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Premises Liability in Michigan: Enter at Your Own Risk

King Scholar Seminar Final Paper

Cara L. Nieboer

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I. Introduction

On July 14, 2000, Eleanor Lauff, a 75 year old, legally blind woman, went to Wal-Mart to purchase a birthday gift for her granddaughter. After selecting a necklace, Ms. Lauff had to use the restroom. Her son who had brought her to the store, escorted her there and waited outside for her. Ms. Lauff walked to the back of the restroom to use the handicapped stall. While walking to the toilet seat and sitting down, she heard toilet paper crinkle on the floor but did not notice any water or other liquid on the floor. When she stood up her foot slipped out from under her and she fell. While on the floor, Ms. Lauff could feel that there was water, paper, and wet gook all over the floor. According to the cleaning schedule on the wall of the bathroom, no one had cleaned the bathroom for eight days prior to Ms. Lauff's fall.

Mrs. Lauff was in the hospital for nine days while doctors operated on her fractured hip and attempted to control her rib and chest pain. Ms. Lauff later files suit alleging negligence on the part of defendant Wal-Mart for failing to keep its premises in a reasonably safe condition and for failing to warn her, a blind woman, about debris on the floor in the handicapped stall of the restroom. Defendant brings a motion for summary judgment arguing the condition was open and obvious. Consider whether the court should grant or deny the motion.

In two recent decisions by the Michigan Supreme Court, *Stitt v. Holland Abundant Life Fellowship*, and *Lugo v. Ameritech Corp.*, Michigan has reverted back to the historic, technical common-law rules that tend to immunize landowners from liability in premises liability cases. In doing so, Michigan has rejected the trend followed by the majority of other jurisdictions to instead adopt a reasonableness approach to premises liability cases due to the harshness of many of these common law rules. This article will provide a brief discussion of the history of common-law premises liability and the current trend in the majority of jurisdictions in the United

States. Then this article will provide a discussion of these Michigan decisions and their impact on premises liability cases in Michigan. Finally, this paper will set forth a proposal for Michigan to adopt a reasonableness standard.

II. Background

Historically, landowners have enjoyed a position of favor among the courts.¹ When the common-law was defining a landowner's duty of care to visitors on his premises, the landowner was "the backbone of the social system" and "land ownership was synonymous with power and importance."² As a result, the law provided the landowner with many rights and privileges, and placed a significant emphasis on his proprietary interests.³

In the area of premises liability, the courts adopted various rules to limit the power of a jury to decide premises liability cases.⁴ Although "aware of the threat that unlimited landowner freedom and its accompanying immunity placed upon the community," courts nevertheless "refused to provide juries with unbounded authority to determine premises liability cases."⁵ Courts mistrusted juries because they "were comprised mainly of potential land *entrants* who most likely would act to protect the community at large and thereby reign in the landowner's sovereign power over his land."⁶ Thus, courts created various technical rules "to disgorge the jury of some of its power by either allowing the judge to take the case from the jury based on legal rulings or by forcing the jury to apply the mechanical rules of the trichotomy instead of considering the pertinent issue of whether the landowner acted reasonably in maintaining his

¹ See Lucinda S. Ingram, *Missouri Retreat From the Known or Obvious Danger Rule in Premises Liability*, 54 MO. L. REV. 241, 243 (1989).

² Thomas S. Kleeh, *Self v. Queen: Retaining Eighteenth Century Feudilistic Jurisprudence to determine a Landowner's Duty of Care*, 100 W. Va. L. Rev. 467, 470 (1997).

³ See *id.*

⁴ See *Alexander v. Medical Associates Clinic*, 646 N.W.2d 74 (Iowa, 2002).

⁵ *Alexander*, 646 N.W.2d at 81.

⁶ *Id.*

land.”⁷

The most well known of these rules is the common-law trichotomy, which places a land entrant into one of three categories, and the category to which he is placed determines the duty of care the landowner owes him.⁸ Another of these technical rules was the “open and obvious” rule, which absolved the landowner from liability for harm caused by a dangerous condition on the land if the entrant knew and realized the risk, or the condition presented an “obvious” risk.⁹ Arguably, these rules came about before negligence principles were in existence.¹⁰ When negligence principles emerged, they conflicted with the immunity conferred upon the landowners under the classifications.¹¹ Nevertheless, many courts refused to replace these rules with modern principles of negligence law, but rather “superimposed the new negligence principles upon the existing framework of entrant categories.”¹²

III. The Trichotomy

The classification of entrants on the land is used to determine the “duty” a landowner owes to that particular entrant. Liability for negligence depends upon whether a landowner owes a duty of care, and if so, to what extent. Traditionally, the landowner’s duty of care toward persons on his property varies depending on how that injured person is classified. These “classifications” or “categories” include: (1) trespassers, who entered without invitation or permission and were entitled to a minimal duty of care, (2) licensees who entered with

⁷ *Id.*

⁸ See W.E. Shipley, Comment Note.--“Economic benefit” or “public invitation” as test of licensee-invitee status, 95 A.L.R.2d 992 (1964).

⁹ See Ernest H. Schopler, Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk, 35 A.L.R.3d 230 (1971).

¹⁰ See *Kleeh*, *supra* n. 2.

¹¹ See *id.* (citing Kathryn E. Eriksen, *Premises Liability in Texas—Time for a “Reasonable” Change*, 17 St. Mary’s L.J. 417, 421 (1986)).

¹² *Id.* (quoting Sears, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U.Kan.L.Rev. at 176 (1995)).

permission of the landowner and were entitled to a slightly greater degree of care than the trespasser, and (3) invitees, whose presence was actively desired and induced by the landowner and were entitled to a duty of reasonable care while they were on the premises.¹³

Many jurisdictions define "invitee" broadly to include all those who enter or remain on land because of an invitation that carries an implied representation, understanding, or assurance that the landowner or occupier used reasonable care to prepare the premises and make them safe for these visitors.¹⁴ However, the term "invitation" is not the same as the term invitation is popularly understood.¹⁵ Rather, "invitee" is a term of art in the legal sense, and not everyone that is invited onto an owner's land is an "invitee" in the legal sense.¹⁶ In most jurisdictions a social guest who enters the land upon express invitation by the owner, does not constitute an invitee but a licensee.¹⁷

A. The Trichotomy under the First Restatement

The concept of "invitation" has been subject to considerable litigation among the courts. The first edition of the Restatement of Torts abandoned the terms as the courts had commonly used them. Instead, the Restatement of Torts offered the following definitions:

Sec. 330. *Licensee Defined.* A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission.¹⁸

Sec. 331. *Gratuitous Licensee Defined.* A gratuitous licensee is any licensee

¹³ See Shipley, *supra* n. 8.

¹⁴ See 62 AM. JUR. 2D *Premises Liability* § 87.

¹⁵ See *id*

¹⁶ See *id*.

¹⁷ See *id*. Courts have declined to grant invitee status to social guests on the basis that one is not an invitee unless the owner or occupant has an economic interest in his visit, and also that a host merely offers his premises to a social guest for enjoyment with the same security that the host and his family who live on the premises would have. *Id.* at § 399

¹⁸ RESTATEMENT OF TORTS § 330.

other than a business visitor as defined in Sec. 332.¹⁹

Sec. 332. *Business Visitor Defined.* A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.²⁰

The First Restatement defines “licensee” broadly to include any person who is privileged to remain on the land because of the possessor’s consent, whether given by invitation or permission. The First Restatement then divides this broad class into “gratuitous licensees” and “business visitors” thereby deliberately discarded the term “invitee” altogether. Additionally, the First Restatement did away with the determination of whether the visitor entered by invitation or bare permission, in favor of the test that looks to the occupier’s pecuniary interest in his presence.²¹ The theory behind such a requirement is that the duty of care required of an occupier towards a business visitor is the price the occupier pays for the prospective economic benefit he hopes to derive from the person’s presence.²² Likewise, when no such benefit exists, he is under no such duty.²³

B. The Trichotomy under the Second Restatement.

The Second Restatement of Torts includes “public invitees” within the definition of invitee. Section 332 defines an “invitee” as follows:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor

¹⁹ RESTATEMENT OF TORTS § 331.

²⁰ RESTATEMENT OF TORTS § 332.

²¹ See William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 574 (1942).

²² See *id.*

²³ See *id.*

of the land.²⁴

The Second Restatement recognizes that invitees generally fall into two classes: (1) those that enter as members of the public for a purpose for which the land is held open to the public; and (2) those who enter for a purpose connected with the business of the possessor.²⁵ Thus, the Second Restatement provides that an invitee is either a public invitee or a business visitor.²⁶ Restatement Second § 330 defines a licensee as a person who is privileged to enter or remain on land only by virtue of the possessor's consent.²⁷

The Second Restatement is closely aligned with the conclusions drawn by Professor Prosser in his critique of the First Restatement.²⁸ Prosser presents an historical analysis of the concept of "invitation" at common law in order to determine when invitee status arose.²⁹ Prosser

²⁴ RESTATEMENT (SECOND) OF TORTS § 332. Comment (d) of section 332 of the Restatement Second states:

Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member of the public who enters for that purpose is an invitee.

