

STATE OF MICHIGAN  
IN THE SUPREME COURT

DONNA LIVINGS,

Plaintiff-Appellee,

Supreme Court No. 159692

v

Court of Appeals No. 339152

SAGE'S INVESTMENT GROUP, LLC,  
a Michigan limited liability company,

Macomb County Circuit Court  
No. 2016-1819-NI

Defendant-Appellant,

and

T&J LANDSCAPING & SNOW REMOVAL,  
INC., a Michigan Corporation and GRAND  
DIMITRE'S OF EASTPOINTE FAMILY  
DINING, a Michigan Corporation,

Defendant-Appellees.

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**AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE**

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**JURISDICTIONAL STATEMENT**

The Michigan Association for Justice relies on this Court's February 7, 2020 MOA order. (2/7/20 Order).

**QUESTIONS PRESENTED**

- I. Whether the “special aspects” doctrine in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001) should be overruled.
- II. Whether, if this Court retains, in some form, the “special aspects” doctrine, it should hold that the Plaintiff-Appellee’s employment is a relevant consideration in determining whether a condition is effectively unavoidable.
- III. Whether evidence raises genuine issues of material fact that Defendant-Appellant Sage should have anticipated the harm to invitee employees who needed to enter the restaurant to perform their jobs and, under *Lugo*, that the hazardous parking lot constituted an effectively unavoidable condition.

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state.<sup>1</sup>

In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 93-94, 117; 485 NW2d 676 (1992) and *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-612; 537 NW2d 185 (1995), this Court unanimously adopted 2 Restatement Torts, 2d, § 343A(1).<sup>2</sup> Section 343A(1), which should be “read together” with 2 Restatement Torts, 2d, § 343 (articulating an invitor’s standard of care in a premises liability claim),<sup>3</sup> *Bertrand* at 610, states that “[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*” *Id* (emphasis added). This Court also follows 2 Restatement Torts, 2d, § 343A(1), comment f, providing, in pertinent part:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. ...

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<sup>1</sup> Pursuant to MCR 7.312(H)(4), the MAJ verifies that no counsel for a party authored this brief, in whole or in part, and no party or party’s counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> In *Riddle*, both the majority and dissent agreed that § 343A(1) applies in Michigan. *Id* at 94-95 (majority); *id* at 117 (Levin, J, dissenting). In *Bertrand*, Justice Weaver’s and Justice Levin’s partial factual dissents did not dispute Michigan follows § 343A(1).

<sup>3</sup> This Court unanimously adopted 2 Restatement of Torts, 2d, § 343 in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258-259; 235 NW2d 732 (1975).

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk.... It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

*Bertrand*, *supra* at 611-612, quoting 2 Restatement Torts, 2d, § 343A(1), comment f (Court's original italic emphasis; underlined emphasis added).<sup>4</sup> One such definitive example of a case where the possessor has reason to know that the invitee will proceed to encounter a known or obvious danger is set forth in illustration 5 to § 343A, addressing when the invitee must encounter the open and obvious danger in order to perform her job:

A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

2 Restatement Torts, 2d, § 343A(1), illustration 5 (emphasis added).

Six years after *Bertrand*, in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517, 520-521; 629 NW2d 384 (2001) (majority), *id* at 527 (Cavanagh, J, concurring), *id* at 544 (Weaver, J, concurring), the Supreme Court unanimously held that a pothole in a parking lot was an open and obvious condition that did not otherwise constitute an unreasonable risk of harm. After reaffirming that, “consistent with 2 Restatement Torts,

<sup>4</sup> Comment f also has been applied in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 718; 737 NW2d 179 (2007), and *Bragan ex rel Bragan v Symanzik*, 263 Mich App 324, 331 n 26; 687 NW2d (2004).

2d, §§ 343 and 343A, circumstances may arise in which an open and obvious condition is nevertheless unreasonably dangerous so as to give rise to a duty upon a premises possessor to in some manner remove or otherwise appropriately protect invitees against the danger,” *id* at 524, the majority modified the Restatement rule to provide that an invitor is not liable unless “‘special aspects’ of the open and obvious condition ... differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm ....” In advisory dicta, the Court offered two categories of open and obvious conditions that would subject the invitor to liability: when (1) “the open and obvious condition is effectively unavoidable” (offering the hypothetical of a customer who must use “one exit for the general public” in a commercial building “where the floor is covered with standing water”) or (2) “special aspects that impose an unreasonably high risk of severe harm” (offering the hypothetical of “an unguarded thirty foot deep pit in the middle of a parking lot”). *Id* at 518.

Justice Michael Cavanagh, joined by Justice Marilyn Kelly, and Justice Weaver, filed concurring opinions. Justice Cavanagh and Kelly disagreed with the majority’s “special aspects” analysis. *Lugo, supra*, 464 Mich at 527 (Cavanagh, J, concurring). Justice Cavanagh explained that the majority (a) conjured up its “special aspects” rule by morphing a quotation from *Bertrand* regarding a “special aspect” as a potentially relevant liability consideration whether injury resulting from an open and obvious condition was foreseeable into an ironclad limiting rule, *id* at 541-542; (b) improperly departed from *Bertrand* and other Michigan Supreme Court precedent adopting 2 Restatement Torts, 2d, § 343A(1), *id* at 538-543; and (c) improperly departed from *Bertrand* and Michigan precedent by transforming a “standard of care” issue, which “is for the jury to decide,” into a question of the invitor’s “duty,” *id* at 538-541, quoting

*Bertrand, supra*, 616-617.

In her concurrence, Justice Weaver objected to the majority “unnecessarily introduc(ing) – in dicta – a new standard by which open and obvious defects will be deemed unreasonably dangerous despite their open and obvious presence.” *Lugo, supra*, 464 Mich at 544 (Weaver, J, concurring). Justice Weaver lamented that the majority had launched “new legal principles from a factual vacuum,” instead of properly applying the new standard “to an actual case that came before this Court.” *Id* at 545. Justice Weaver added that, “[r]ather than introduce new standards into the open and obvious doctrine, I would remain true to existing precedent.” *Id* at 544. She explained that the majority’s new “unreasonabl[e]... risk of severe harm ... standard has no precedent in Michigan's common law of the open and obvious doctrine,” and saw no reason to depart from the existing rule exempting the invitor from liability “unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Id* at 546-547, quoting *Riddle, supra* 440 Mich at 96.

In the nineteen years since *Lugo*,<sup>5</sup> language in some cases has narrowed the “effectively unavoidable” rule into a requirement that the hazard be absolutely unavoidable. See *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002) (original emphasis) (affirming summary disposition on the special aspects issue because the plaintiff was not “effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out”); *Hoffner v Lanctoe*, 492 Mich 450, 468, 472; 821 NW2d 88 (2012) (original emphasis) (“Unavoidability is characterized by an *inability* to be *avoided*, an *inescapable* result, or the *inevitability* of a

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<sup>5</sup> Defendant-Appellant Sage’s Investment Group, LLC (Sage) incorrectly contends that *Lugo* and its progeny represent “decades of common law premises liability precedent.” (Sage’s supplemental brief, p 32).

given outcome.” An effectively unavoidable hazard “must truly be, for all practical purposes, one that a person is required to confront under the circumstances.”); *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014), quoting *Joyce, supra* (“Put simply, the plaintiff must be ‘effectively trapped’ by the hazard.”).

Moreover, contrary to the final clause of Restatement § 343A(1), comment f, and illustration 5 – recognizing that possessors will be liable if they have reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in her position the advantages of doing so would outweigh the apparent risk, such as when necessary to perform the invitee’s job – in *Bullard*, the Court of Appeals declared: “The mere fact that a plaintiff’s employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable.” *Id*, 308 Mich App at 412.<sup>6</sup> The Court of Appeals also has held that the plaintiff’s need to encounter an obvious hazard in order to perform her job raises a material fact question whether the condition constitutes a special aspect. See *Lymon v Freedland*, 314 Mich App 746, 760-764; 887 NW2d 456 (2016).

In this case, the Plaintiff-Appellee, Donna Livings (Plaintiff), was injured trying to walk through Sage’s completely snow and ice-covered parking lot so she could begin her 6:00 am shift at a restaurant. Considering Sage’s application for leave from the Court of Appeals’ decision affirming denial of summary disposition, this Court entered a

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<sup>6</sup> As addressed below, the *Bullard* panel unnecessarily issued its statement that the invitee’s employment may be irrelevant to consideration whether the risk was effectively unavoidable. The court acknowledged that the plaintiff was only required to inspect the generator on a “monthly” basis, and could have returned at another time. *Id*, 308 Mich App at 413. The MAJ also demonstrates below that *Hoffner, supra*, and *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002) do not support the conclusion that plaintiff’s employment is irrelevant to determining an invitor’s potential liability for maintaining an open and obvious condition.

MOA order requesting briefing addressing “(1) whether the plaintiff’s employment is a relevant consideration in determining whether a condition is effectively unavoidable, *Hoffner v Lanctoe*, 492 Mich 450 (2012), and *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11 (2002); and (2) whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition.” (2/7/20 Order).

Because the issue presented is of major significance to the state’s jurisprudence and involves a rule that indiscriminately causes manifestly unjust results, the MAJ now respectfully submits this amicus curiae brief. For the reasons presented, it is long past time to overrule *Lugo’s* “special aspects” doctrine and return to previous, unanimously-established precedent adopting, in its entirety, 2 Restatement Torts, 2d, § 343A(1). At the very least, because it is not only incongruous, but merciless, to subject invitees to the Hobson’s choice of either forgoing employment or encountering a dangerous physical condition which the invitor has a duty to alleviate, this Court should rule that a plaintiff’s employment is a relevant consideration in determining whether a condition is effectively unavoidable.

### **STATEMENT OF FACTS**

The MAJ relies on the statement of facts in Plaintiff’s response to Sage’s application for leave to appeal, Plaintiff’s supplemental brief, and the Court of Appeals’ majority opinion. For purposes of this MCR 2.116(C)(10) issue, the record establishes the following material facts, which bear summarizing:

1. For ten years before her fall on the morning of February 21, 2014, Plaintiff worked as a waitress at Grand Dimitre’s of Eastpointe Family Dining (Dimitre’s). (COA majority opinion, p 2 – Sage’s Appendix Tab A; Plaintiff supplemental brief, p 3).

