**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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Steven A. Hicks (P49966)
Co-Counsel for Plaintiff/Appellant
216 North Chestnut Street
Lansing, MI 48933-1061
(517) 881-5564
steve@chair2consulting.com

Michael S. Daoudi (P53261)
Law Offices of Michael S. Daoudi, P.C.
Attorneys for Plaintiff/Appellant
560 Kirts Boulevard, Suite 104
Troy, MI 48084-4141
(248) 220-4377
msd@msd4law.com

Robert G. Kamenac (P35283)
PLUNKETT COONEY
Attorneys for Defendants-Appellees
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304-5096
(248) 901-4000
rkamenec@plunkettcooney.com

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# PLAINTIFF/APPELLANT FRANK SCOLA'S REPLY BRIEF IN RESPONSE TO DEFENDANT/APPELLEE CHASE BANK'S SUPPLEMENTAL BRIEFING

**ORAL ARGUMENT REQUESTED**

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Prepared by:

STEVEN A. HICKS (P49966)
Co-Counsel for Plaintiff/Appellant
216 North Chestnut Street
Lansing, MI 48933-1061
(517) 881-5564
steve@chair2consulting.com

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## INTRODUCTION

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. This Court should peremptorily reverse the Court of Appeals' majority ruling in this case, because Scola's claim against Chase Bank is clearly 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.

## ARGUMENT

### I. THE DANGEROUS CONDITION MUST BE ON LAND THAT DEFENDANT POSSESSED AND CONTROLLED FOR THE CLAIM TO BE A PREMISES CLAIM.

Chase Bank contends that premises liability in Michigan includes dangerous conditions found outside the boundaries of the land that a defendant possessed and controlled. In short, so long as the duty allegedly breached is based on something that the possessor of land did (or did not do) on its land that resulted in another person encountering a dangerous condition near its land, and thus, being injured, the claim is a premises claim. Oddly, however, Chase Bank does not cite a single case – from any jurisdiction! – to support its position. Instead, it attempts to duck that anomaly in this case by suggesting to this Court that the "situs of the injury" need not be on the premises owned and controlled by the defendant. But, of course, situs of the injury need not be the same! The question in a premises liability case is whether a dangerous condition existed on land that was possessed and controlled by the defendant, not where the plaintiff was injured.

The hypothetical scenario suggested by defense counsel as part of Chase Bank's supplemental briefing in this case illustrates that point. If a person trips on a defective and dangerous condition on the roof of a building that is possessed and controlled by the defendant, i.e., a "loose board", it makes no difference where that person landed. In that scenario, the dangerous condition on land is the "loose board", and unlike this case, the "loose board" admittedly is on defendant's land, not in "the adjacent property owner's yard".

Clearly, that hypothetical situation is similar only in two respects: 1) the duties allegedly breached all concern the defendant's failure to use due care to protect that person from being injured, by taking appropriate steps on land that it possessed and controlled and 2) the "situs of injury" happens to be outside the boundaries of defendant's land. But, the operative question is still whether the dangerous condition was on land defendant possessed and controlled. And clearly, the dangerous condition was on defendant's land because the "loose board" was on the roof of its building. But, here, the dangerous condition was not on premises that Chase Bank possessed and controlled, as it was the danger posed by vehicles traveling westbound on the adjoining one-way street.

In a premises liability case, it seems axiomatic that the dangerous condition (that injured the plaintiff) must be on land that the defendant possessed and controlled. Yet, Chase Bank asks this Court to hold otherwise so that it can defend both the Court of Appeals' erroneous conclusion that this case is a premises liability claim, and the majority opinion that the open and obvious danger rule negated any duty owed by Chase to Scola.

Chase Bank cites *Schneider v Nectarine Ballroom*, 201 Mich App 4, 514 NW2d 486 (1994) to support its flawed contention that Scola seeks to make "situs of injury" the determining factor as to whether his claim is an premises claim or a negligence claim. Its

discussion of the *Schneider* case, however, is a red herring, because Scola clearly is not arguing that situs of injury should determine the nature of his claim against Chase Bank. He is saying that the dangerous condition must be on land that Chase Bank possessed and controlled and here, the dangerous condition was traffic on the busy adjoining street.

