVATE PROPERTY OWNER TO WARN OTHERS OF THE PRESENCE OF A ONE-WAY STREET.**

### A. Applicable law.

An essential element of any type of negligence claim, whether it involves a claim for premises liability or ordinary negligence, is the existence of a duty owed by the defendant to the plaintiff. *Smith v Kowalski*, 223 Mich App 610, 613; 567 NW2d 463 (1997). The determination of whether a duty exists is a question of law for the court to determine. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999). A private premises owner is under no duty to warn of the presence of a one-way street. *Balcer, supra* at 510-511 (1991). According to Michigan law, it is the state highway commission – not a private premises owner or possessor – which 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. (*See* MCL 257.641, Def Appx 000393b).

### B. Analysis.

This Court should deny leave to appeal, regardless of whether the nature of the claim is premises liability or ordinary negligence. While the Chase Defendants agree with the trial court and Court of Appeals that Plaintiff's allegations against them sound in premises liability, whether Plaintiff's allegations sound in premises liability or ordinary

negligence has no effect on the ultimate outcome of Plaintiff's case against the Chase Defendants. Simply put, the Chase Defendants did not owe Plaintiff any of the duties Plaintiff claims that he was owed in this matter. This is true whether the case is analyzed by applying the law applicable to premises liability claims or the law applicable to ordinary negligence claims. As pointed out by Plaintiff's alleged experts, as well as the Court of Appeals in *Balcer*, there is no ordinance, statute, standard, code, or law that places a duty on a private property owner to post signs, traffic control devices, or other warnings in their private parking lot to alert drivers that they are approaching a one-way street and not to turn the wrong way onto to the one-way street. If the Chase Defendants do not owe Plaintiff any of the duties alleged by Plaintiff, then the Chase Defendants are entitled to summary disposition, as a matter of law.

The Court is otherwise referred to the discussion found in Argument I, Sections (B)(3) and (4).

**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, and 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

BY: /s/Robert G. Kamenec
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Dated: October 18, 2019

STATE OF MICHIGAN

IN THE SUPREME COURT

FRANK ANTHONY SCOLA,

Plaintiff-Appellant,

v

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

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, and JP MORGAN CHASE & CO.,

Defendants-Appellees,

and

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

Defendants.
_____/

**PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE**

STATE OF MICHIGAN )
)SS
COUNTY OF OAKLAND )

MONIQUE M. VANDERHOFF, being first duly sworn, deposes and says that she is an employee with the firm of Plunkett Cooney, and that on October 18, 2019, she caused to be served a copy of Defendants-Appellees' Supplemental Answer to Application for Leave to Appeal, Defendants-Appellees' Appendix Volumes I, II and III, with Index/Table of Contents, and Proof of Service/Statement Regarding E-Service as follows:

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**Counsel was served via MiFile**

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