2. Sage owns the plaza and parking lot on which Dimitre's is located. (COA majority opinion, p 5 – Sage's Appendix Tab A; Plaintiff supplemental brief, p 3).

3. Sage leased the property to Dimitre's. (COA majority opinion, pp 5-6 – Sage's Appendix Tab A; Plaintiff supplemental brief, pp 3-4).

4. Sage assumed the responsibility for maintaining the common areas, including the parking lot where plaintiff fell. (COA majority opinion, p 6 – Sage's Appendix Tab A; Plaintiff supplemental brief, p 6). For ten years before Plaintiff's fall, Sage "had always handled the snow removal" in the parking lot. (COA majority opinion, p 7 – Sage's Appendix Tab A).

5. At approximately 5:50 am on February 21, 2014, Plaintiff arrived in Sage's parking lot to report for her 6:00 am shift at Dimitre's. (COA majority opinion, p 2 – Sage's Appendix Tab A; Plaintiff supplemental brief, pp 7-8).

6. On that morning, the entire parking lot surrounding the restaurant, including its rear employee and front entrances, was covered with an "accumulation of approximately six inches of 'packed' snow that had been 'flattened' to the ground by vehicles and the snow plow over the course of two months of snowfall." (COA majority opinion, p 2 – Sage's Appendix Tab A; Plaintiff supplemental brief, pp 4, 6-7, 9). There was "snow, ice and water pretty much through the parking lot." (Plaintiff supplemental brief, p 7).

7. Plaintiff's co-workers Debra Buck and Chef Bob arrived and entered the building before Plaintiff. (COA majority opinion, pp 2-3 – Sage's Appendix Tab A; Plaintiff supplemental brief, p 7). Due to the surrounding slippery conditions, Ms. Buck had difficulty walking from her car to the building. (Plaintiff supplemental brief, p 8). She "kinda shimmied" her way in. (Id; see also COA majority opinion, p 3 – Sage's

Appendix Tab A).

8. After taking about three steps toward the rear employee entrance, Plaintiff “fell straight back.” (Plaintiff supplemental brief, p 10). She tried to get up immediately, but could not because the parking lot was too slippery. (Id). So, Plaintiff “got down on her hands and knees and crawled across the parking area.” (COA majority opinion, p 3 – Sage’s Appendix Tab A). Plaintiff “tried to get to the back door, but she could not, so she ‘ended up walking the snow drift, plowed area, whatever you want to call it’ around the building to the front entrance.” (Id). “She called the restaurant with her cell phone when she got to the front door, and Buck answered the phone and opened up the front door for her.” (Id). Debra Buck testified that Plaintiff “was soaking wet from the waist down after her fall.” (Id).

9. After the fall, Plaintiff “was diagnosed with a lower back injury that ultimately required three surgeries, including an anterior lumbar fusion at L4-5.” (COA majority opinion, p 4 – Sage’s Appendix Tab A).

10. Plaintiff filed this premises liability action in the Macomb Circuit.

11. Sage’s admits Plaintiff was its business invitee and was owed “the highest duty of care.” (Sage’s supplemental brief, p 14).

12. On February 26, 2019, the Court of Appeals issued a 2-1 unpublished opinion affirming the trial court’s order denying Sage’s motion for summary disposition, holding that Plaintiff presented a genuine issue of material fact that that “the entire parking lot presented an effectively unavoidable hazard of packed snow and ice.” (COA majority opinion, p 11 – Sage’s Appendix Tab A). Judge Tukul dissented, asserting that, under *Bullard*, *Hoffner* and *Perkoviq*, the hazardous condition was not effectively unavoidable since “Plaintiff could have simply declined to enter the premises, thereby

avoiding the hazard.” (COA dissent, pp 2-4 – Sage’s Appendix Tab C). In his concurrence, before distinguishing *Bullard* and *Perkoviq*, Judge Shapiro stated the dissent’s position that “Plaintiff could have skipped work and suffered the consequences to her employment ... cannot be harmonized with substantive justice.” (COA concurrence, pp 1-2 – Sage’s Appendix Tab B).

13. On February 7, 2020, this Court issued its MOA order. (2/7/20 Order).

### **STANDARD OF REVIEW**

The *de novo* standard of review is set forth in Sage’s application for leave and Plaintiff’s response.

### **ARGUMENT**

#### **I. LUGO’S “SPECIAL ASPECTS” DOCTRINE SHOULD BE OVERRULED.**

#### **Argument Summary**

The overriding purpose of the law is to “promote justice.” See *Anderson v Robinson*, 38 Mich 407, 408 (1878). To accomplish substantive justice, this Court must hold that Plaintiff’s employment is a relevant consideration in determining whether Sage is liable for maintaining the open and obvious snow and ice hazard in the parking lot. While the Court could conceivably reach this holding under some modification or clarification of the “special aspects”/“effectively unavoidable” doctrine from *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517, 520-521; 629 NW2d 384 (2014), the more just, sound and judicially-economical ruling is to overrule that inherently-flawed doctrine and reinstate the unanimous holdings of *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611, 537 NW2d 185 (1995) and *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 93-94, 117; 485 NW2d 676 (1992) adopting, in its entirety, 2 Restatement Torts, 2d, §

343A(1). After years of unjust decisions immunizing inviters for maintaining open and obvious conditions which would foreseeably injure their invitees, and over 690 reported Michigan and federal court cases addressing *Lugo*, (see below), it is time to overrule the “special aspects” doctrine and reinstate the *Bertrand, Riddle* and Restatement rule.

Application of the relevant factors definitively establishes that the “special aspects”/“effectively unavoidable” rule – coupled with its advisory hypothetical of a customer trapped in a building – must be overruled. *Lugo’s* “special aspects” doctrine was wrongly decided, legally unsupported, and an abrupt and largely unexplained departure from *Bertrand’s* and *Riddle’s* precedent. Confirming this, not a single other jurisdiction in the nation has adopted *Lugo’s* limitation on the open and obvious exception. Moreover, as Justice Weaver explained, instead of deciding the specific case and controversy, the *Lugo* majority, acting more like a legislature or administrative agency than an Article VI court, announced its “special aspects” rule in advisory opinion dicta.

In addition, the “special aspects”/“effectively unavoidable” rule has defied practical workability. Contrary to the majority’s apparent goal of reducing litigation, *Lugo* has spawned a legion of over 690 reported Michigan and federal decisions addressing “special aspects” issues. Much like the protracted, yin-yang controversy over the judicial standard for determining a serious impairment under MCL 500.3135, (discussed below), *Lugo* exemplifies the mistake of the judiciary trying to limit common law liability by creating predetermined categories of hypotheticals meeting an abstract test and transforming determination of standard-of-care fact issues into questions of law for a trial court.

It is equally clear that reliance interests on the “special aspects” rule will not work

an undue hardship or cause inequity. Overruling *Lugo* will not have any “practical real-world dislocations.” As Sage admits, even under *Lugo*, premises possessors owe invitees the “highest duty of care” and “the Restatement Second of Torts” “has been the standard that has most often guided the State’s jurisprudence in premises liability.” (Sage supplemental brief, p 15). As an integral part of this law, premises liability plaintiffs still must prove that the condition constituted an unreasonable risk of harm, possessors had notice of the dangerous condition, and that possessors should have anticipated harm resulting from an open and obvious condition. Overruling the “special aspects” doctrine will not work any undue hardship or inequity on business inviters.

Finally, changes in the law effectuated by *Lugo*’s progeny, and the unjust results they have caused, establish that upholding and continuing the “special aspects” rule is no longer justified, but will likely result in serious detriment prejudicial to public interests. If *Lugo*’s legally-unsupported limitation on the Restatement rule was ever justified and fair – which the MAJ rejects – subsequent limitations in *Joyce, supra, Hoffner, supra,* and *Bullard, supra,* have rendered the rule manifestly unjust. As Judge Shapiro so aptly stated in his concurrence, the proposition that “Plaintiff could have skipped work and suffered the consequences to her employment ... cannot be harmonized with substantive justice.” (COA concurrence, pp 1-2 – Sage’s Appendix Tab B).

The MAJ respectfully submits that an unjust rule cannot, and should not, be perpetuated, tweaked or clarified. Substantive justice requires that *Lugo*’s “special aspects”/“effectively unavoidable” doctrine be overruled, with reinstatement of *Bertrand, Riddle,* and Restatement § 343A(1).

### **Argument**

It is long past time for this Court to overrule the portion of *Lugo, supra,* 464 Mich

at 516-517, 520-521, implementing the “special aspects” doctrine and reinstate the unanimous holdings of *Bertrand, supra*, 449 Mich at 610-611 and *Riddle, supra*, 440 Mich at 93-94, adopting, in its entirety, 2 Restatement Torts, 2d, § 343A(1). “The application of stare decisis is generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *People v Wilson*, 500 Mich 521, 528; 902 NW2d 378 (2017) (citation omitted). “But stare decisis is a principle of policy rather than an inexorable command.” *Id* (citations and quotation marks omitted); see also *McCormick v Carrier*, 487 Mich 180, 224; 795 NW2d 517 (2010) (Weaver, J, concurring, quoting *Lawrence v Texas*, 539 US 558, 577 (2003)).<sup>7</sup>

Sage mistakenly argues that grounds to overrule the “special aspects” doctrine do not exist. (Sage supplemental brief, pp 29-35). In determining whether to overrule

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<sup>7</sup> This Court’s rulings over the past 20 years establish that the principle of stare decisis is not inviolate. From 2000 to 2006, no less than 40 Supreme Court cases overruled scores of its previous decisions. See *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 247 n 9; 731 NW2d 41 (2007) (Markman, J, concurring). Since 2006, this Court has continued to overrule, in whole or part, numerous additional Supreme Court decisions. See, e.g., *In re Ferranti*, 504 Mich 1, 7-8; 934 NW2d 610 (2019) (overruling *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993)); *People v Arnold*, 502 Mich 438, 918 NW2d 164 (2018) (overruling or abrogating two Supreme Court cases); *Wilson, supra* (overruling *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992)); *People v McKinley*, 496 Mich 410, 413; 852 NW2d 770 (2014) (overruling, in part, *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997)); *Lansing Sch Ed Ass’n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 352; 792 NW2d 686 (2010) (overruling six Supreme Court cases); *McCormick, supra*, 487 Mich at 184 (overruling *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004)). This does not include the many Supreme Court decisions, such as *Covenant Medical Center v State Farm Mutual Auto Ins Co*, 500 Mich 191, 199-200; 895 NW2d 490 (2017) and *Titan Ins Co v Hyten*, 491 Mich 547, 550; 817 NW2d 562 (2012), overruling published Court of Appeals cases.