Where land is held open to the public, it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in so opening the land is not a business purpose, and the visitor's presence is in no way related to business dealings with the possessor, or to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor. Thus where a strip of private land abutting upon the public sidewalk is so paved that it is indistinguishable from the sidewalk, the possessor holds it open to the public as provided for public use for the purpose of passage, and anyone so using it is an invitee. The possessor's duty to use reasonable care to keep such land in proper and safe condition is not far removed from his obligation to the public upon the highway itself, or to those who stray a few feet from it in the course of travel.

It is not large enough, to hold land open to the public, that the public at large, or any considerable number of persons, are permitted to enter at will upon the land for their own purposes. As in other instances of invitation, there must be some inducement or encouragement to enter, some conduct indicating that the premises are provided and intended for public entry and use and that the public will not merely be tolerated, but is expected and desired to come. When a landowner tacitly permits the boys of the town to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to it are invitees. *Id.*

²⁵ See RESTATEMENT (SECOND) OF TORTS § 332.

²⁶ See *id.*

²⁷ See *id.*

²⁸ William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). Interestingly, the leading proponent of the economic benefit rule among the legal writers was Professor Bohlen, who was also the reporter for the first edition of the Restatement of Torts. 95 A.L.R. 992, n.5.

²⁹ William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

found that “benefit” to the occupier did not play an important part in determining invitee status, and in most of the early decisions, it was entirely absent.³⁰ Rather, “the theory of liability is simply that the defendant has opened his premises to the public with an invitation to come, and that the plaintiff has come as one of the public, in reliance upon an implied representation of safety.”³¹

Prosser determined that the origin of the notion that benefit to the occupier as the *sine qua non* of an affirmative duty of care to make the premises safe, originated with Robert Campbell in his treatise on negligence in 1871.³² According to Professor Prosser, one thing that is clear from the early cases that determine invitee status “is that the duty of the occupier toward his ‘invitee’ was not, in its inception, a matter of quid pro quo for a benefit conferred or hoped for.”³³ Rather, it rested “upon an implied representation of safety, a holding out of the premises as suitable for the purpose for which the visitor came; and this was stated in terms of an invitation to come.”³⁴

Where the “mutual benefit” or “business visitor” came into play were in situations involving private invitations.³⁵ Courts relied upon the business purpose or mutual benefit requirement to impose a greater duty on private property owners than was required toward their

³⁰ *See id.*

³¹ *Id.*

³² *See id.* citing Campbell, *Law of Negligence* (2d ed. 1878) 63-64. “The principle appears to be that invitatio is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.” *Id.*

³³ William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). Interestingly, the leading proponent of the economic benefit rule among the legal writers was Professor Bohlen, who was also the reporter for the first edition of the Restatement of Torts.

³⁴ *Id.*

³⁵ *Id.* “A private invitation or permission to enter is one which is extended to the individual only, and is not shared by the public at large. It follows that the individual cannot rest his claim upon any representation made or any duty owed to him as one of the public, but must look to his personal relation with the occupier as the source of the obligation to protect him.” *Id.*

social guests.³⁶ By looking at the purpose for the invitation by the owner, courts could distinguish between those who were invited for some “mutual benefit” or “business purpose” of the possessor, and those who were merely social guests of the possessor.³⁷

The Second Restatement of Torts demonstrates the move away from the traditional immunity afforded to landowners. Under the Second Restatement, a landowner who holds the land open to the public for some public purpose has the same duty of care as a business owner. The invitation test under the Second Restatement goes further and deems the visitor an invitee if the visitor enters the premises for that particular purpose for which the premises is held open to the public for.³⁸

C. Toward a Standard of Reasonableness

Since 1957, many jurisdictions rejected the common-law category distinctions in favor of a test that these courts viewed as more suitable to the modern state of negligence law. England, the jurisdiction that created the entrant classifications, was the first to reject them. When England passed the Occupier’s Liability Act in 1957 it abolished the distinction between invitees and licensees, and instead imposed a “common duty of care” toward all persons who enter the premises upon the occupier of land³⁹

Two years later, in *Kermarec v. Compagnie Generale Transatlantique*,⁴⁰ the United States Supreme Court refused to extend the common-law distinctions between licensees and invitees to maritime law. The Supreme Court recognized that the classifications were created in a culture “deeply rooted to the land, a culture which traced many of its standards to a heritage of

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See* 62 AM. JUR. 2D *Premises Liability* § 92.

³⁹ *See* Occupier’s Liability Act, 5 & 6 Eliz. 2, c. 31 (1957).

⁴⁰ 358 U.S. 625 (1959).

feudalism.”⁴¹ The Court noted that courts have formulated “subtle refinements,” sub classifications among common-law categories, and delineated “fine gradations in the standards of care” in order to achieve justice “in an industrialized urban society, with its complex economic and individual relationships.”⁴² However, these classifications and sub classifications have produced confusion and conflict and new distinctions have obscured the older ones.⁴³ From this, the Court reasoned, the common-law has moved toward imposing a duty of reasonable care to persons under the circumstances.⁴⁴

In 1968, California was the first United States jurisdiction to judicially abrogate the common-law categories when the Supreme Court of California issued its opinion in *Rowland v. Christian*.⁴⁵ The court set forth its rationale for abolishing the common-law categories:

A man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.⁴⁶

Rowland listed a number of factors to be considered in determining whether to allow an exception to the general principle that a person is liable for injury caused by the failure to exercise reasonable care:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the

⁴¹ *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959).

⁴² *Kermarec*, 358 U.S. at 630-31.

⁴³ *See id.*

⁴⁴ *See id.* at 632.

⁴⁵ 443 P.2d 561 (Cal. 1968).

⁴⁶ *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁴⁷

The California Supreme Court's decision in *Rowland* has motivated a number of other jurisdictions to reevaluate the usefulness and viability of maintaining the common-law trichotomy.⁴⁸ Today, fifteen states have rejected the invitee-licensee distinction in favor of a reasonableness standard,⁴⁹ while eight states have abolished all three common-law categories in favor of a reasonableness standard.⁵⁰ Twenty-seven jurisdictions still recognize the common-law categories of trespasser, invitee, licensee.⁵¹ However, the majority of the jurisdictions that have retained the common-law categories have adopted the Second Restatement's definition of

⁴⁷ *Rowland*, 443 P.2d at 568.

⁴⁸ See *Kotzebue v. McLean*, 702 P.2d 1309, 1314 (Alaska 1985); *Evans v. Park*, 732 P.2d 369, 370 (Idaho Ct. App. 1987); *Moody v. Manny's Auto Repair*, 871 P.2d 935, 943 (Nev. 1994); *Ford v. Board of County Comm'rs*, 879 P.2d 766, 770 (1994); *Nelson v. Freeland*, 507 S.E.2d 882, 886 (N.C. 1998); *Mallet v. Pickens*, 522 S.E.2d 436, 444 (1999).

⁴⁹ See *Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 72 (Cal. 1998); *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998); *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Poulin v. Colby College*, 402 A.2d 846, 850 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Ford v. Board of County Com'rs of County of Dona Ana*, 879 P.2d 766, 771 (N.M. 1994); *Nelson v. Freeland*, 507 S.E.2d 882, 893 (1998), *O'Leary v. Coenen*, 251 N.W.2d 746, 751-52 (N.D. 1977); *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, (R.I. 1994); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn.1984); *Mallet v. Pickens*, 522 S.E.2d 436, 448 (W.Va. 1999); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 11 (Wis. 1975); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).

⁵⁰ See *Webb v. City & Borough of Sitka*, 561 P.2d 731 (Alaska 1977); *Pickard v. City and County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992); *Cates v. Beauregard Elec. Co-op., Inc.*, 3s28 So.2d 367, 371 (La. 1976); *Limberhand v. Big Ditch Co.*, 706 P.2d 491, 496 (Mont. 1985); *Moody v. Manny's Auto Repair*, 871 P.2d 935, 942-43 (Nev. 1994); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976).