In *Schneider*, the Court of Appeals rejected the defendant nightclub's claim that it owed no duty to protect its patrons from being assaulted after being ejected from its premises. In short, the Court of Appeals agreed with the plaintiff's position that the situs of the injury was not controlling. But, the issue in the *Schneider* case was not whether the claim sounded in premises liability or ordinary negligence. The issue was whether a tavern keeper's duty to protect a patron from being injured by another person extended to injuries sustained off the defendant tavern's premises. Id, at pp 4-6. No one argued in the *Schneider* case that the situs of the injury determined the nature of the claim, as the defense now mistakenly suggests that Scola is claiming. Simply put, Chase Bank's focus on situs of injury is misplaced, and consequently, so is its reliance on the *Schneider* case.

The importance of where the dangerous condition is located cannot be so easily escaped. If anything, *Schneider* confirms that the situs of the injury is not determinative of whether a duty was owed in this case to protect Scola from being harmed. Clearly, it does not obviate the essential requirement in a premises liability case that the alleged dangerous condition actually be located on land that defendant possessed and controlled.

Situs of injury is not controlling and Scola never claimed otherwise. The defense argues this point solely to focus attention on something other than the undisputable fact that the dangerous condition in this case was located outside the boundaries of its land.

## II. BOTH THE COMPLAINT AND THE EVIDENCE MUST BE CONSIDERED IN DETERMINING THE NATURE OF SCOLA'S CLAIM AND BOTH SUPPORT HIS POSITION THAT HE BROUGHT AN ORDINARY NEGLIGENCE CLAIM.

Chase Bank contends that this Court should focus exclusively on Scola's amended complaint to determine if this claim is a premises claim or an ordinary negligence claim. In support, it relies upon Justice Viviano's dissenting opinion in *Trowell v Providence Hospital*, 502 Mich 509, 918 NW2d 645 (2018). But, in *Trowell*, unlike this case, the issue was whether the shorter 2-year statute of limitations for medical malpractice claims should be applied or the longer 3-year statute of limitations applicable to ordinary negligence claims. Moreover, in *Trowell*, the defendant hospital moved for summary disposition before discovery closed. And, it did not move for summary disposition under MCR 2.116(C)(10).

Here, Chase Bank moved for summary disposition after discovery closed. And, it did so using the evidentiary record as support its position that Scola brought a premises liability claim that was precluded by the open and obvious danger doctrine in Michigan. While a copy of the complaint was attached as an exhibit to its motion for summary disposition, its briefing was devoid of any substantive discussion of what Scola alleged.[1]

Now, the defense seeks to truncate this Court's review to the complaint only, arguing that the complaint is controlling when it comes to determining whether the claim brought against it by Scola is a premises claim or an ordinary negligence claim. But, none of the concerns raised in *Trowell* apply in this case. Here, there was no confusion about the nature of the claims. Defense counsel identified and pled a myriad of defenses to that

[1]As the Court of Appeals correctly observed, the summary disposition motion below was supported "with documentary evidence, including depositions" and "[t]hus, review on appeal is pursuant to MCR 2.116(C)(10)." *Scola*, slip op at p 2. [Appx 3].

claim, including that the claim was precluded on open and obvious danger grounds. No motion for more definite statement was filed seeking clarification as to the nature of the claims alleged in the complaint. And, summary disposition under MCR 2.116(C)(8) was not sought until after discovery ended, presumably because the defense recognized that "leave to amend pleadings is freely given when justice so requires". See MCR 2.118(A)(2).

Here, both Scola's amended complaint and the evidentiary record in this case support his contention that his claim sounds in ordinary negligence, not premises liability as the Court of Appeals concluded. For brevity's sake, the analysis undertaken previously in Scola's supplemental briefing – both as to the allegations made in his complaint and the evidentiary record supporting his contention that he brought an ordinary negligence claim – will not be restated. Scola simply incorporates it by reference in support of his reply to the defense's position that his allegations do not support an ordinary negligence claim.