precedent, this Court considers the following factors: “(1) ‘whether the earlier decision was wrongly decided,’ (2) ‘whether the decision at issue defies practical workability,’ (3) ‘whether reliance interests would work an undue hardship,’ and (4) ‘whether changes in the law or facts no longer justify the questioned decision.’” *North American Brokers, LLC v Howell Pubic Schools*, 502 Mich 882; 913 NW2d 638, 641 (2018) (McCormack, CJ, concurring), quoting *Robinson v Detroit*, 462 Mich 439, 464; 653 NW2d 307 (2000); *Wilson, supra* at 529. In *McCormick, supra*, this Court applied these analogous factors in concluding that *Kreiner, supra*, must be overruled: (1) “whether the rule has proven to be intolerable because it defies practical workability,” (2) “whether reliance on the rule is such that overruling it would cause a special hardship and inequity,” (3) “whether upholding the rule is likely to result in serious detriment prejudicial to public interests,” and (4) “whether the prior decision was an abrupt and largely unexplained departure from precedent.” *Id*, 487 Mich at 211, citing *Petersen v Magna Corp*, 484 Mich 300, 314-315; 773 NW2d 564 (2009) (opinion by KELLY, CJ). Assessment of these factors readily establishes that *Lugo’s* “special aspects” doctrine must be overruled with restoration of the Restatement standard under *Bertrand and Riddle*.

A. ***Lugo’s* “special aspects” rule was wrongly decided and constituted an “abrupt and largely unexplained departure from precedent.”**

The first factors for overruling this portion of *Lugo* are easily met. The *Lugo* majority wrongly crafted the “special aspects” doctrine out of whole cloth. *Lugo’s* implementation of the “special aspects” exception to the open and obvious defense erroneously, abruptly and inexplicably departed from previous Supreme Court precedent unanimously adopting 2 Restatement Torts, 2d, § 343A(1) including, in particular, its final clause emphasizing that an possessor is not liable for a condition

which is open and obvious to the invitee “*unless the possessor should anticipate the harm.*” *Id* (emphasis added). The portion of *Lugo* announcing the “special aspects” doctrine also constituted dicta and an unconstitutional advisory opinion. The “special aspects” doctrine must be overruled.

- 1. Before *Lugo*, this Court had unanimously adopted 2 Restatement of Torts, 2d, § 343A(1), including its provision that, even if the condition is open and obvious, a possessor is liable if it should “anticipate the harm” to the invitee.**

Since the 1800’s, this Court has held that a defendant may not be liable for maintaining a condition that was open and obvious to the plaintiff. *Batterson v Chicago & GT Ry Co*, 53 Mich 125, 127; 18 NW 584 (1884); *Storrs v Michigan Starch Co*, 126 Mich 666, 670; 86 NW 134 (1901) (reversing a judgment and holding that a directed verdict should have entered because risks “were as open to (the plaintiff’s) observation as to anybody.”). Just as importantly, for nearly a century, this Court has recognized that the open and obvious nature of a condition does not preclude liability if the defendant “was reasonably bound to anticipate” the plaintiff may encounter the hazard and sustain an injury. *Boylen v Berkey & Gay Furniture Co*, 260 Mich 211, 216-219; 244 NW 451 (1932).

In 1934, the American Law Institute (ALI) promulgated the First Restatement of Torts. See Restatement of the Law, Torts, Introduction (1934). Restatement (First) of Torts § 343 set forth a premises possessor’s standard of care. As Justice Michael Cavanagh explained in his *Lugo* concurrence, Michigan adopted Restatement (First) of Torts § 343 in *Goodman v Theatre Parking*, 286 Mich 80, 82; 281 NW 54 (1938). *Lugo, supra*, 464 Mich at 528 (Cavanagh, J, concurring).

In 1965, the ALI promulgated the Second Restatement of Torts. Restatement of Torts, 2d, Introduction (1965). The Restatement provisions pertinent to this appeal are 2 Restatement Torts, 2d, §§ 343 and 343A(1).<sup>8</sup> Encapsulating an invitee's standard of care in a premises liability case, Section 343 provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

2 Restatement Torts, 2d, § 343. This Court unanimously adopted § 343 in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258-259; 235 NW2d 732 (1975).

Consolidating Michigan's long-standing open and obvious rule, Section 343A(1) states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*" *Id* (emphasis added). Sections 343 and 343A must be read together. *Bertrand, supra*, 449 Mich at 610, citing 2 Restatement Torts, 2d, § 343, comment a.

As quoted above, Section 343A includes comment f, providing, in pertinent part, that the open and obvious nature of a dangerous condition does not excuse the invitor from liability "where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." 2 Restatement Torts, 2d, § 343, comment f (emphasis added). "In such cases the fact that the danger is

<sup>8</sup> 2 Restatement Torts, 2d, § 343A(2), addressing invitees "entitled to make use of public land, or of the facilities of a public utility," does not apply in this case.

known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk[,] ... (but) [i]t is not ... conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. *Id* (emphasis added); see also *Bertrand, supra* at 611-612.

As also quoted above, one definitive example of a case where the possessor has reason to know that the invitee will proceed to encounter a known or obvious danger is set forth in illustration 5 to § 343A, addressing when the invitee must encounter the open and obvious danger in order to perform her job. 2 Restatement Torts, 2d, § 343A, illustration 5. As Sage recognizes, this is what occurred in the case at bar. (Sage supplemental brief, pp 9, 18).

After *Quinlivan* adopted 2 Restatement of Torts, 2d, § 343, in *Riddle, supra*, this Court formally adopted its companion provision, 2 Restatement of Torts, 2d, § 343A(1). The Court chronicled that, in *Quinlivan*, it “adopted the revised § 343,” *Id*, 440 Mich at 93, citing *Quinlivan* at 261. *Riddle* continued that, in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988), the Court “noted the standard outlined” in 2 Restatement Torts, 2d, § 343A(1). *Riddle* at 94. This Court then declared that “[o]ur conclusions in these Michigan cases correctly define the law regarding a premises owner's duty of care to invitees.” *Id* at 95 (emphasis added).

With this edict, the Supreme Court formally adopted both Section 343 and Section 343A(1). The Court's decision in *Riddle* to formally adopt § 343A(1) was unanimous. Both the majority and dissent unanimously agreed that § 343A(1) applies in Michigan. *Id* at 94-95 (majority); *id* at 117 (Levin, J, dissenting). Sage's contention that this Court “has never wholeheartedly endorsed” § 343A(1) is patently incorrect. (Sage supplemental brief, p 6).

In *Bertrand, supra*, this Court held, as a matter of law, that a step in the defendant's car dealership was open and obvious, but a jury question existed whether the defendant should have anticipated that the step – located in a congested customer traffic area near a hinged door, cashier's window and vending machine – constituted an unreasonable risk of harm. *Id*, 449 Mich at 621-625 (majority opinion); *id* at 626 (Levin, J, concurring).<sup>9</sup> In the companion case of *Maurer v Oakland Co Parks & Recreation Dep't*, this Court held that a cement step on the defendant's premises was open and obvious and there was no evidence presented that the step, despite being open and obvious, constituted an unreasonable risk of harm. *Id* at 618-621 (majority), *id* at 625-626 (Weaver, J, concurring).<sup>10</sup>

In reaching these holdings, this Court unanimously (a) reaffirmed the holdings of *Quinlivan* and *Riddle* adopting, as Michigan law, 2 Restatement of Torts, 2d, §§ 343 and 343A(1), *Id* at 609-612;<sup>11</sup> (b) held that Sections 343 and 343A(1) “are to be read together,” *Id* at 610, citing 2 Restatement of Torts, 2d, § 343, comment a; (c) emphasized that “the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care[.]” because “if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions,” *Id* at 611; (d) ruled that in cases raising a fact question that the risk of harm presented by an open

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<sup>9</sup> Justice Weaver dissented from the majority's factual holding.

<sup>10</sup> Justice Levin dissented from this factual holding.

<sup>11</sup> As noted above, Justice Weaver and Justice Levin did not dissent from this Court's continued adherence to the Restatement rules. Their dissents/concurrences addressed only application of the law to the facts. *Id* at 625-626 (Weaver, J, concurring in part and dissenting in part), *id* at 626-627 (Levin, J, concurring in part and dissenting in part).

and obvious condition remains unreasonable, “[t]he issue then becomes the standard of care and is for the jury to decide[.]” *Id.*; (e) quoted and followed 2 Restatement of Torts, 2d, § 343A, comment f; *Id.* at 611-612; and (f) relied, in part, on 2 Restatement of Torts, 2d §343A, comment f, illustration 3, in concluding that evidence raises a material fact question that the open and obvious step in *Bertrand* was an unreasonable risk of harm, *Id.* at 624.<sup>12</sup>

**2. *Lugo* erroneously misconstrued and abruptly departed from unanimous Supreme Court precedent to create the “special aspects” doctrine which, with no supporting authority, modified and limited the unanimously-adopted Restatement § 343A(1).**

With adherence to Restatement §§ 343 and 343A(1) unanimously established, this Court issued *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). On the facts, the Court unanimously held that an unobscured pothole in the middle of a parking lot was an open and obvious condition that did not otherwise constitute an unreasonable risk of harm. *Id.* at 516-517, 520-521 (majority); *id.* at 527 (Cavanagh, J, concurring); *id.* at 544 (Weaver, J, concurring).

Although the actual case and controversy, based on established law, was resolved, the *Lugo* majority proceeded to abruptly depart from previous Supreme Court precedent, without adequate explanation, *McCormick, supra*, 487 Mich at 211, and significantly alter and narrow the open and obvious rule. After quoting the applicable rules of law from *Bertrand* and *Riddle, Id.*, 464 Mich at 516-317, the majority presented the following synopsis modifying their holdings:

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<sup>12</sup> Sage incorrectly asserts that “Michigan has never followed the illustrations and, therefore, is not compelled to do so here.” In *Bertrand*, this Court specifically followed § 343A illustration 3. Moreover, Sage fails to cite any case expressly rejecting the applicability or persuasiveness of the illustrations to § 343A.