⁵¹ See *Nicoletti v. Westcor, Inc.*, 639 P.2d 330, 332-33 (Ariz. 1982); *Tucker v. Sullivan*, 307 Ark. 440, 821 S.W.2d 440 (1991); *Corcoran v. Jacovino*, 290 A.2d 225, 228 (Conn. 1971); *Colorado, C.R.S. 13-21-115(5)(c)* (1999); *Malin v. Consolidated Rail Corp.*, 438 A.2d 1221, 1226 (Del.Super. 1981); *Post v. Lunney*, 261 So.2d 146, 148-49 (Fla. 1972); *Loomis v. Granny's Rocker Nite Club*, 620 N.E.2d 664, (Ill.App. 1993); *Burrell v. Meads*, 569 N.E.2d 637, 642 (Ind. 1991); *Howard County Bd. of Educ. v. Cheyne*, 99 Md. App. 150; *Martin v. B.P. Exploration & Oil, Inc.*, 769 So.2d 261, 265 (Miss.App. 2000); *Martin v. City of Washington*, 848 S.W.2d 487, 493, (Mo. 1993); *Daily v. K-Mart Corp.* 458 N.E.2d 471(1981), *Walsh v. C & K Market, Inc.*, 16 P.3d 1179, 1181 (Or. 2000); *Palange v. City of Philadelphia, Law Dept.*, 640 A.2d 1305, 1308 (Pa. 1994); *Sims v. Giles*, 541 S.E.2d 857, 862 (S.C.App. 2001); *City of Richmond v. Grizzard*, 136 S.E.2d 827, 830 (1964); *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 414 P.2d 773 (1966); *OCGA § 51-3-1*; *Peterson v. Romine*, 960 P.2d 1266, 1269 (Idaho 1998); *Filipowicz v. Diletto*, 796 A.2d 296, 300 (N.J.Super. 2002); *Brown v. Nicholson*, 935 P.2d 319, 321-322 (Okla. 1997); *Underberg v. Cain*, 348 N.W.2d 145, 146 (S.D.1984), *Wool v. Larner*, 26 A.2d 89, 92-93 (Vt. 1942);

invitee.⁵²

D. The Trichotomy in Michigan: *Stitt v. Holland Abundant Life Fellowship*

In *Stitt v. Holland Abundant Life Fellowship*,⁵³ the Michigan Supreme Court narrowed the definition of an “invitee” which applies in premises liability cases. In *Stitt*, Plaintiff Violet Moeller had joined a friend to participate in an evening bible study at defendant’s church.⁵⁴ While Ms. Moeller was exiting her friend’s vehicle, she tripped over a tire stop in the parking lot of defendant’s church and fractured her left arm.⁵⁵ Subsequently, Ms. Moeller brought a premises liability claim against the defendant church, alleging that the church negligently placed the tire stop and failed to provide adequate lighting in the parking lot.⁵⁶

The Michigan Supreme Court granted certiorari to determine the narrow issue of whether invitee status should extend to individuals entering upon church property for *noncommercial* purposes.⁵⁷ In a 5-2 decision, the Michigan Supreme Court reversed the court of appeals and held that persons on the premises of a church for other than commercial purposes are licensees and not invitees.⁵⁸

The Court recognized the three common-law categories for persons who enter upon the

⁵²See *Nicoletti v. Westcor, Inc.*, 639 P.2d 330, 332-33 (Ariz. 1982); *Tucker v. Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991); *Corcoran v. Jacovino*, 290 A.2d 225, 228 (Conn. 1971); *Colorado*, C.R.S. 13-21-115(5)(c) (1999); *Malin v. Consolidated Rail Corp.*, 438 A.2d 1221, 1226 (Del.Supr. 1981); *Post v. Lunney*, 261 So.2d 146, 148-49 (Fla. 1972); *Loomis v. Granny's Rocker Nite Club*, 620 N.E.2d 664, (Ill.App. 1993); *Burrell v. Meads*, 569 N.E.2d 637, 642 (Ind. 1991); *Howard County Bd. of Educ. v. Cheyne*, 99 Md. App. 150; *Martin v. B.P. Exploration & Oil, Inc.*, 769 So.2d 261, 265 (Miss.App. 2000); *Martin v. City of Washington*, 848 S.W.2d 487, 493, (Mo. 1993); *Daily v. K-Mart Corp.* 458 N.E.2d 471(1981), *Walsh v. C & K Market, Inc.*, 16 P.3d 1179, 1181 (Or. 2000); *Palange v. City of Philadelphia*, Law Dept., 640 A.2d 1305, 1308 (Pa. 1994); *Sims v. Giles*, 541 S.E.2d 857, 862 (S.C.App. 2001); *City of Richmond v. Grizzard*, 136 S.E.2d 827, 830 (1964); *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 414 P.2d 773 (1966).

⁵³ 462 Mich. 591, 614 N.W.2d 88, (2000).

⁵⁴See *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 594, 614 N.W.2d 88, 90 (2000).

⁵⁵ See *Stitt*, 462 Mich.at 594, 614 N.W.2d at 90.

⁵⁶ See *id.*

⁵⁷ See *Stitt* 462 Mich. at 597.

⁵⁸ See *id.* at 607

premises of another: (1) trespasser, (2) licensee, or (3) invitee.⁵⁹ A “trespasser” is “a person who enters upon another’s land, without the landowner’s consent.”⁶⁰ The only duty a landowner owes to a trespasser is to refrain from injuring the trespasser by “willful and wanton” misconduct.⁶¹ A “licensee” is a person who is privileged to enter the land of another by virtue of the possessor’s consent.⁶² A landowner has a duty to warn licensees of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved.⁶³ Importantly, the landowner does not have a duty to inspect or to use affirmative care to make the premises safe for the licensee’s visit.⁶⁴

An “invitee” is “a person who enters upon the land of another upon invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee’s reception.”⁶⁵ As to “invitees”, the landowner has a duty to invitees in addition to the duty to warn the invitee of any dangers known to the landowner, the obligation to “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.”⁶⁶ A landowner is liable to invitees who are injured by a condition on the land if the landowner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it poses an unreasonable risk of harm to invitees; (b) should expect that invitees will not discover the danger, or will not be able to protect themselves from the danger; and (c) does not exercise reasonable care to protect invitees from

⁵⁹ *Id.* at 596.

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *See id.* at 596-97.

⁶⁵ *Id.* at 597.

⁶⁶ *Id.*

the danger.⁶⁷

After setting forth these basic principles, the Court looked to Michigan's common-law to determine the meaning of "invitation." Noting that previous decisions were unclear as to what extent an invitation is sufficient to confer the status of "invitee," the Court nevertheless found support for "the requirement that the landowner's premises be held open for a commercial business purpose."⁶⁸ Likewise, the Court recognized that "some of its earlier decisions were "replete with broad language suggestive of the Restatement's 'public invitee' definition," however the Court emphasized that in these cases "the precise contours of the definition, are difficult to discern."⁶⁹

Finally, the Court looked to *Preston*, which the court of appeals had interpreted as having adopted the second Restatement of Torts, section 332.⁷⁰ The majority disagreed with the court of appeals, stating that even though *Preston* is purported to have adopted the Restatement "public invitee" definition, it also appears to recognize the commercial purpose requirement.⁷¹ The Court found that *Preston* recognized the commercial purpose requirement when, quoting Cooley on Torts, it stated:

An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it. *"To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business with*

⁶⁷ *See id.*

⁶⁸ *Id.* at 598 citing *Perl v. Cohodas, Peterson, Paoli, Nast Co.*, 295 Mich. 325, 294 N.W. 697 (1940); *Diefenbach v. Great Atlantic & Pacific Tea Co.*, 280 Mich. 507, 273, N.W. 783 (1937); *Sink v. Grand Trunk Western R. Co.*, 227 Mich. 21, 198 N.W. 238 (1924); *Butler v. Ramco-Gerchenson, Inc.*, 214 Mich.App. 521, 542 N.W.2d 912 (1995); *Bradford v. Feedback*, 149 Mich. App. 67, 385 N.W.2d 729 (1986); *Leep v. McComber*, 118 Mich.App. 653, 325 N.W.2d 531 (1982). The Court also found it significant that "the 'commercial purpose' distinction is sufficiently recognized in Michigan case law that there are even secondary authorities that include Michigan among those jurisdictions conferring invitee status only on business visitors. *Id.*

⁶⁹ *Id.* at 599 citing *Polston v. S.S. Kresge Co.*, 324 Mich. 575, 37 N.W.2d 638 (1949); *Sheldon v. Flint & P.M. R. Co.*, 59 Mich. 172, 26 N.W. 507 (1886); *Hargreaves v. Deacon*, 25 Mich. 1 (1872).

⁷⁰ *See id.* citing *Preston v. Sleziak*, 383 Mich. 442, 175 N.W.2d 759 (1970).