## III. NO STATUTORY DUTY NEED BE ESTABLISHED FOR A DUTY TO EXIST THAT SUPPORTS AN ORDINARY NEGLIGENCE CLAIM.

Chase Bank further argues that no duty is owed in this case because no statute was violated. Presumably, if a statute had been violated, the defense would be pointing out that a statutory violation is evidence of negligence, and not negligence per se. But, regardless, the absence of a statutory violation is not dispositive of whether a duty was owed, nor whether a duty was breached. If that were the case, negligence cases would be limited solely to those situations where the Legislature had opted to create a statutory duty to protect its citizens from harm. Obviously, it is far more common that a duty is owed because of something the defendant either did or failed to do when it should have knowing the risk of harm presented. As this Court observed in *Hill v Sears, Roebuck & Co*, 492 Mich 651, 822 NW2d 190 (2012), whether a legal duty is owed, depends on the following:

> [T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." Factors relevant to the determination whether a legal duty exists include the "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." [Footnotes omitted]. Id, at p 661 (citing In *re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505-506, 740 NW2d 206 (2007) and *Brown v Brown*, 478 Mich 545, 552, 739 NW2d 313 (2007).

Simply put, whether a statutory duty was owed is not a litmus test for determining whether a duty is owed in Michigan. Thus, even assuming Chase Bank is correct that no statutory duty was violated by not designing its parking lot so motorists would not turn the wrong-way onto westbound Michigan, or alternatively, warning motorists exiting from its parking lot onto westbound Michigan that the adjoining street was one-way westbound, that fact alone does not warrant a conclusion that no common law duty was owed in this case.

Here, Chase Bank owed a duty to Scola because it designed the parking areas, and in particular, the exit from the parking lot onto westbound Michigan where Scola's mother mistakenly turned the wrong-way when exiting. If Chase Bank had simply provided motorists using that exit with an exit similar to the exit on the west side of its building, this motor vehicle accident would not have happened and Scola would not have been injured. But, instead, Chase Bank put up signs and pavement markings instructing motorists that they should simply pull forward and exit onto Michigan without telling them it was one-way. Because it designed the parking areas, and installed exit signs and pavement markings, Chase Bank owed a duty to motorists exiting from its parking lot onto westbound Michigan. It was that undertaking by Chase Bank that created a duty to protect all motorists using its parking lot from the foreseeable harm of turning the wrong-way onto westbound Michigan.

## IV. THERE IS NO CLEARLY ESTABLISHED REQUIREMENT IN MICHIGAN THAT ACTS BE OVERT (OR CONTEMPORANEOUS) TO SUPPORT AN ORDINARY NEGLIGENCE CLAIM.

In its supplemental briefing, Chase Bank seeks to establish a new standard for ordinary negligence cases that would require that the defendant's acts be "overt" and also "contemporaneous" for a duty to be owed to the person that was harmed. To do so, Chase Bank looks outside the state of Michigan, and quotes, without any substantive discussion, a Texas case entitled *United Scaffolding, Inc v Levine*, 537 SW3d 463, 471 (Texas 2019).

While that Texas case is accurately quoted, and it does reject the "general negligence" claim on the grounds stated by defense counsel, it must be noted that the Court also considered whether plaintiff's "general negligence" claim was not viable because defendant had control over the scaffolding from which the plaintiff fell at the time that he was injured. Concluding that defendant controlled the scaffolding, the Court held that the case was a premises liability claim and therefore, it was reversible error for the case to have been tried as a general negligence claim. Clearly, that is not the same as this case.

Here, Chase Bank did not have control over the condition that injured Scola, i.e., oncoming traffic heading westbound on the busy adjoining one-way street. But, Chase Bank had control over its parking areas and the signs/markings that instructed motorists to exit from its parking lot onto that busy adjoining street without also informing them that it was one-way traffic heading westbound and consequently, the exit was "left turn only". It is that control that makes this case easy to distinguish from the Texas case now cited. By considering both concerns, the Texas court made it clear that whether the alleged acts of the defendant were "overt" and "contemporaneous" was not the end of the discussion.

Moreover, the proper analysis in this case presumably should be focused more on what Michigan courts have said than what a Texas court concluded in a divided opinion.

While the word "overt" has been used in passing in a few instances in Michigan, there has never been any discussion as to what exactly is required for the defendant's acts to be considered "overt". See generally, *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 781 NW2d 806 (2010), citing *Laier v Kitchen*, 266 Mich App 482, 702 NW2d 199 (2005) for the proposition that "[a]n injured person may pursue a claim for ordinary negligence for the overt acts of a premises owners on his or her own premises."[2] "Contemporaneous", in contrast, is a word that has not been employed much in discussing ordinary negligence claims in Michigan, although it likely could be used to describe the acts of some defendants in Michigan cases where an ordinary negligence claim existed. See generally, *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062, 743 NW2d 917 (2008) (defendant opened the door to his mobile home and struck plaintiff with it and plaintiff fell backwards off the porch of defendant's mobile home and was injured).