In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

*Id* at 517 (emphasis added). The words “special aspects” do not appear anywhere in the operative standards from Restatement Sections 343 or 343A(1), *Riddle* or *Bertrand*. Notwithstanding, the *Lugo* majority claimed the following language from *Bertrand* supported engrafting a “special aspects” limitation into the open and obvious rule:

With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though inviters have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. [*Quinlivan, supra*, 395 Mich at 261] Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be *special aspects* of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe.

*Id* at 517, quoting *Bertrand*, 449 Mich at 614 (original emphasis). Having plucked this potential, illustrative term from *Bertrand*, the *Lugo* majority proclaimed: “Consistent with *Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly ‘special aspects’ of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the ‘special aspect’ of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.” *Id* at 517-518.

Straying farther from the actual case and controversy, in advisory dicta, the *Lugo* majority offered only two categories of open and obvious conditions that would subject

the invitor to liability: when (1) “the open and obvious condition is effectively unavoidable” (presenting the hypothetical of a customer who must use “one exit for the general public” in a commercial building “where the floor is covered with standing water”) or (2) “special aspects that impose an unreasonably high risk of severe harm” (stating the hypothetical of “an unguarded thirty foot deep pit in the middle of a parking lot”). *Id* at 518. Other than the phrase taken from *Bertrand*, the majority cited no Michigan or national authority supporting their modification and limitation of the final-clause exception in Restatement § 343A(1) to the two categories of “special aspects.”

*Lugo* “special aspects” rule was wrongly decided. *Robinson, supra*, 462 Mich at 464. It constituted an abrupt and largely unexplained departure from previous, well-established precedent. *McCormick, supra*, 487 Mich at 211.

As Judge Michael Cavanagh demonstrated in his concurrence, joined by Justice Marilyn Kelly, no authority supported the majority’s implementation of the “special aspects” doctrine. *Lugo, supra*, at 541-542 (Cavanagh, J, concurring). Instead, the majority manufactured the rule by misapplying, out of context, *Bertrand’s* “special aspect” phrase. *Id*. In his *Bertrand* decision, Justice Cavanagh used this term as a potentially relevant consideration for whether an open and obvious step might still constitute an unreasonable risk of harm which the possessor should anticipate under the Restatement rule. *Id*, 449 Mich at 614. Nothing in *Bertrand* or any other decision supported using the phrase “special aspect” to create an ironclad principle limiting the exception to the open and obvious defense to rigidly-defined contexts.

Indeed, *Bertrand* used the term “special aspects” to require consideration whether the character, location, or surrounding conditions of the steps made the risk of harm presented unreasonable, establishing that the possessor still had a duty exercise

reasonable care to protect the invitee, which is a standard of care issue for the jury. For the *Lugo* majority to exploit this portion of *Bertrand* to severely limit the exception to the open and obvious rule to two narrow, hypothetical factual contexts was completely untenable. The majority created the “special aspects” rule entirely out of whole cloth.<sup>13</sup>

As Justice Cavanagh further established, other than mistakenly asserting that the “special aspects” doctrine was “[c]onsistent with *Bertrand*,” *Id* at 517-518, the *Lugo* majority offered absolutely no justification for departing from unanimous Michigan Supreme Court precedent adopting 2 Restatement Torts, 2d, § 343A(1). *Id* at 538-543 (Cavanagh, J, concurring). Justice Weaver also correctly disapproved of the majority announcing an “unreasonabl[e]... risk of severe harm ... standard” with “no precedent in Michigan's common law of the open and obvious doctrine.” *Id* at 544-545 (Weaver, J, concurring; original emphasis). Justice Weaver saw no reason to depart from the existing rule exempting the invitor from liability “unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Id* at 546-547, quoting *Riddle*, *supra*, 440 Mich at 96.

A previous Supreme Court majority decision is binding on this Court. *People v Tanner*, 496 Mich 199, 214 n 9; 853 NW2d 653 (2014). A Supreme Court decision remains stare decisis unless overruled upon due consideration of the factors set forth in *Wilson*, *supra*, 500 Mich at 529, *Robinson*, *supra*, 462 Mich at 464, and *McCormick*, *supra*, 487 Mich at 211. Violating the principles of stare decisis, the *Lugo* majority did

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<sup>13</sup> Ironically, Sage argues that stare decisis mandates adherence to *Lugo* and that Plaintiff seeks “a radical departure” from “the standard that has most often guided the State’s jurisprudence in premises liability: the Restatement Second of Torts,” (Sage supplemental brief, p 15), while ignoring the fact that, in creating the “special aspects” doctrine, *Lugo* inexplicably and abruptly disregarded the binding precedent of *Bertrand* and *Riddle* adopting, in its entirety, Restatement § 343A(1).

not even consider, let alone analytically determine, that the prior precedent of *Riddle*, *Bertrand* or *Quinlivan* needed to be overruled in whole or part. The majority did not even contend, let alone demonstrate with empirical or anecdotal evidence, that the established open and obvious rule was confusing, unworkable, or inconsistent with substantial justice. *Lugo*'s "special aspects" rule was an abrupt, largely unexplained and improvident departure from binding Supreme Court precedent. *McCormick, supra*. It was wrongly decided. *Robinson, supra*.

In addition, as Justice Cavanagh's dissent indicated, the *Lugo* majority improperly departed from *Bertrand* and Michigan precedent by transforming the exception to the open and obvious defense from a "standard of care" issue, which "is for the jury to decide," into a question of the invitor's "duty." *Id* at 538-541 (Cavanagh, J, concurring), quoting *Bertrand*, 449 Mich at 616-617. This not only again violated the rule of stare decisis but, as demonstrated below, has created far more controversy and litigation than the *Lugo* majority likely thought they would prevent.

Moreover, in the nineteen years since *Lugo* was issued, not one court from another jurisdiction (state and federal courts not applying Michigan law) has ever adopted *Lugo*'s "special aspects" rule. To the contrary, in *Makeef v City of Bismarck*, 693 NW2d 639, 644 (ND 2005), the North Dakota Supreme Court cited, and rejected the "special aspects" rule.<sup>14</sup> The court held that "a reasonableness test more closely follows our previous holdings and makes for better public policy." *Id*. This is the same standard Michigan followed, before *Lugo*, under *Riddle*, *Bertrand* and the Restatement.

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<sup>14</sup> *Makeef* cited the rule from the post-*Lugo* decision *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392, 395 (2002).

Whether “sister states” follow an analogous rule is a relevant factor in determining whether a decision was wrongly decided and must be overruled. *North American Brokers, supra*, 502 Mich 882; 913 NW2d at 641 (McCormack, CJ, concurring). The fact that not even a single other state has adopted *Lugo* further demonstrates that it was wrongly decided.

*Lugo*’s “special aspects” rule misconstrued and abruptly departed from Supreme Court precedent, was bereft of any actual authoritative support, and lacked any proffered justification for significantly limiting the exception to the open and obvious rule to two narrow, judicially predetermined factual categories. *Lugo*’s “special aspects” doctrine was wrongly decided and must be overruled.

**3. The *Lugo* majority announced its “special aspects” doctrine as dicta and an unconstitutional advisory opinion.**

*Lugo*’s “special aspects” doctrine was also wrongly offered as dicta and an unconstitutional advisory opinion. A statement in a judicial opinion is dicta, and not binding precedent, if “unnecessary to determine the case at hand.” *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). In her concurrence, Justice Weaver rightly objected to the majority “unnecessarily introduc(ing) – in dicta – a new standard by which open and obvious defects will be deemed unreasonably dangerous despite their open and obvious presence.” *Lugo, supra*, 464 Mich at 544 (Weaver, J, concurring). Justice Weaver added that, “[r]ather than introduce new standards into the open and obvious doctrine, I would remain true to existing precedent.” *Id* at 544.

As previously adopted, the open and obvious Restatement rule established, as a matter of law, that an unobscured pothole in the middle of a parking lot is an open and obvious condition which the possessor should not reasonably anticipate would

foreseeably harm its invitee. The Court unanimously agreed with this conclusion. Accordingly, it was “unnecessary to determine the case at hand” for the *Lugo* majority to modify the established rule and implement the “special aspects” doctrine. *Peltola, supra*. It was not necessary for the majority to offer the two categorical limitations on the exception (“effectively unavoidable” conditions and hazards imposing “an unreasonably high risk of severe harm”). *Lugo*, 464 Mich at 518. In particular, it was not necessary to pronounce that only two hypothetical fact patterns (a customer who must use “one exit for the general public” in a commercial building “where the floor is covered with standing water” and “an unguarded thirty foot deep pit in the middle of a parking lot”) may satisfy the exception. *Id.* Announcement of the “special aspects” rule, its component parts, and the two categorical limitations all constituted non-precedential dicta.

Even assuming creation of the “effectively unavoidable” subcomponent of the “special aspects” pronouncement was necessary to resolution of the case, the remainder of the majority’s declaration was unrelated to the case and clear dicta. Unquestionably, it was not necessary to resolution of the case to limit the “effectively unavoidable” exception to “the customer in the building” hypothetical. *Lugo* did not involve an invitee in a commercial building. The majority improvidently interjected that hypothetical into the case. Moreover, since the case had nothing to do with an alleged hazard creating an “unreasonably high risk of severe harm” or an “unguarded thirty foot deep pit in the middle of a parking lot,” the majority’s discussion of these matters constituted non-binding dicta.<sup>15</sup>

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<sup>15</sup> The majority incorrectly asserted that its “special aspects” analysis was necessary to “holding that defendant was entitled to a grant of summary disposition in its favor” and not dicta. *Id* at 519 n 3.

In addition, the *Lugo* majority's promulgation of the "special aspects" doctrine did not result from an actual case and controversy and therefore amounted to an unconstitutional advisory opinion. The Michigan Constitution authorizes this Court to issue advisory opinions exclusively concerning the constitutionality of legislation, only upon the request of either house of the Legislature or the Governor, and only after it has been enacted into law but not yet taken effect. *Lansing Schools Educ Ass'n, supra*, 487 Mich at 359-360, citing Const 1963, art 3, § 8. Otherwise, "judicial power" has been traditionally based, in pertinent part, on the existence of a real dispute, or case or controversy, and "the avoidance of deciding hypothetical questions ...." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2014).