⁷¹ *See id.*

which the occupant of the premises is engaged, or which he permits to be carried on there. There must be some mutuality of interest in the subject to which the visitor's business relates, although the particular business which is the object of the visit may not be for the benefit of the occupant. The distinction between a visitor who is a mere licensee and one who is on the premises by invitation turns largely on the nature of the business that brings him there, rather than on the words or acts of the owner which precede his coming."⁷²

The Court emphasized Cooley's acknowledgement that invitee status depends upon a "commercial purpose" and "mutuality of interest" concerning the visit, and determined that this language demonstrates "that Michigan has historically, if not uniformly, recognized a commercial business purpose as a precondition for establishing invitee status."⁷³ The Court justified its refusal to recognize the public invitee status as follows:

The imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose.⁷⁴

Turning to the case before it, the Court adopted the rationale of a 1957 Florida Supreme Court decision, *McNulty v. Hurley*,⁷⁵ which considered a business purpose or a business or commercial benefit to the landowner is a necessary requirement for a visitor to have invitee

⁷² *Id.* quoting 3 Cooley, Torts (4th ed.), § 440, pp. 193-194 (emphasis added).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 97 So.2d 185 (Fla. 1957). The majority found the following language in *McNulty* persuasive:

An invitation to enter and worship, whether it be either express or implied, does not constitute one who accepts the invitation an invitee in the legal sense. In order for such relationship to arise the person entering onto the premises, i.e., the invitee must have done so for purposes which would have benefited the owner or occupant of the premises, i.e., the invitor, or have been of mutual benefit to the invitee and the invitor. And as we view it this benefit must be of a material or commercial rather than of a spiritual, religious, or social nature. *Stitt*, 462 Mich. at 605 (quoting *McNulty*, 97 So.2d at 188).

status.⁷⁶ The *Stitt* majority agreed with *McNulty*'s rejection of the argument that she had made financial contributions in the past. The court adopted the following language from *McNulty*:

[N]or would it matter if the plaintiff had alleged that she made a contribution when the collection plate was passed, for this would not have changed her status.... It seems clear to us...that one who attends a religious edifice for the purpose of attending a religious service, as did the plaintiff in this case, does so "for his own convenience, pleasure or benefit" and is at best a licensee.⁷⁷

The Court recognized that a majority of jurisdictions have adopted the public invitee definition as set forth in section 332 of the Restatement.⁷⁸ Nevertheless, the Court declined to do so under the auspice of its role in "determin[ing] which common law rules best serve the interests of Michigan citizens."⁷⁹ The Michigan Supreme Court concluded, "Michigan is better served by recognizing that invitee status must be founded on a commercial purpose for visiting the owner's premises."⁸⁰ Therefore, "[a]bsent a showing that the church's invitation to attend its services was for an essential commercial purpose, Ms. Moeller should be considered a licensee, and not an invitee."⁸¹

In her dissent, Justice Kelly identifies the flaws in the majority's reasoning and purports instead that Michigan case law supports the adoption of the "public invitee" as set forth in the

⁷⁶ See *Stitt*, 462 Mich. at 605. As noted by Justice Kelly, Florida rejected the *McNulty* decision in *Post v. Lunney*, 261 So.2d 146. In *Post*, the Florida Supreme Court adopted § 332, pointing out that the *McNulty* mutual benefit test was too narrow and had the potential to cause unjust results. See *id.* at 617-18 (Kelly, J. dissenting).

"For example, it would prohibit recovery for damages due to ordinary negligence to a "window shopping" visitor to a store, while permitting recovery to a person who made a purchase however small. To avoid these and similar results, the economic benefit theory has been strained to the breaking point. The Florida court applied the public invitee provision of § 332 to the case. It concluded that the plaintiff was an invitee because she had been invited to enter the property opened to members of the public for tours." *Id.* (Kelly, J. dissenting) (quoting *Post v. Lunney*, 261 So.2d 146 (Fla. 1972)).

⁷⁷ *Id.* at 606 (quoting *McNulty*, 97 So.2d at 188-189).

⁷⁸ See *id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Restatement Second Section 332.⁸² Justice Kelly also points out that most of the decisions that rely on the “business invitee” provision of § 332 do not consider the “public invitee” provision because they could establish invitee status on the basis of economic benefit to the owner.⁸³

Justice Kelly notes that the Florida Supreme Court has overruled the decision relied upon by the majority, *McNulty v. Hurley*.⁸⁴ In *Post v. Lunney*,⁸⁵ the Florida Supreme Court adopted § 332 including the public invitee provision. In court in *Post* found the mutual benefit test was too narrow and had the potential to cause unjust results: “it would prohibit recovery for damages due to ordinary negligence to a ‘window-shopping’ visitor to a store, while permitting recovery to a person who made a purchase, however small.”⁸⁶ To avoid these and similar results “the economic benefit theory has been strained to the breaking point.”⁸⁷

Justice Kelly adopted the reasoning of the Indiana Court of Appeals in *Fleischer v. Hebrew Orthodox Congregation* for adopting the “public invitee” test of the Restatement

⁸² See *id.* at 608 (J. Kelly dissenting).

⁸³ See *id.* at 614-15 (J. Kelly dissenting) (citing *Stanley v. Town Square Cooperative*, 203 Mich.App. 143, 147, 512 N.W.2d 51 (1993) (“The distinguishing characteristic that fixes the duty depends upon whether the licensee’s visit is related to the pecuniary interests of the possessor of the land”) (the guest of a co-op resident was an invitee because the co-op obtained pecuniary gain in exchange for giving the resident the right to license visitors); *White v. Badalamenti*, 200 Mich.App. 434, 436, 505 N.W.2d 8 (1993) (“To be an invitee, plaintiff’s presence on defendants’ land must have been related to an activity of some tangible benefit to defendants”) (the question for the jury to decide is whether an unpaid babysitter who was injured at defendant’s home is an invitee); *Doran v. Combs*, 135 Mich.App. 492, 496, 354 N.W.2d 804 (1984) (“An invitee is one who is on the owner’s premises for a purpose mutually beneficial to both parties”) (a former mother-in-law who fell on the defendant’s driveway while returning children from the former husband’s home was an invitee because of the pecuniary benefit received by the defendant); *Danaher v. Partridge Creek Country Club*, 116 Mich.App. 305, 312, 323 N.W.2d 376 (1982) (“[A]n invitee is one who is on the owner’s premises for a purpose mutually beneficial to both parties”) (the plaintiff was an invitee when he arrived at the defendant’s golf course to play golf); *Socha v. Passino*, 195 Mich.App. 445, 447-48, 206 N.W.2d 316 (1981) (“An individual can be an invitee if the visit may reasonably be said to confer or anticipate a business, commercial, monetary, or other tangible benefit to the occupant”) (the plaintiff was a licensee when injured in the defendant’s house while removing a piece of furniture that benefited him, but provided no benefit to the defendant).

⁸⁴ 97 So.2d 185.

⁸⁵ 261 So.2d 146 (1972).

⁸⁶ *Id.*

⁸⁷ *Id.*

Second.⁸⁸ The Indiana Court of Appeals noted that the “public invitee” test of § 332 would not extend invitee status to social guests because it requires the owner or occupant to hold his premises open to the public.⁸⁹ Because the occupier holds the premises out to the public, the condition and use of the premises affects the public interest, thus it is reasonable to impose a standard of reasonable care toward members of the public who enter for the purpose for which they are invited.⁹⁰ The occupant can withdraw the invitation or restrict entry and thereby retain control of his property.⁹¹ Furthermore, the test requires the visitor “enter the premises for the particular purpose for which the occupant has encouraged the public to do so.”⁹² “Given the public interest involved and our recognition of the implication of safety which arises when the public is encouraged to enter premises for a particular purpose” therefore, the public invitee test is a proper guide for determining invitee status.⁹³

E. So, Who’s Right?

Jurisdictions that have refused to abolish the common-law categories present a variety of rationales. One rationale is that a “duty of reasonable care under the circumstances”, despite its common usage, is an amorphous standard that provides little guidance to the landowner.⁹⁴ Furthermore, just to say that the rule is reasonable care under the circumstances in all instances ignores the responsibility of the law to provide guidance.⁹⁵ “To abandon the careful work of generations for an amorphous ‘reasonable care under the circumstances’ standard seems [rather]

⁸⁸ 462 Mich. at 619 (Kelly, J. dissenting) (quoting *Fleischer v. Hebrew Orthodox Congregation*, 504 N.E.2d 320, 323 (Ind.App., 1987).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See Wood v. Camp*, 284 So.2d 691 (Fla.1973).