## V. PRIOR MICHIGAN CASES HAVE RECOGNIZED THAT A DUTY TO USE DUE CARE MAY BE OWED IN SUCH CIRCUMSTANCES AND THOSE CASES CLEARLY SOUND IN ORDINARY NEGLIGENCE.

Chase Bank attempts, but fails to distinguish the analogous cases from Michigan that Scola has cited in his supplemental briefing and that he relied upon in the lower courts. Specifically, Chase Bank is able to say nothing more about *Langen v Rushton*, than simply

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[2]The Court of Appeals in *Laier*, supra, never used the word "overt" to describe what the defendant did, nor is it clear that what he did was "contemporaneous" with plaintiff being injured. In *Laier*, supra, the defendant raised up the bucket of a front-end loader so that a hydraulic hose could be repaired, and plaintiff was crushed when a fitting on the hydraulic hose failed, thus, releasing the pressure that held the bucket up so that it came down suddenly. Presumably, the defendant's negligent act was raising the bucket up so that plaintiff could work on the hydraulic hose without recognizing the risk posed to him if the pressure was released, because if it did, the bucket would come down suddenly. It is unclear how much time passed from when the defendant raised up the bucket and when the hydraulic hose failed and plaintiff was crushed by the bucket.

noting that "[t]here was no discussion or determination of whether the claim was one for premises liability or ordinary negligence." But, no discussion is needed when it is clear from the facts in that case that it could be nothing other than an ordinary negligence claim.

Chase Bank seeks to dodge the implications for this case of what the Court said in *Langen*, supra, when it held that the shopping center owner had a duty to "design, develop, and maintain" its parking areas "so as to prevent an unreasonable harm to motorists traveling on adjacent highways." Id, at p 678. In *Langen*, plaintiff's status on defendant's land was not discussed, because he was a motorcyclist traveling on the adjoining street when he was struck by a vehicle exiting the shopping center. As in this case, the shopping center owner had possession and control only over its parking areas, not the adjoining street. Consequently, *Langen* was an ordinary negligence claim, and not a premises claim.

The same can be said of *Balcer v Forbes*, 188 Mich App 509, 470 NW2d 453 (1991). If, as the defense apparently is now claiming, *Balcer* was a premises liability case, where is the discussion of the plaintiff's status on the defendant's land, or for that matter, the open and obvious danger rule? Both the majority opinion and the dissenting opinion in *Balcer* are squarely focused on whether a duty is owed, and both discuss duty in terms that make it abundantly clear that they view the case as an ordinary negligence claim. The majority opinion holds that the accident was not foreseeable as the plaintiff not only turned the wrong way onto the adjoining street but traveled a full city block before the collision occurred. The dissent, in contrast, citing *Langen*, concluded that "[a] landowner creating or abutting an obvious traffic hazard which presents a serious risk of harm that is "relatively foreseeable," can have a duty to minimize that hazard or warn of its existence." Id, p 515.

## CONCLUSION

Chase Bank asks this Court to expand premises liability law in Michigan to include dangerous conditions beyond the land that it possessed and controlled. This Court should reject such efforts because there is simply no grounds for doing so. Scola clearly has brought an ordinary negligence claim. As such, premises law, including the open and obvious danger rule, does not apply here. To the extent that this Court is interested in harmonizing the law so that a consistent standard is applied both to dangerous conditions on the defendant's land and to dangerous conditions found outside the defendant's land, this Court should consider whether to adopt a due care standard that applies to all such conditions (and thus, claims), as discussed in the Rest Torts 3d, §51. By doing so, this Court would ensure that Michigan law protects both injured persons and possessors of land by holding both parties responsible for harm that results when due care is not used.

## 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: November 8, 2019

/s/ Steven A. Hicks

Steven A. Hicks (P49966)
Co-Counsel for Plaintiff/Appellant
216 North Chestnut Street
Lansing, MI 48933-1061
(517) 881-5564
steve@chair2consulting.com