In her concurrence, Justice Weaver lamented that the majority had launched "new legal principles from a factual vacuum," instead of properly applying the new standard "to an actual case that came before this Court." *Id* at 545 (Weaver, J, concurring) (emphasis added). She aptly stated that, "[i]n an apparent effort to provide guidance to the bench and bar, the majority presents unlikely hypothetical examples." *Id*. Justice Weaver added that, "[w]hen launching new legal principles from a factual vacuum, it would be more helpful to apply this new severe-harm standard to an actual case that came before this Court ...." *Id* (emphasis added).

By announcing the "special aspects" doctrine not to resolve the specific case and controversy before the Court, but to "provide guidance to the bench and bar" regarding "hypothetical examples" which may meet the new standard, the Court issued an unconstitutional advisory opinion. *Lugo* is much more analogous to a legislative enactment or administrative agency's rule promulgation rather than a judicial holding

under Const 1963, art 6 resolving the specific issue presented in the case. This is not how our judicial system works.

As discussed below, in the nineteen years since *Lugo*, instead of viewing the *Lugo* majority's "customer in the commercial building" and "unguarded 30-foot deep pit" as mere suggestions, our courts have construed them as strict, categorical limitations on the "special aspects" exception to the open and obvious rule. This is why dicta and advisory opinions, even if well intended, are not binding precedent. For this additional reason, *Lugo*'s "special aspects" doctrine was wrongly decided and must be overruled. The previous, unanimously-adopted rule under *Riddle*, *Bertrand* and 2 Restatement of Torts, 2d, § 343A(1) must be reinstated.

**B. *Lugo* has defied "practical workability."**

*Lugo*'s "special aspects" doctrine has defied "practical workability." *Robinson, supra*. The *Lugo* majority's apparent goal in promulgating the "special aspects" rule was to reduce premises liability litigation involving open and obvious conditions. That goal definitely has not been unrealized.

"[A] rule of decision defies practical workability if it has proved difficult to apply or implement." *In re Ferranti*, 504 Mich 1, 26; 934 NW2d 610 (2019). A decision particularly defies practical workability if it triggers a significant increase in appellate litigation. *McCormick, supra*, 487 Mich at 213.

A Westlaw search reveals that, since *Lugo* was issued in July 2001, no fewer than 580 Michigan appellate cases have addressed "special aspects" issues. Compounding this, 111 reported federal district and circuit court decisions applying

Michigan law have considered the “special aspects” rule.<sup>16</sup> In sharp contrast, during the 117 years preceding *Lugo*’s release, 1884<sup>17</sup> to July 2001, only 254 Michigan and federal court decisions in premises liability claims addressed opinion and obvious issues.<sup>18</sup> *Lugo*’s purpose of creating an ironclad rule and reducing litigation has been a colossal failure.<sup>19</sup>

In addition, cases applying *Lugo* have reached inconsistent results. Focusing only on the MOA issue presented, our courts have both accepted and rejected the relevance of the invitee’s employment for determining whether a condition was “effectively unavoidable.” See *Lymon v Freedland*, 314 Mich App 746, 760-764; 887 NW2d 456 (2016) (holding that the plaintiff’s need to encounter an obvious hazard in order to perform her job raises a material fact question whether the condition constitutes a special aspect); *Bullard, supra*, 308 Mich App at 412 (Declaring: “The mere fact that a plaintiff’s employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable.”). More generally, while *Lugo* required that the condition merely be “effectively unavoidable” to meet the “special aspects” standard, language in *Hoffner, supra*, 492 Mich at 468, 472, apparently requires that the hazard be absolutely unavoidable. *Id* (original

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<sup>16</sup> Word search: “*Lugo* /p special /1 aspects”

<sup>17</sup> When *Batterson v Chicago & GT Ry Co*, 53 Mich 125; 18 NW 584 (1884), discussed above, was released.

<sup>18</sup> Word search: “premises and open /2 obvious”

<sup>19</sup> The 691 reported decisions which have addressed *Lugo* issues starkly rebut Sage’s prediction that a return to the *Riddle* and *Bertrand* rule will create a “slippery slope,” unleash a “floodgate” of cases, and wreak “havoc.” (Sage supplemental brief, pp 17, 22, 33).

emphasis) (“Unavoidability is characterized by an *inability* to be avoided, an *inescapable* result, or the *inevitability* of a given outcome.” An effectively unavoidable hazard “must truly be, for all practical purposes, one that a person is required to confront under the circumstances.”).<sup>20</sup>

The controversy and increased litigation over the “special aspects” rule mirrors the protracted appellate court battle over the injuries necessary to constitute a serious impairment of body function under MCL 500.3135. Seemingly trying to effectuate the same goals as the *Lugo* majority, in *Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004), this Court modified (or effectively overruled) *DiFranco v Pickard*, 427 Mich 32, 50–58; 398 NW2d 896 (1986)<sup>21</sup> and created a procedural regime rendering most serious impairment issues a question of law for the trial court. Instead of clarifying the law and reducing litigation, however, *Kreiner*, like *Lugo*, spawned a legion of appellate decisions. This is a central reason why, in *McCormick, supra*, this Court overruled *Kreiner*. *Id.*, 487 Mich at 211-216. The Court explained:

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, ‘[t]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect.’ [*Kreiner*, 471 Mich at 145 (Cavanagh, J, dissenting)]. As such, the analysis does not ‘lend itself to any bright-line rule or imposition of [a]

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<sup>20</sup> Even more, as further discussed below, the “special aspects” doctrine contradicts the fact, to which Sage repeatedly pays lip service, that premises possessors owe their invitees “the highest duty of care.” (Sage supplemental brief, pp 14-15). If, contrary to *Bertrand, Riddle* and the Restatement, Michigan law immunizes inviters from liability despite maintaining an open and obvious hazard they should have anticipated subjected their invitees to an unreasonable risk of harm, then their so-called “highest duty of care” is illusory.

<sup>21</sup> Which had overruled *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).

nonexhaustive list of factors,' particularly where there is no basis in the statute for such factors. *Id.*

*McCormick, supra*, 487 Mich at 215-216. Accordingly, this Court held that the trial court should decide a serious impairment issue as a matter of law unless “there is a material factual dispute regarding the nature and extent of the person's injuries....” *Id.* at 193–194. In such cases, determination of a serious impairment is a question of fact for the jury conducted “on a case-by-case basis.” *Id.* at 215. Confirming the wisdom of leaving resolution of case-specific fact questions to the jury, in PA 2019, No. 21 and No. 22, the Legislature amended MCL 500.3135 to incorporate *McCormick's* holding. See MCL 500.3135(2) and (5); see also *Lingenfelter v Farm Bureau General Ins Co*, \_\_\_ Mich \_\_\_, 943 NW2d 87, 88 (2020) (Cavanagh, J, dissenting).

Like the serious impairment issue, *Lugo's* “special aspects” rule exemplifies the mistake of transforming what this Court previously held are jury questions regarding the possessor’s “standard of care” which must be determined on a case-by-case basis, see *Bertrand, supra*, 449 Mich at 611, into questions of law regarding the defendant’s duty for the trial court based on judicially pre-determined factual categories meeting the “special aspects” test. Trial courts’ opinions on what constitutes a “special aspect” may not only differ, but will usually propagate appeals.<sup>22</sup> By far, the wisest choice is to overrule *Lugo's* “special aspects” doctrine and restore this Court’s previous, unanimous adoption of 2 Restatement of Torts, 2d, § 343A(1).

Sage concedes that “the Restatement Second of Torts” “has been the standard that has most often guided the State’s jurisprudence in premises liability ....” (Sage

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<sup>22</sup> This is especially true because summary disposition rulings and decisions resolving questions of law are reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019) (summary disposition); *Riddle, supra*, 440 Mich at 95 (duty).

supplemental brief, p 15). This concession encapsulates the incongruity and confusion *Lugo* has caused by modifying and significantly limiting the exception to the open and obvious defense in the final sentence of 2 Restatement Torts, 2d, § 343A(1). As *Bertrand* unanimously held, § 343 and § 343A(1) must be read “together.” *Bertrand, supra*, 449 Mich at 610, citing 2 Restatement Torts, 2d, § 343, comment a. A possessor’s duty to invitees under the Restatement cannot be consistently and justly applied if *Lugo*’s virtual nullification of a material portion of § 343A(1) is maintained.

The “special aspects” doctrine has defied practically unworkable. It must be overruled.

**C. Reliance interests on the “special aspects” rule will not work an undue hardship or cause inequity.**

Overruling the “special aspects” rule will not work an “undue hardship,” *Robinson, supra*, 462 Mich at 464, or cause tangible inequity, *McCormick, supra*, 487 Mich at 211. In considering this factor, “[t]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 173; 895 NW2d 154 (2017), quoting *Robinson* at 466. There is no basis to conclude that overruling *Lugo* will have any “practical real-world dislocations.”

As Sage repeatedly emphasizes, because it exercised possession and control over the parking lot common area and was responsible for removing snow and ice, Sage owed its business invitees, like Plaintiff, “the highest common law duty available.” (Sage supplemental brief, p 15, see also p 14 (conceding “business invitees are entitled to the highest duty of care.”)). Since *Lugo* was issued, a premises possessor has

continued to owe “a duty 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.” *Lugo, supra*, 464 Mich at 516, citing *Bertrand, supra*, 449 Mich at 609. This duty requires the obligation “not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards.” *Hoffner, supra*, 492 Mich at 457.

Because, by Sage’s own admission, possessors owe invitees this “highest duty of care,” overruling the “special aspects” rule will not work any undue hardship or inequity on business inviters. As indicated above, Sage recognizes that “the Restatement Second of Torts” “has been the standard that has most often guided the State’s jurisprudence in premises liability ....” (Sage supplemental brief, p 15). Since overruling the “special aspects” doctrine will restore, rather than depart from Restatement § 343A(1) as adopted in *Riddle* and *Bertrand*, this could not possibly impose a hardship or inequitable consequences on commercial possessors. Indeed, as demonstrated below, the failure to overrule, or at least modify *Lugo*, will continue to perpetrate manifestly unjust results on Michigan citizens.