⁹⁵ *See id.*

improvident.”⁹⁶ One court contrasts the common law rule, described as “well-settled and reasonable,” with the negligence standard, “a single vague duty of reasonable care, under which the property owner acts at his peril with no standard by which he can judge his obligations in advance.”⁹⁷ Moreover, they argue that a reasonableness standard imposes upon the landowner the expense of “emotional and monetary resources to defend a meritless suit” where a judge or jury may find no liability.⁹⁸

The main reason that the categories were created was because of the general mistrust of juries in entering a just verdict.⁹⁹ As one court observed, “jurisdictions retaining the trichotomy fear that plaintiff-oriented juries—like feudal juries composed mostly of land entrants—will impose unreasonable burdens upon defendant-landowners.”¹⁰⁰ However, juries have properly applied negligence principles in all other areas of tort law, and there has been no indication that defendants in other areas have had unreasonable burdens placed upon them.¹⁰¹ Modern jurors are more likely to be landowners themselves, thus it is unlikely that they would be willing to place a burden upon a defendant that they would not wish to comply with themselves.¹⁰² Furthermore, “[s]tudies suggest that abolition of the distinctions between the duty owed to an invitee and that owed to a licensee has not altered greatly the results reached, has not left the juries without direction or standards by which to judge the action of the occupier of lands, and has resulted in outcomes that would probably be the same as if the status rules had been applied.”¹⁰³ In response to the argument by critics who say abolishing the licensee-invitee

⁹⁶See *Carter v. Kinney*, 896 S.W.2d 926, 930 (Mo.1995).

⁹⁷See *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I.1994).

⁹⁸ See *Wood*, 284 So.2d at 694.

⁹⁹ See *Alexander*, 646 N.W.2d at 82

¹⁰⁰ *Id. citing Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C.1998)..

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id. citing Jones v. Hansen*, 867 P.2d 303 (1998).

distinction will leave the jury without any standards, the Massachusetts Supreme Court answered:

The abolition of the licensee-invitee distinction and the creation of a “reasonable care in all the circumstances” standard will not leave the jury without standards to guide their determination of reasonable conduct. The principles which are now to be applied are those which have always governed personal negligence. Our decision merely prevents the plaintiff’s status as a licensee or invitee from being the sole determinative factor in assessing the occupier’s liability. However, the foreseeability of the visitor’s presence and the time, manner, place and surrounding circumstances of his entry remain relevant factors which will determine “in part the likelihood of injury to him, and the extent of the interest which must be sacrificed to avoid the risk of injury.”¹⁰⁴

The trichotomy has led to confusion in the law, and inequity in the cases decided.¹⁰⁵

Recovery by an entrant in many instances “has become dependent upon the pigeonhole in which the law has put him, e.g. ‘trespasser,’ ‘licensee,’ or ‘invitee’ – each of which has had radically different consequences in law.”¹⁰⁶ Consider the following:

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it was when he goes away. Does he change his color in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.¹⁰⁷

Courts recognize that “[i]t is often difficult, if not impossible, to discern an entrant’s status.”¹⁰⁸ Arguably, the focus should not be on the plaintiff’s status as licensee or invitee but

¹⁰⁴ *Mounsey v. Ellard*, 297 N.E.2d 43, 51 n.7 (Mass.1973).

¹⁰⁵ See *Alexander*, 646 N.W.2d at 82.

¹⁰⁶ *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639, 642 (1972).

¹⁰⁷ *Mallet v. Pickens*, 522 S.E.2d 436, 441 (W.Va. 1999) (citations omitted).

¹⁰⁸ *Vega v. Piedilato*, 154 N.J. 496, 713 A.2d 442, 450 (N.J.1998) (Handler, J., concurring). *Mallet* cites the following examples from other jurisdictions underscoring the tortured logic courts have gone through in applying the trichotomy: *Franconia Assoc. v. Clark*, 250 Va. 444, 463 S.E.2d 670 (Va.1995) (considering whether mall employee lost status as an invitee by attempting to stop a robber); *Lakeview Assoc. Ltd. v. Maes*, 907 P.2d 580 (Colo.1995) (discussing whether tenant, who paid rent but happened to not own a car, was invitee or licensee when

whether the landowner exercised reasonable care under the circumstances to ensure that the premises were safe for a reasonably foreseeable event, namely, that someone might suffer injury under the circumstances.¹⁰⁹

Most of the jurisdictions have only abolished the distinction between licensees and invitees, and have retained the trespasser distinction.¹¹⁰ One court in refusing to abrogate the trespasser distinction held that “balanced against the need for a predictable standard by which landowners may govern their conduct is the absence of any right of a trespasser to claim more generous protections since the trespasser comes on the land without the express or implied consent or invitation of the property owner.”¹¹¹ Another commentator notes, “[I]n a civilization based on private ownership, it is considered a socially desirable policy to allow a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right.”¹¹² One court adopted the following rationale for retaining the trespasser distinction:

[I]n invitees and licensees enter another’s lands under color of right, [but] a trespasser has no basis for claiming extended protection. There remains the possibility that the abandonment of the status of trespasser would place an unfair

she fell while walking across the parking lot of an apartment complex); *Peterson v. Romine*, 131 Idaho 537, 960 P.2d 1266 (Idaho 1998) (considering whether plaintiff who parked in downtown parking lot provided for shoppers, but who shopped at an adjacent but unaffiliated store, was therefore not a business invitee when she was injured by stepping into a pothole); and *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 75 Ohio St.3d 312, 662 N.E.2d 287 (Ohio 1996) (questioning whether fare-paying customer of subway system, who was assaulted and thrown onto tracks by third parties upon exiting train, was still invitee when left lying on tracks and struck by train). *Mallet*, 522 S.E.2d at 447 n. 7.

¹⁰⁹ See *Alexander*, 646 N.W.2d at 83.

¹¹⁰ See *Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 72 (Cal. 1998); *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998); *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Poulin v. Colby College*, 402 A.2d 846, 850 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Ford v. Board of County Com'rs of County of Dona Ana*, 879 P.2d 766, 771 (N.M. 1994); *Nelson v. Freeland*, 507 S.E.2d 882, 893 (1998), *O'Leary v. Coenen*, 251 N.W.2d 746, 751-52 (N.D. 1977); *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, (R.I. 1994); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn.1984); *Mallet v. Pickens*, 522 S.E.2d 436, 448 (W.Va. 1999); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 11 (Wis. 1975); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).

¹¹¹ *Poulin v. Colby College*, 402 A.2d 846, 851 n. 5 (Me.1979).

¹¹² W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 58, at 395 (5th ed.1984).

burden on a landowner who has no reason to expect a trespasser's presence.¹¹³

In fact, the California legislature enacted a law that limited a landowners' liability to trespassers who were on the property to commit a crime in response to cases in which trespassing criminals had recovered for injuries sustained while engaging in an unlawful intrusions.¹¹⁴

Although some jurisdictions require some sort of material or economic benefit to the landowner to confer invitee status,¹¹⁵ no jurisdictions require that the premises be held open for a "commercial purpose" in order to justify the higher standard of care. Thus, charities, government buildings, non-profit organizations, individual homeowners, and the like will no longer be held to the higher duty imposed in the invitor-invitee context because it is rare that their premises are held open for a "commercial purpose". Arguably, the economic benefit rule does not even apply because even if the entrant is on the premises and is providing some sort of pecuniary benefit to the landowner, as long as the premises is not held open for a "commercial purpose," the entrant is entitled only to licensee status. Thus, the landowner will only owe them a duty to warn of hidden latent defects of which he is aware, and the duty to avoid willful and wanton misconduct.

The argument in favor of abolishing the categories finds its strength in the notion that juries have proven capable of determining whether the possessor's conduct is reasonable under everyday circumstances.¹¹⁶ Those who advocate a less structured standard are likely to stress that property ownership is a privilege as well as a right, and imposes high obligations as well as

¹¹³ Poulin v. Colby College, A.2d 846, 851 (Me.1979).

¹¹⁴ See *Alexander*, 646 N.W.2d at 77, citing 1085 Cal. Stat. Ch. 1541, § 1 (codified at Cal. Civil Code § 847 (West 2002)).

¹¹⁵ See OCGA § 51-3-1; Peterson v. Romine, 960 P.2d 1266, 1269 (Idaho 1998); Filipowicz v. Diletto, 796 A.2d 296, 300 (N.J.Super. 2002); Brown v. Nicholson, 935 P.2d 319, 321-322 (Okla. 1997); Underberg v. Cain, 348 N.W.2d 145, 146 (S.D.1984), Wool v. Larner, 26 A.2d 89, 92-93 (Vt. 1942); Hambright v. First Baptist Church, 638 So.2d 865, 867 (Ala. 1994); Stevens v. Salt Lake County, 478 P.2d 496, 498-99 (Utah 1970); Olivier v. Snowden, 426 S.W.2d 545, 550 (Tex.1968).

¹¹⁶ Marshall S. Shapo, Basic Principles of Tort Law, 77.

offering substantial benefits.¹¹⁷

The rule adopted by the Court in *Stitt* is harsh, inequitable, and not supported by any other jurisdiction. The “commercial purpose” requirement serves to remove a substantial portion of landowners from liability from dangerous conditions on their property. At first blush, this rule could appear to wipe out a great deal of premises liability claims in Michigan. However, there have been relatively few decisions that have turned on *Stitt*, primarily because the Michigan Supreme Court has redefined another common-law technical rule, which has had a much greater impact on premises liability decisions in Michigan.

IV. The Open and Obvious Danger Doctrine

The “open and obvious” danger rule is also firmly entrenched in the common law.¹¹⁸ Traditionally, a landowner does not owe an invitee a duty to warn or a duty to protect against dangers that are open and obvious to the invitee.¹¹⁹ This limitation on the landowners duty is another example of how historically, the common-law treated landowners as sovereign and provided them with various immunities to limit their liability for dangerous conditions on the land.

A. The First Restatement “No Duty” Rule

The First Restatement of Torts sets forth the traditional rule, or “no duty rule” of the open and obvious doctrine:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition

¹¹⁷ *Id.*

¹¹⁸ See Lucinda S. Ingram, *Missouri Retreats from the Known or Obvious Danger Rule in Premises Liability*, 54 MO. L. REV. 241, 248 (1989).

¹¹⁹ See Ann K. Dittmeier, *Premises Liability: The Disappearance of the Open and Obvious Doctrine*, 64 MO. L. REV. 1021, 1025 (1999).

which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm.¹²⁰

Thus, the landowner had no duty to protect invitees from dangerous conditions of which the invitee was aware, or which were so obvious that it is reasonable for the landowner to expect that the invitee would discover the danger and take reasonable care for his own safety.¹²¹ The First Restatement framed this as an objective test focusing on the landowner's expectation, rather than the subjective test of whether the invitee's conduct was justified.¹²²

Courts have adopted various rationales in support of the "no duty" rule of the open and obvious doctrine. The rationale most frequently applied is the concept that the landowner's liability rests upon his superior knowledge as to the condition of his land, and if the invitee possesses the same knowledge, the invitee is in a better position to protect himself than the landowner, and the invitee should exercise reasonable care for his safety.¹²³ A second rationale used to support the "no duty" rule is that if a condition is open and obvious and an invitee knows or should know of the condition, the occupier is relieved of liability because it is not foreseeable that the visitor will not recognize or anticipate the danger presented by the condition, and therefore it is not "unreasonably dangerous."¹²⁴ This is so because the likelihood of injury is low

¹²⁰ RESTATEMENT OF TORTS § 343 (1965).

¹²¹ See Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 642 (1952).

¹²² See Dittmeier, *supra* note 53, at 1026.

¹²³ See *id.* (citing Keeton, *supra*).

¹²⁴ See *id.*

in that people are likely to discover the danger and protect themselves against it.¹²⁵

Another approach used when holding that a possessor has no duty to protect an invitee from open and obvious conditions, defines the duty to keep the premises safe for invitees “applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like,” of which the invitee is not aware, and is not likely to observe or discover while exercising ordinary care.¹²⁶ Here, the invitee “assumes all normal, obvious, or ordinary risks attendant to the use of the premises, relieving the possessor of any duty to reconstruct or alter them so as to obviate known or obvious dangers.”¹²⁷

2. The Second Restatement Approach

The rationale behind the original Restatement’s “no-duty” rule, is that the “duty to keep premises safe for invitees applies only to defects or conditions which are not known to the invitee, and would not be observed or discovered by him in the exercise of ordinary care, that the invitee assumes all normal, obvious, or ordinary risks attendant to the use of the premises,” thereby relieving the possessor of any duty to remove the known or obvious risks.¹²⁸ Many jurisdictions have moved away from this “no-duty” approach to known and obvious dangers in favor of a more lenient rule as adopted by the Restatement 2d.

Restatement of Torts 2d, § 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

¹²⁵ *See id.*

¹²⁶ 62 AM. JUR. 2D *Premises* § 148 (citing *Simoneaux v. Copolymer Rubber & Chemical Corp.* 189 So.2d 745 (La. App.).

¹²⁷ *Id.*

¹²⁸ *See id.*

protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.¹²⁹

Under the Restatement 2d, “obvious” means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.¹³⁰ The word “known” denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves.¹³¹

In Comment a in the Reporter’s Notes of section 343 the author instructs that section 343 should be read together with section 343A. What constitutes an unreasonable risk under the Restatement 2d may vary according to the nature of the defect and the circumstances giving rise to the injury.¹³² The Restatement suggests that many different factors should come into play and the inquiry under the Restatement is whether the possessor would foresee those circumstances.¹³³ For example, what constitutes reasonable care on the part of possessors of a premises such as a hospital, may be different than that of a possessor of premises such as an office building, because invitees on the premises of hospital are likely to have physical injuries or handicaps which makes them less capable as an “ordinarily reasonable man” to look out for themselves and protect themselves from dangerous conditions.

Section 343A of the Restatement (Second) of Torts provides:

(1) 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.

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 343.

¹³⁰ RESTATEMENT (SECOND) TORTS § 343A, cmt. b.

¹³¹ *Id.*

¹³² *See* 62 Am Jur 2d § 158.

¹³³ *See id.*

(2) In determining whether the possessor should anticipate harm from a known and obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that harm should be anticipated.¹³⁴

Comments e and f to § 343A(1) deal with the traditional rule and the newly formulated qualification respectively.¹³⁵ Comment e provides that ordinarily, an invitee who enters land is “entitled to nothing more than knowledge of the conditions and dangers” he will encounter on the land.¹³⁶ If he knows about the conditions of the land, or the activities that are carried on the land, and the dangers associated with either, then he is free to choose “whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land.”¹³⁷ Therefore, a possessor’s reasonable care does not require precautions or warning against known dangers, or dangers “so obvious to him that he may be expected to discover them.”¹³⁸

Comment f provides that there are situations in which the possessor should anticipate that the condition will cause harm despite an invitee’s knowledge.¹³⁹ In these cases, the possessor still owes a duty of reasonable care to the invitee, which may require him to warn the invitee, or take other precautions to safeguard the invitee from the harm presented by the condition.¹⁴⁰ An example of this is where the dangers are such that “the possessor has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious, or he will forget what is discovered, or fail to protect himself against it.”¹⁴¹ Another example is “where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 343A.

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.”¹⁴² In these cases, “the fact that the danger is known, or is obvious” does not conclusively determine the duty of the possessor, or whether he has acted reasonably under the circumstances.”¹⁴³ It is, however, “important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk.”¹⁴⁴

C. Michigan’s Open and Obvious Doctrine: *Lugo v. Ameritech Corp., Inc.*

In *Lugo v. Ameritech Corp. Inc.*,¹⁴⁵ the Michigan Supreme Court reinstated the traditional view of the open and obvious danger doctrine in premises liability cases. In *Lugo*, the Plaintiff was walking through the defendant’s parking lot in order to pay her telephone bill, when she stepped in a pothole and fell resulting in injury.¹⁴⁶ The plaintiff testified in her deposition that she did not see the pothole before the accident because she was concentrating on a truck that was moving through the parking lot at the time. However, she also testified that nothing would have prevented her from seeing the pothole otherwise. The circuit court granted the defendant’s motion for summary disposition on the basis that the pothole was an open and obvious danger, and thus the defendant did not have a duty to protect the plaintiff.¹⁴⁷

The Court of Appeals reversed the grant of summary disposition.¹⁴⁸ The Court of Appeals found that the circuit court erred by concluding that the plaintiff’s legal duty to look where she was walking barred her claim. The Court applied the principles of comparative negligence and stated that a plaintiff’s negligence can only reduce the amount of recovery; it cannot eliminate altogether the defendant’s liability. The Court also found a genuine issue of

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 464 Mich. 512, 629 N.W.2d 384 (2001).

¹⁴⁶ *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 629 N.W.2d 384 (2001).

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

material fact regarding the open and obvious danger rule based on whether defendant should have expected that a pedestrian might be distracted by a moving vehicle, and might step into a pothole in order to avoid a vehicle. The Supreme Court reversed the Court of Appeals in a 4-3 decision.

The majority declared the open and obvious doctrine as an integral part of the definition of the duty an invitor owes to his invitees.¹⁴⁹ The Court adopted the reasoning set forth in

Bertrand v. Alan Ford:

When §§ 343 and 343A [of the Restatement of Torts, 2d] are read together, the rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, 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.¹⁵⁰

That duty, in general, requires the premises possessor to “exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land.”¹⁵¹ However, “where the dangers are so known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.”¹⁵² The Court adopted the general rule 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

¹⁴⁹ *See id.*

¹⁵⁰ *Lugo*, at 386-387, citing *Bertrand v. Alan Ford, Inc.* 449 Mich. 606, 609, 537 N.W.2d 185 (1995).

¹⁵¹ *Id.* at 517.