The fact that *Lugo* has remained constantly litigated over the past 19 years further establishes that no embedded reliance interest weighs against overruling the “special aspects” doctrine. With 691 Michigan appellate and federal court decisions addressing *Lugo*, coupled with this Court’s MOA order, possessors have not justifiably relied on the “special aspects” doctrine – let alone altered their behavior in the wake of their “highest legal duty” owed to invitees.

Even more, Michigan maintains ample safeguards to prevent business inviters from being subjected to undue liability. It is universally established that inviters are not the absolute insurers of their invitees' safety. See *Quinlivan, supra*, 395 Mich at 261; *Bertrand, supra*, 449 Mich at 614; *Lugo, supra*, 464 Mich at 517 (citations omitted). Further, a plaintiff in a premises liability claim must prove that the possessor "had actual or constructive notice of the dangerous condition at issue." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2016). Overruling the "special aspects" doctrine will not work an undue hardship or cause inequity.

**D. Changes in the law and facts no longer justify maintaining *Lugo's* "special aspects" rule. To the contrary, perpetuating *Lugo* is likely to result in serious detriment prejudicial to public safety interests.**

The issue presented dramatically illustrates that continuation of the "special aspects" rule is no longer legally or factually justified. *Robinson, supra*, 462 Mich at 464. To the contrary, upholding and continuing *Lugo* "is likely to result in serious detriment prejudicial to public interests." *McCormick, supra*, 487 Mich at 211.

In drafting 2 Restatement of Torts, 2d, § 343A(1), the ALI recognized, in 1966, that possessors should anticipate invitees will encounter open and obvious hazards in order to perform their jobs. *Id*, comment f, illustration 5. Notwithstanding, *Lugo* and its progeny support the argument – memorialized in Judge Tukul's dissent and Sage's argument – that an open and obvious hazard is "effectively unavoidable," and therefore does not constitute an unreasonable risk of harm, if the invitee can simply forego her employment and not encounter the risk.

By its own advisory dicta, *Lugo* suggested that the only "effectively unavoidable" hypothetical situation that might subject a possessor to liability for maintaining an open

and obvious hazard is when customer in a commercial building must use “one exit for the general public” “where the floor is covered with standing water.” *Id*, 464 Mich at 518. Subsequently, *Lugo’s* progeny have declared that the “special aspects” rule is satisfied only if the invitee is “effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out,” *Joyce, supra*, 249 Mich App at 242 (original emphasis); *Bullard, supra*, 308 Mich App at 412; and only for absolutely unavoidable hazards (“characterized by an *inability* to be *avoided*, an *inescapable* result, or the *inevitability* of a given outcome”), *Hoffner, supra*, 492 Mich at 468, 472 (original emphasis). *Lugo’s* progeny has also asserted that “[t]he mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable.” *Bullard* at 412.

Neither the ALI in promulgating Restatement Sections 343 and 343A(1), nor this Court in deciding *Riddle* and *Bertrand*, ever intended this result. Through its illustrations, Restatement § 343A(1) offered numerous specific examples of situations where a possessor should anticipate its invitee may foreseeably be injured by an open and obvious condition.<sup>23</sup> One intuitively-obvious situation is when the possessor should reasonably anticipate that an invitee will encounter an open and obvious hazard in order to perform her job. *Id*, comment f, illustration 5.

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<sup>23</sup> Contrary to Sage’s assertion, Michigan courts have never rejected application of the illustrations to 2 Restatement Torts, 2d, § 343A. As demonstrated above, *Bertrand* specifically cited and relied on illustration 3. *Id*, 449 Mich at 624. In turn, no Court of Appeals or Supreme Court decision has expressly rejected application of any illustration to § 343A(1). Even if Sage is correct that, in the guise of applying the “special aspects” rule, some Court of Appeals decisions have “indirectly” or “effectively” “rejected” some of the illustrations to § 343A, (Sage supplemental brief, pp 6, 17-18, 20-21), this further proves *Lugo’s* departure from the Restatement rule has caused manifestly unjust results.

In *Bertrand*, this Court emphasized that, in cases raising a fact question that the risk of harm presented by an open and obvious condition remains unreasonable, “[t]he issue then becomes the standard of care and is for the jury to decide.” *Id.*, 449 Mich at 611. As *Bertrand*’s holding demonstrates, determination whether a fact question exists requires consideration of several factors, such as the condition’s location, how crowded the area is, or whether nearby items (such as a door, cashier’s window or vending machine) rendered the condition an unreasonable risk of harm. *Id.*, 449 Mich at 614, 621-625.<sup>24</sup>

If not at inception, *Lugo*’s progeny has crystalized the “special aspects” rule into a rigid doctrine that is inconsistent with substantive justice. Changes in the law effectuated by *Lugo*’s progeny mandate that the doctrine must be overruled.

If it ever was, the “special aspects” rule also is no longer factually warranted. To appreciate the human consequences of the “special aspects”/“effectively unavoidable” doctrine, we need look no further than what happened in this case. The Plaintiff, Ms. Livings, tried to navigate Sage’s completely snow and ice-covered parking lot in order to start her 6:00 am shift as a waitress. Even after falling and suffering an injury, she crawled, on her hands and knees, to reach the entrance. (COA majority opinion, p 3 – Sage’s Appendix Tab A). Under the Restatement rule, and under *Bertrand* and *Riddle*, evidence unquestionably raises a material fact question that Sage, admittedly responsible for clearing snow and ice from the parking lot, knew or should have known

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<sup>24</sup> Of course, this is what Justice Cavanagh meant in his majority opinion when he used the term “special aspects.” *Id.* Unfortunately, the *Lugo* majority cited this phrase for precisely the opposite principle – to limit application of the open and obvious exception to predetermined, narrow factual contexts.

that its invitees – employees of the restaurant – would encounter an open and obvious hazard in order to perform their job and earn a living.

Despite this, Sage, Judge Tukul's dissent, (COA dissent, pp 2-4 – Sage's Appendix Tab C), and some of *Lugo's* progeny (principally *Bullard, supra*) contend that a hazard is not "effectively unavoidable" because the invitee employee can simply chose to forgo performing her job and risk termination (or, at a minimum, non-receipt of wages). As Judge Shapiro's concurrence wisely states, the proposition that "Plaintiff could have skipped work and suffered the consequences to her employment ... cannot be harmonized with substantive justice." (COA concurrence, pp 1-2 – Sage's Appendix Tab B).

Recognizing the manifest injustice of its position, Sage goes out of its way to completely remove humanity from consideration of the issue presented. According to Sage, the issue is purely "objective," constituting nothing more than "arithmetic" and "calculus." (Sage supplemental brief, pp 1, 33). Yet, the law is not bean-counting or an ideological exercise.<sup>25</sup> The overriding purpose of the law is to "promote justice." See *Anderson v Robinson*, 38 Mich 407, 408 (1878). In particular, "[t]he policy behind the law of torts is more than compensation of victims; it seeks also to encourage the implementation of reasonable safeguards against risks of injury." *Funk v GMC*, 392 Mich 91, 104; 220 NW2d 641 (1974).

No one, including Sage, disputes that forcing an invitee to forego employment or encounter an unreasonable risk of bodily harm "cannot be harmonized with substantive

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<sup>25</sup> Even if the law was purely actuarial, our premises liability jurisprudence must not damage the economy by forcing Michigan workers to either encounter dangerous conditions or lose their income – or their jobs.

justice." (COA concurrence, pp 1-2 – Sage's Appendix Tab B).<sup>26</sup> It is inherently inconsistent with the Restatement rule this Court unanimously adopted in *Riddle* and *Bertrand*.<sup>27</sup> It is also callous, harsh, unjust, and inconsistent with the principles of comparative negligence.

Changes in the law and presentation of compelling facts, such as in this case, conclusively establish that *Lugo's* "special aspects" rule must not be maintained. *Robinson, supra*. Unquestionably, by depriving a remedy to invitees whom possessors should have foreseen would sustain injury despite the open and obvious nature of the condition, the rule has caused, and will continue to cause, "special hardship and inequity." *McCormick, supra*. The "special aspects" doctrine must be overruled.

**II. IF THIS COURT RETAINS, IN SOME FORM, THE "SPECIAL ASPECTS" DOCTRINE, IT SHOULD HOLD THAT THE PLAINTIFF'S EMPLOYMENT IS A RELEVANT CONSIDERATION IN DETERMINING WHETHER A CONDITION IS EFFECTIVELY UNAVOIDABLE.**

**Argument Summary**

As demonstrated above, to restore Michigan premises liability to the intent and consistency of the Restatement rule under *Riddle* and *Bertrand*, *Lugo's* authoritatively-

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<sup>26</sup> Sage's contention that potential workers' compensation benefits mitigate the injustice of depriving invitees, like Plaintiff, of a tort recovery is totally misplaced. As Plaintiff's supplemental brief demonstrates, workers' compensation benefits are not intended to supplant or fully compensate an injured person for damages recoverable in tort. In addition to Plaintiff's cited authority (a) the exclusive remedy provision of MCL 418.131 precludes most tort claims against only employers, and (b) Michigan law is clear that an employer or worker's compensation insurance carrier that has paid benefits to an injured employee is entitled to reimbursement from any recovery that the employee obtains in a third-party tort action, *Ramsey v Kohl*, 231 Mich App 556, 558-559; 591 NW2d 221 (1998), citing MCL 418.827.

<sup>27</sup> Sage's contention – that recognizing the relevance of the need to perform employment in determining whether an invitee should be anticipated to encounter a risk of harm is "a significant departure from the Second Restatement" rule – is patently incorrect. (Sage supplemental brief, p 8).

unsupported and nationally-orphaned “special aspects” doctrine must be overruled. Yet, should this Court retain, in some form, the “special aspects” rule, at a minimum, the Court must hold that the Plaintiff’s employment is a relevant consideration in determining whether a condition is “effectively unavoidable.”

*Bertrand, Riddle*, and overwhelming national law hold, pursuant to Restatement § 343A(1), that possessors should be liable for maintaining an open and obvious condition that they should anticipate will injure their invitees. Despite dicta and language to the contrary, *Lugo* and its progeny do not authoritatively support rejecting the relevance of an invitee’s employment in determining whether a condition is “effectively unavoidable.” Within the parameters of the “special aspects” doctrine, the Court of Appeals decision in *Lymon v Freedland*, 314 Mich App 746, 760-764; 887 NW2d 456 (2016) represents the correct approach. To the extent that cases preclude consideration of the invitee’s employment as a relevant factor, they should be disfavored or overruled.