¹⁵² *Id.* at 516.

undertake reasonable precautions to protect invitees from that risk.”¹⁵³

Court provided two illustrations of open and obvious conditions which possessed “special aspects” that served to make the conditions unreasonably dangerous: (1) “a commercial building with only one exit for the general public where the floor is covered with standing water,” and (2) “a thirty foot deep pit in the middle of a parking lot.”¹⁵⁴ In the first situation, a customer trying to leave the building would have to go through the water in order to do so.¹⁵⁵ Thus, although the condition is open and obvious, the condition is effectively unavoidable.¹⁵⁶ In the second situation, although the pit in the parking lot “might be open and obvious, and one would be capable of avoiding the danger, the situation would still present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken.”¹⁵⁷

The Court concluded “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.”¹⁵⁸ Applying this rule to the facts, the Court concluded that plaintiff’s claim was barred by the open and obvious danger doctrine because the condition was a common pothole in a parking lot and the plaintiff failed to show what special aspects of the pothole made it unreasonably dangerous.¹⁵⁹ The plaintiff argued that moving vehicles in the parking lot distracted her and prevented her from noticing the condition, however, the court emphasized “there is certainly nothing “unusual” about vehicles being driven in the parking lot, and, accordingly, this is not a factor that removes this case from the open and

¹⁵³ 462 Mich. at 517.

¹⁵⁴ *Id.* at 518.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 518-519

¹⁵⁹ *Id.* at 524.

obvious danger doctrine.”¹⁶⁰

Thus, the rule adopted by the Michigan Supreme Court in *Lugo* can be summarized as follows: A possessor of land owes its invitees a duty to “exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.”¹⁶¹ This duty does not extend to open and obvious dangers unless *special aspects* of the condition create an unreasonable risk of harm.¹⁶²

In his concurrence, Justice Cavanaugh argues that sections 343 and 343A of the Restatement should not be read so as to create a duty, rather they should be read together so as to set forth the standard of care.¹⁶³ Furthermore, special aspects of a particular condition may be relevant in determining whether the landowner is liable, but the court should make this determination in the context of the Restatement test.¹⁶⁴ He states:

[W]hile “special aspects” may be considered in determining whether liability should be suspended, the existence or absence of special aspects in a particular case will not necessarily be outcome determinative. Instead, pursuant to the Restatement, courts must focus on whether an unreasonable danger is presented, whether harm should be anticipated, and whether the duty of care has been breached.¹⁶⁵

In her concurrence, Justice Weaver rejects the “severe harm” standard that the majority adopted.¹⁶⁶ Justice Weaver scolds the majority for adopting hypothetical standards that are unlikely.¹⁶⁷ She stated, “When launching new legal principles from a factual vacuum, it would be more helpful to apply this new severe-harm standard to an actual case before the Court”.¹⁶⁸

¹⁶⁰ *Id.* at 522.

¹⁶¹ *Id.* at 516.

¹⁶² *See id.*

¹⁶³ *See id.* at 526 (Cavanaugh, J. concurring).

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 543.

¹⁶⁶ *See id.* at 545 (Weaver, J. concurring).

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

D. Courts Applying *Lugo*

1. *Joyce v. Rubin*

In *Joyce v. Rubin*,¹⁶⁹ the Court of Appeals clarified that the open and obvious doctrine applies to claims brought under a failure to maintain theory as well as claims premised upon a failure to warn theory. In *Joyce*, the plaintiff invitee sued defendant homeowners for injuries suffered when she slipped and fell on the snow walkway. The Court of Appeals first acknowledge that the open and obvious doctrine not only eliminates the possessor's duty to warn, it also eliminates the possessor's duty to maintain premises and does not require removal of open and obvious dangers.¹⁷⁰ The Court went on to determine whether the condition of the walkway was open and obvious.¹⁷¹

The Court determined that the plaintiff, and “an average user of ordinary intelligence would have been able to discover” the condition of the sidewalk.¹⁷² The Court further noted that the plaintiff had testified that it had snowed that day, that she slipped on the snow that had not yet melted, and that the sidewalk was slippery.¹⁷³ The plaintiff also testified that she had told the defendant that it was slippery and that she had slipped twice while walking on the sidewalk before she ultimately fell.¹⁷⁴ Based on these facts, the court found that “an average person with ordinary intelligence” would have discovered the condition and realized the risk of slipping on it; therefore, the condition was open and obvious.¹⁷⁵

After finding that the condition was open and obvious, the Court then looked at whether there were special aspects of the condition that made it unreasonably dangerous thereby

¹⁶⁹ 249 Mich.App. 231, 642 N.W.2d 360 (2002).

¹⁷⁰ *See id.* at 237.

¹⁷¹ *See id.*

¹⁷² *Id.* at 239-240.

¹⁷³ *See id.* at 239.

¹⁷⁴ *See id.* at 239-240.

¹⁷⁵ *Id.*

imposing liability upon the defendant. The plaintiff argued that the condition was “effectively unavoidable” because it was the only way she could enter the house.¹⁷⁶ She testified that she had told the defendant about the slippery conditions and asked her if she could enter through the garage or use the rug for traction but the defendant refused her requests.¹⁷⁷ However, the court determined that this was not enough evidence to demonstrate a “uniquely high likelihood of harm” or that it was an “unavoidable risk.”¹⁷⁸ The court felt that the plaintiff could have simply removed her personal items another day or advised the defendant that if she would not permit her to use the garage door, she would have to come back another day. The court said, “unlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out.”¹⁷⁹ Furthermore, the court found that the light snow on the sidewalk was a common condition that was unremarkable and was not the kind of “uniquely dangerous” condition, which warrants removal from the open and obvious doctrine.¹⁸⁰

2. *Corey v. Davenport College of Business*

In *Corey v. Davenport College of Business, (On Remand)*,¹⁸¹ rejected the notion that snowy and icy conditions are an exception to the open and obvious doctrine. The court reconciled the former decision, *Quinlivan v. Great Atlantic & Pacific Tea Co., Inc.*,¹⁸² with the more recent decision in *Joyce*.¹⁸³ In *Quinlivan*, the Court discussed an invitor’s responsibility

¹⁷⁶ *See id.* at 241.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* at 242-243.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 240.

¹⁸¹ 251 Mich App 1, 649 NW2d 392 (2002).

¹⁸² 395 Mich. 244, 235 N.W.2d 732 (1975).

¹⁸³ 251 Mich. App. at 8.

regarding snow and ice hazards that were visible to invitees.¹⁸⁴ The Court quoted the following statement from *Quinlivan*:

[W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazards of injury to the invitee.¹⁸⁵

The court reconciled these decisions by holding that “the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious.”¹⁸⁶

The court held that an icy stairway leading into a dormitory was an open and obvious condition that possessed no “special aspects” to remove the condition from the open and obvious doctrine. The plaintiff in *Corey* testified that he saw the condition of the steps, that there was another entrance to the building nearby, but he nonetheless attempted to use the steps.¹⁸⁷ The court determined that “[a]lthough the steps likely had ‘some potential for severe harm,’ we have no doubt that these circumstances are not the type of special aspects that *Lugo* contemplated.”¹⁸⁸ The court recognized that “the stairway on which plaintiff fell consisted of three steps and was elevated only a couple of feet.”¹⁸⁹ The court, determined that “[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit” and does not represent “such a *substantial risk of death or severe injury* that it would be unreasonably

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* (quoting *Quinlivan*, 395 Mich. at 261.)

¹⁸⁶ 251 Mich. App. at 8

¹⁸⁷ *See id.* at 6-7, 649 NW2d 392

¹⁸⁸ *Id.* quoting *Lugo*, *supra* at 518.

¹⁸⁹ *Id.*

dangerous to maintain the condition.”¹⁹⁰

3. *Perkoviq v. Delcor Homes-Lake Shore Pointe*

In its most recent open and obvious decision, *Perkoviq v. Delcor Homes-Lake Shore Pointe*,¹⁹¹ our Supreme Court determined that there were no “special aspects” of snow and ice on a sloped rooftop to remove the condition from the open and obvious doctrine. In *Perkoviq*, the plaintiff sued the defendant owner/general contractor when he slipped on ice or frost on a house roof and fell approximately 20 feet. The Supreme Court found that the condition of the roof was open and obvious, and there were no special aspects of the condition that would serve to remove the condition from the open and obvious doctrine.¹⁹² In this case, the owner was also the general contractor who hired plaintiff to perform painting services on the project. The roof was in an unfinished state, and there were several plywood boards attached to support workers. As plaintiff was attempting to attach another board, he slipped on frost on the plywood. The Supreme Court held that the plaintiff failed to present “evidence that the condition of the roof was unreasonably dangerous for purposes of premises liability.”¹⁹³ The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition.”¹⁹⁴ Thus, under *Perkoviq*, even a fall of an extended distance does not necessarily constitute an “unreasonably dangerous condition” because even though the risk of falling and the severe injury that is likely, there were no “special aspects” of the roof that served to remove it from the open and obvious doctrine.¹⁹⁵

E. So, What is Reasonable?

¹⁹⁰ *Id.* quoting *Lugo*, supra at 518

¹⁹¹ 466 Mich. 11, 20, 643 N.W.2d 212, 216 (2002).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Under *Lugo*, the question of whether a condition is open and obvious is whether “an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.”¹⁹⁶ Thus, the circumstances surrounding the particular injury are not necessarily relevant. Even though, the Second Restatement suggests that many different factors should come into play and the inquiry under the Restatement is whether the possessor would foresee those circumstances¹⁹⁷ it appears that the majority is only willing to look at the actual physical condition, and the surrounding circumstances are irrelevant. For example, what constitutes reasonable care on the part of possessors of a premises such as a hospital, may be different than that of a possessor of premises such as an office building, because invitees on the premises of hospital are likely to have physical injuries or handicaps which makes them less capable as an “ordinarily reasonable man” to look out for themselves and protect themselves from dangerous conditions.