### Argument

- A. **National courts overwhelmingly recognize, consistent with Restatement § 343A(1), that possessors remain liable when they should anticipate invitees will encounter an open and obvious condition to perform their employment.**

Consistent with this Court’s adoption of 2 Restatement Torts, 2d, § 343A(1) and comment f in *Bertrand*, as well as § 343A illustration 5, national courts overwhelmingly hold that a possessor remains liable in a premises liability claim if it should anticipate the invitee will encounter an open and obvious condition to perform his or her employment. See *Docos v John Moriarty & Associates, Inc*, 940 NE2d 501, 505 (Mass App 2011) (Citing, in part, 2 Restatement of Torts, 2d, § 343A, comment f, illustration 5,

the court found “a genuine issue of fact about whether a reasonable person in (the plaintiff’s) position would conclude that the advantages of continuing to work in a setting more dangerous than the typical active construction site due to excessive debris would outweigh the apparent risk.”); *LaFever v Kemlite*, 706 NE2d 441, 446 (Ill 1998) (applying the “deliberate encounter exception” to the open and obvious rule and rejecting as incompatible with the Restatement a test which would require a showing that the worker had no reasonable alternative but to encounter the danger before liability could attach);<sup>28</sup> *Mammoccio v 1818 Market Partnership*, 734 A2d 23, 34 (Pa Super 1999) (affirming verdict where the record supported the fact that defendant should have anticipated that plaintiff, as part of her job duties, would encounter the dangerous condition of an elevator shaft ladder); *Zrust v Spenser Foods, Inc*, 667 F2d 760, 765 (8th Cir 1982) (finding the trial court properly instructed the jury that a landowner could be liable for an open and obvious danger when the duties of the invitee's employment required unavoidable exposure to the danger); *Maci v State Farm Fire & Cas Co*, 314 NW2d 914, 918 (Wis App 1981), *overruled on other grounds by Rockweit v Senecal*, 541 NW2d 742 (Wis 1995) (holding that the defendant should have anticipated the harm to the plaintiff despite the obviousness of the danger because plaintiff’s employment provided no reasonable alternative but to encounter the danger); *Shannon v Howard S Wright Constr Co*, 593 P2d 438, 440-441 (Mont 1979) (Citing Restatement § 343A, comment f and illustration 5, the court explained that the exception to the open and obvious rule especially applies “in situations where an employee is involved and the employee, if he is to continue his employment, has no alternative but to continue facing

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<sup>28</sup> The Seventh Circuit applied the “deliberate encounter exception” in *Staples v Krack Corp*, 186 F3d 977, 980-981 (7th Cir 1999).

the risk or hazard.”); *Scales v St. Louis–San Francisco Ry Co*, 582 P2d 300, 306 (Kan App 1978) (finding fact question defendant should have anticipated harm despite the risk where plaintiff essentially had choice of encountering the hazard or “quitting his job”); *Davis v Inca Compania Naviera SA*, 440 F Supp 448, 453 (WD Wash 1977) (following law holding possessor liable when invitee must encounter open and obvious hazard “to enter her place of employment”); *Bitsos v Red Owl Stores, Inc*, 459 F2d 656, 662 (8th Cir 1972) (Followed § 343A, illustration 5 and case law providing that invitee employee “is not precluded from recovering where he was left with no reasonable alternative to using the steps.”); *Kremer v Carr's Food Center, Inc*, 462 P2d 747, 749 n 8 (Alaska 1969) (adopting § 343A(1) and illustration 5).<sup>29</sup>

The only jurisdiction outside Michigan to reject a possessor’s liability for maintaining an open and obvious condition which it should anticipate an invitee will encounter to perform employment is Alabama. See *Daniels v Wiley*, \_\_\_ So3d \_\_\_; 2020 WL 3478593 at \*9 (June 26, 2020), overruling *Terry v Life Ins Co of Georgia*, 551 So2d 385, 386-387 (Ala 1989) (which previously adopted Restatement § 343A(1) and illustration 5). Otherwise, national law fully concurs with *Bertrand* and *Riddle*’s adoption of Restatement § 343A(1), including comment f, and the principle that a possessor remains liable when it should anticipate that an invitee will encounter an open and obvious condition.

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<sup>29</sup> In *Quinlivan*, *supra*, this Court followed *Kremer*’s adoption of 2 Restatement of Torts, 2d, § 343, which the Court described as “a landmark case.” *Id*, 395 Mich at 258-260.

**B. Sage's cited cases do not authoritatively support eliminating an invitee's employment as a relevant consideration in determining whether a condition is effectively unavoidable.**

None of Sage's cited cases supports eliminating an invitee's employment as a relevant consideration in determining whether a condition is effectively unavoidable. This begins with *Lugo* itself.

*Lugo's* sole case-and-controversy holding was that, as a matter of law, the possessor was not liable for maintaining an unobscured, "common" pothole in a parking lot which was open and obvious and for which there was no "special aspect" about the hazard. *Id*, 464 Mich at 520-524. Undisputedly, the plaintiff tripped in the pothole not because of anything unusual about its appearance or because it was unavoidable, but merely because she "wasn't looking down" and failed to observe the condition. *Id* at 521. Absolutely nothing in *Lugo* supports, let alone mandates, the conclusion that an invitee's employment is irrelevant in determining a possessor's potential liability for maintaining an open and obvious condition. The *Lugo* plaintiff was not working at the time of her fall, but was walking through a parking lot to pay a utility bill. *Id* at 514.

Moreover, since the plaintiff was not a customer trying to use the only available exit in a commercial building blocked by "water," and since the case did not involve "an unguarded thirty foot deep pit in the middle of a parking lot," the Court's suggestion of those hypotheticals as the only potential "special aspects" that might subject a possessor to liability was not necessary to determine the case at hand. *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). As demonstrate above, it was, instead, non-precedential obiter dicta. *People v Lown*, 488 Mich 242, 267 n 46; 794 NW2d 9 (2011) ("Obiter dicta, or 'dicta,' are not binding precedent. Rather, they are

statements that are not essential to determination of the case at hand and, therefore, lack the force of an adjudication.”) (citations and internal quotation marks omitted).

1. **The *Hoffner* majority decision erroneously pronounced, through dicta, that the invitee’s employment may be irrelevant in a “special aspects” analysis. This portion of *Hoffner*, and the concurring statement in *Bullard*, must be disfavored or overruled.**

Sage incorrectly argues that language in *Hoffner, supra*, and *Bullard, supra*, authoritatively established that Plaintiff’s employment is not a relevant consideration for determining whether the hazardous condition was “effectively unavoidable.” *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002) also does not support Sage’s position.

*Hoffner* did not address an employee performing her job, but a customer trying to enter a fitness center where she was a member. *Id*, 492 Mich at 456-457. Notwithstanding, in reaching its holding that the hazard at the fitness center’s entrance was not “effectively unavoidable,” the majority stated: “Relevant here, it cannot be said that compulsion to confront a hazard by the *requirement of employment* is any less ‘avoidable’ than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club.” *Id* at 471-472 (original emphasis). The majority offered two purported justifications for this statement.

First, the majority implied that *Perkoviq* rejected employment obligations as a factor in determining whether a hazard is “effectively unavoidable.” *Id* at 471-472. This is not correct. In *Perkoviq*, the plaintiff fell from a roof while constructing a home. After concluding the frost or ice on the roof constituted an open and obvious condition, this Court held, in language more faithful to *Bertrand* than *Lugo*, that evidence did not raise

a material fact question that the defendant should have anticipated the harm despite its open and obvious nature:

[T]here is no question that the condition of the roof was open and obvious. Thus, the question is whether, despite its obviousness and plaintiff's knowledge of it, a factfinder could determine that defendant breached a duty of reasonable care in the circumstances. We conclude that it could not, and that summary disposition was properly granted. In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site. There were no special aspects of this condition that made the open and obvious risk unreasonably dangerous.

*Id.*, 466 Mich at 18-19 (emphasis added). The Court unanimously concurred in the result. *Id.* at 20 (Weaver, Cavanagh and Kelly, JJ, concurring).

Not a word in *Perkoviq* supports the *Hoffner* majority's proposition that "the compulsion to confront a hazard by the *requirement of employment*" is irrelevant to determining whether a condition is "effectively unavoidable." *Hoffner, supra* (original emphasis). *Perkoviq* did not even suggest, and certainly did not hold, that an invitee's employment is irrelevant to a "special aspects" analysis. It merely held, on the facts, that evidence failed to raise a material fact question that the defendant possessor had "reason to foresee" the injury. This ruling was entirely consistent with *Bertrand* and 2 Restatement of Torts, 2d, § 343A(1). The *Hoffner* majority's reliance on *Perkoviq* as precedent rejecting the relevance of the invitee's employment was clearly erroneous.

The *Hoffner* majority's second justification for injecting "employment" into a case addressing a fitness center customer was no less valid. Dismissing the plaintiff's argument that her contract with the fitness center entitled her to enter the building and rendered her injury foreseeable, the majority indicated that, because the contractual relationship constituted "a business interest," they would not permit an "expansion of

liability by imposing a new, *greater* duty than that already owed to invitees.” *Id* at 469-470. The majority additionally asserted that:

“[b]y providing that a simple business interest is sufficient to constitute an *unquestionable necessity* to enter a business, thereby making any intermediate hazard ‘unavoidable,’ plaintiff’s proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship.

*Id* at 470 (original emphasis).

The *Hoffner* majority’s contention, that recognition of “business interests” in assessing whether a condition was “effectively unavoidable” will expand and “create a new subclass of invitees,” is untenable. Pursuant to *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), authored by Justice Young, who also wrote the *Hoffner* majority opinion, a person attains the status of an invitee only if he or she is on the possessor’s premises for a “mutual” “commercial business purpose.” *Id* at 598-600. Recognizing the relevance of the invitee’s purpose on the premises (offset by the requirements of notice of the condition and reasonable anticipation of the harm) is fundamental to establishing an invitor’s duty. By definition, every invitee who visits a premises is there for some mutual, commercial business purpose. This recognition neither expands an invitor’s liability nor creates “a new subclass” of invitees.

Because consideration of the invitee’s employment was unnecessary to resolve the case, *Hoffner*’s implication that the invitee’s employment is irrelevant to determining whether a condition was “effectively unavoidable” constituted non-precedential dicta. *Peltola, supra*, 489 Mich at 190 n 32; *Lown, supra*, 488 Mich at 267 n 46. *Hoffner*’s statement also was completely unsupported by *Perkoviq*. This portion of *Hoffner* must be declared non-binding dicta or overruled.

Sage also spuriously relies on *Bullard, supra*, as authority rejecting the relevance of the invitee's employment. Concluding that frost or ice on the roof where the plaintiff fell while constructing a house was not "effectively unavoidable," the court declared that: "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Id.*, 308 Mich App at 412. The court cited, as purported support, *Perkoviq*, 466 Mich at 18 and *Hoffner*, 492 Mich at 471-472. However, as established, *Perkoviq* did not reject the relevance of the invitee's employment in determining whether a condition is "effectively unavoidable." As also established, *Hoffner's* discussion of an invitee's "employment" was non-precedential dicta and palpably erroneous.

In *Lymon, supra*, 314 Mich App at 760-764, distinguishing *Joyce* and *Hoffner*, the Court of Appeals held that the plaintiff's job as a home health aide established a material fact question that encountering hazardous ice in order to enter a home and care for her patient was effectively unavoidable. *Lymon* represents the better-reasoned and far more equitable approach to this issue.

In his dissent, Judge Tukul tried to distinguish *Lymon* as an aberration where, for "public policy reasons, some jobs, due to their importance dealing with the safety and well-being of others, will effectively remove from the employee the 'option' of not reporting for work, despite the attendant compulsion of confronting hazardous risks." (COA dissent, pp 3-4 – Sage's Appendix Tab C). This is both unavailing and callous. While no one can doubt the importance of the plaintiff's job in *Lymon*, Ms. Livings' need to make a living and responsibility to her family – as well as to her employer and co-workers – was no less valuable to herself or society. Judge Tukul's position runs afoul of Justice Young's concern, fallacious in *Hoffner* but valid here, about creating "a

subclass” of invitees. The proposition that some invitee’s jobs are simply more important, and entitled to more common law protection, than others’, is legally unsupported and morally indefensible.

Under *Bertrand*, *Lymon*, Restatement § 343A(1), and overwhelming law, an invitee’s employment is a relevant consideration in determining whether a condition is “effectively unavoidable.” To the extent *Hoffner*, *Bullard* and (somehow) *Perkoviq* constituted authority on this issue, they should be disfavored or overruled.

**2. Subsequent decisions incorrectly extrapolated from *Lugo* that a condition is “effectively unavoidable” only if it “traps” the invitee “inside a building.” Moreover, *Hoffner* erroneously declared that the hazard must be absolutely unavoidable.**

Reliance on *Lugo*’s advisory dicta in subsequent Court of Appeals decisions was wholly misplaced. The court’s statement, in *Joyce*, *supra*, that a hazard is not “effectively unavoidable” unless the plaintiff is “effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out,” rested exclusively on *Lugo*’s “hazard ... at the only exit of a commercial building” hypothetical. *Id.*, 249 Mich App at 241-242 (original emphasis). Extrapolation from non-binding dicta does not authoritatively support the proposition that a condition is not “effectively unavoidable” under the “special aspects” rule unless the invitee is “trapped inside a building.”

*Joyce*’s declaration, or suggestion, that an invitee must be “trapped in a building” for a condition to be “effectively unavoidable” was also unnecessary to its holding. As Judge Saad’s opinion explained, undisputed evidence established (at least arguably), as a matter of law, that the icy hazard was not “effectively unavoidable” since the

plaintiff “could have removed her personal items another day” and since the plaintiff “could have used an available, alternative route to avoid the snowy sidewalk.” *Id* at 242. These case-specific facts made it unnecessary to announce any global edict that a condition is “effectively unavoidable” only if it “traps” the invitee “inside a building.”

As discussed above, in *Hoffner*, the Supreme Court held that an ice hazard at the entrance of a fitness center was not “effectively unavoidable.” Extending the genealogy of *Lugo*’s advisory dicta, the Court commented that “Plaintiff was not forced to confront the risk, as even she admits; she was not “trapped” in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.” *Id*, 492 Mich at 464, 473. Concurrently, the Court departed even further from *Bertrand* and the Restatement, declaring:

Unavoidability is characterized by an *inability* to be *avoided*, an *inescapable* result, or the *inevitability* of a given outcome. ... [E]xceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations. Thus, an ‘unreasonably dangerous’ hazard must be just that—not just a dangerous hazard, but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances. An ‘effectively unavoidable’ hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business’s services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a ‘special aspect’ characterized by its *unreasonable risk of harm*.

*Id* at 468, 472-473 (original emphasis; footnotes omitted).

Although *Lugo* required only that the condition be “effectively unavoidable” for the open and obvious exception to apply, through the above language, *Hoffner* transformed the rule into requiring that the hazard be absolutely unavoidable. *Hoffner* cited the *Random House Webster’s College Dictionary* (1997) in support of this position, while

failing to acknowledge that the adverb “effectively” is commonly defined as “in effect; virtually,” <https://www.merriam-webster.com/dictionary/effectively>, and “actually but not officially or explicitly,” <https://www.lexico.com/en/definition/effectively> (Oxford Dictionary). Had *Lugo* intended the condition be “unavoidable,” “absolutely unavoidable” or “metaphysically unavoidable,” it would have said so. *Hoffner’s* even further restriction of the unanimously-adopted Restatement rule under *Bertrand* – with no adequate explanation or support – erroneously immunized inviters for maintenance of all open and obvious conditions (except trapping invitees in a building and maintaining an unguarded 30-foot deep pit in a customer traffic area).<sup>30</sup> *Hoffner’s* unwarranted expansion of the open and obvious defense is inconsistent with substantive justice. It must be disfavored or overruled.

Then, in *Bullard, supra*, 308 Mich App at 412, Judge Saad cited his opinion in *Joyce* for the global proposition that, “[p]ut simply, the plaintiff must be ‘effectively trapped’ by the hazard.” Once again, this broad declaration was not necessary to the court’s holding. *Bullard* involved an electrician inspecting a generator on a hospital roof – not a customer “trapped” inside a commercial building. *Id* at 405-406. Further, case-specific evidence supported the court’s conclusion that the ice hazard on the roof was not “effectively unavoidable.” The plaintiff’s employment did not require him to inspect the generator that day. *Id* at 413. He was only required to inspect the generator on a “monthly” basis. *Id*. There was no “emergency” necessitating encountering the hazardous ice at that time. *Id*. Even worse, the plaintiff

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<sup>30</sup> As demonstrated above, the *Hoffner* majority also rendered premises liability law even more confusing and contradictory by suggesting that an invitee’s “business” or “employment” purpose on the premises is irrelevant in determining whether a condition is “effectively unavoidable” – when, under *Stitt*, every invitee is on the premises for a mutual commercial business purpose.

decided to climb up on the roof and inspect the generator between 4:00 and 4:40 am, “when it was dark and cold” – when nothing prevented him from waiting for sunlight and safer conditions. *Id* at 412. All of these facts supported the Court of Appeals’ decision to reverse the order denying summary disposition without issuing sweeping edicts regarding the factual limits of the “effectively unavoidable” rule.

Neither *Lugo*’s advisory dicta, nor its offspring in *Joyce*, *Hoffner* and *Bullard*, constitute binding precedent that a hazard is “effectively unavoidable” only if it “traps” an invitee. *Hoffner*’s modification of the special aspects rule to allow potential liability only if the condition is absolutely unavoidable was erroneous and manifestly unjust. To the extent the language in these cases constitutes precedent, they must, at least in part, be overruled.

**III. EVIDENCE RAISES GENUINE ISSUES OF MATERIAL FACT THAT SAGE SHOULD HAVE ANTICIPATED THE HARM TO INVITEE EMPLOYEES WHO NEEDED TO ENTER THE RESTAURANT TO PERFORM THEIR JOBS AND, UNDER LUGO, THAT THE HAZARDOUS PARKING LOT CONSTITUTED AN EFFECTIVELY UNAVOIDABLE CONDITION.**

As demonstrated in Plaintiff’s answer to Sage’s application, Plaintiff’s supplemental brief, and in the Court of Appeals’ majority opinion, ample evidence raises a genuine issue of material fact that Sage is liable for maintaining the open and obvious condition. For ten years before Plaintiff’s fall, Sage possessed the parking lot and was responsible for removing snow and ice. Sage knew the parking lot serviced Dimitre’s restaurant, and that invitee employees of the restaurant would have to either confront hazardous snow and ice or forego their employment. Under *Bertrand* and Restatement § 343A(1), which the MAJ urges this Court to reinstate, there is a clear fact question that Sage should have anticipated the harm to Plaintiff despite the open and obvious

nature of the snow and ice. Under *Lugo*, *Perkoviq* and *Lymon*, Sage knew or should have known that the condition was “effectively unavoidable” because it “had reason to foresee” that the restaurant employees would encounter the hazard to enter the building. *Perkoviq*, 466 Mich at 18-19.

None of Sage’s arguments mandates reversing the Court of Appeals’ decision and entering summary disposition. While the jury may agree that the condition was “effectively unavoidable” because Plaintiff could have given up earning wages, left the premises and “returned when the condition was resolved;” “could have remained in the vehicle (for some indeterminate duration) until the ice was cleared,” (Sage supplemental brief, pp 39-40); or should have followed co-worker Buck’s “shimmying” route into the building (despite the fact that Buck arrived before Plaintiff), none of these arguments establishes, as a matter of law, that her injury was not foreseeable or that the condition did not constitute a “special aspect” under *Lugo*.

**RELIEF REQUESTED**

WHEREFORE, for the reasons presented, the Michigan Association for Justice respectfully requests that this Honorable Court overrule *Lugo's* special aspects doctrine, or, at a minimum, hold that Plaintiff's employment is a relevant consideration in determining whether the condition was effectively unavoidable and, based on the material fact question presented, affirm the Court of Appeals' decision.

Respectfully submitted,

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