Once the court determines that a condition is "open and obvious", it is very difficult to prove that it is unreasonably dangerous as demonstrated by the decisions cited above. Courts have relied on the examples cited in *Lugo* as requiring the condition to be “unavoidable” to constitute an “unreasonably dangerous” condition. Courts have taken this concept so far as to conclude that if the visitor could avoid the condition by coming back at a later time or day, the condition is avoidable, and therefore not unreasonably dangerous. Also, when the courts have addressed the “severity of harm” it appears that a simple trip-and-fall, or slip-and-fall at ground level will not be sufficient.¹⁹⁸

The impact of *Lugo* is not apparent until one examines the amount of cases that are

¹⁹⁶ *Novotney v. Burger King Corp. (On Remand)*, 198 Mich.App. 470, 499 N.W.2d 379 (1993).

¹⁹⁷ *See id.*

¹⁹⁸ *See Joyce, supra; Corey, supra.*

summarily dismissed under the open and obvious doctrine. Since the Supreme Court decided *Lugo* in July 2001, the Court of Appeals has reviewed approximately 73 motions for summary disposition or directed verdicts that raised the “open and obvious danger doctrine.”¹⁹⁹ The

¹⁹⁹See *Delay v. McLaren Regional Medical Center*, 2002 WL 31953812, *2+ (Mich.App. Dec 13, 2002) (NO. 239768); *Joyce v. Rubin*, 642 N.W.2d 360, 363+, 249 Mich.App. 231, 236+ (Mich.App. Jan 15, 2002) (NO. 223908); *Lockhart v. Wal-Mart Stores, Inc.*, 2002 WL 31160301, *2+ (Mich.App. Sep 27, 2002) (NO. 229750); *Valinski v. Little Mexico Restaurant*, 2002 WL 31117040, *1+ (Mich.App. Sep 24, 2002) (NO. 233446); *Palmer v. Cendant Corp.*, 2002 WL 31105278, *3+ (Mich.App. Sep 20, 2002) (NO. 234006); *Vannieuwenhuyzen v. Madonna University*, 2002 WL 1747963, *4+ (Mich.App. Jul 26, 2002) (NO. 226559); *Moore v. Varsity Lincoln-Mercury, Inc.*, 2002 WL 1747698, *1+ (Mich.App. Jul 23, 2002) (NO. 232320); *Brousseau v. Daykin Elec. Corp.*, 2002 WL 1275500, *2+ (Mich.App. Jun 07, 2002) (NO. 225880); *Young v. Afrikan Child Enrichment Ass'n*, 2002 WL 1065679, *2+ (Mich.App. May 28, 2002) (NO. 230795); *Mickens v. Dexter Chevrolet Co.*, 2002 WL 857663, *1+ (Mich.App. May 03, 2002) (NO. 208269); *Corey v. Davenport College of Business*, 649 N.W.2d 392, 393+, 251 Mich.App. 1, 2+ (Mich.App. Apr 26, 2002) (NO. 206185); *Liang v. Liase*, 2002 WL 483435, *1+ (Mich.App. Mar 26, 2002) (NO. 206647); *West v. Olympia Entertainment, Inc.*, 2002 WL 433165, *3+ (Mich.App. Mar 19, 2002) (NO. 229044); *Wolfrom v. Hillcrest Memorial Gardens Ass'n*, 2002 WL 226902, *1+ (Mich.App. Feb 12, 2002); *Woodbury v. Bruckner*, 650 N.W.2d 343, 347+, 248 Mich.App. 684, 684+ (Mich.App. Dec 14, 2001) (NO. 204411); *Perkoviq v. Delcor Homes-Lake Shore Pointe, Ltd.*, 643 N.W.2d 212, 215+, 466 Mich. 11, 15+ (Mich. Apr 24, 2002) (NO. 116059); *Anderson v. Herzog*, 2003 WL 550018, *1+ (Mich.App. Feb 25, 2003) (NO. 238081); *Sidorowicz v. Chicken Shack, Inc.*, 2003 WL 140127, *2+ (Mich.App. Jan 17, 2003) (NO. 239627); *Zainea v. City of Grosse Pointe Woods*, 2002 WL 31955129, *2+ (Mich.App. Dec 17, 2002) (NO. 232513); *Holmes v. Shopco Group, Inc.*, 2002 WL 31953985, *2 (Mich.App. Dec 13, 2002) (NO. 232404); *Lambert v. Livonia Apartments*, 2002 WL 31941530, *1+ (Mich.App. Nov 26, 2002) (NO. 236807); *Powell v. Pippin*, 2002 WL 31941533, *1+ (Mich.App. Nov 26, 2002) (NO. 237560); *Schuh v. Meijer, Inc.*, 2002 WL 31934137, *1+ (Mich.App. Nov 19, 2002) (NO. 236558); *Decapua v. Biecker*, 2002 WL 31934140, *1+ (Mich.App. Nov 19, 2002) (NO. 235775); *Kirejczyk v. Hall*, 2002 WL 31474441, *1+ (Mich.App. Nov 05, 2002) (NO. 233708); *Roberts v. Old Country Buffet*, 2002 WL 31474443, *1+ (Mich.App. Nov 05, 2002) (NO. 233517); *Hall v. W3 Const. Co.*, 2002 WL 1963744, *3+ (Mich.App. Aug 23, 2002) (NO. 233337); *Huffman v. Taco Bell Corp.*, 2002 WL 1965580, *1+ (Mich.App. Aug 23, 2002) (NO. 232950); *Taylor v. Cork & Bottle Party Store*, 2002 WL 1923798, *1+ (Mich.App. Aug 20, 2002) (NO. 233077); *Uptergrove v. Nacu*, 2002 WL 1923804, *2+ (Mich.App. Aug 20, 2002) (NO. 230329); *Partin v. Two With Everthing, Inc.*, 2002 WL 1923833, *1+ (Mich.App. Aug 20, 2002) (NO. 231666); *Stevenson v. W.G. Wade Shows, Inc.*, 2002 WL 1746766, *1+ (Mich.App. Jul 26, 2002) (NO. 230999); *Cohen v. Smith*, 2002 WL 1360453, *2+ (Mich.App. Jun 21, 2002) (NO. 231714); *Pelzner v. Meijer, Inc.*, 2002 WL 1275509, *2+ (Mich.App. Jun 04, 2002) (NO. 230448); *Teepel v. Palace Sports*, 2002 WL 1160350, *1+ (Mich.App. May 31, 2002) (NO. 228957); *Evanoff v. City of Pontiac*, 2002 WL 1065620, *2+ (Mich.App. May 24, 2002) (NO. 229162); *Finkbeiner v. Bingo Partners, Inc.*, 2002 WL 1011757, *1+ (Mich.App. May 17, 2002) (NO. 230802); *Anderson v. Pine Knob Ski Resort, Inc.*, 2002 WL 483524, *1+ (Mich.App. Mar 26, 2002) (NO. 227832); *Malloy v. Forest Row Ltd. Partnership*, 2002 WL 481799, *1+ (Mich.App. Mar 22, 2002) (NO. 229112); *Fultz v. Creative Maintenance, Inc.*, 2002 WL 433173, *4+ (Mich.App. Mar 19, 2002) (NO. 223928, 224019); *York v. Eagle Party Store Shop, Inc.*, 2002 WL 87373, *1+ (Mich.App. Jan 22, 2002) (NO. 227811); *Evers v. Aldrich*, 2002 WL 87511, *2+ (Mich.App. Jan 22, 2002) (NO. 223690); *Dunkle v. Kmart Corp.*, 2001 WL 1480816, *3+ (Mich.App. Nov 20, 2001) (NO. 218789); *Odisher v. Snow Snake Mountain, Inc.*, 2001 WL 1134848, *1+ (Mich.App. Sep 21, 2001) (NO. 223764); *Jones v. Enertel, Inc.*, 650 N.W.2d 334, 336+, 467 Mich. 266, 266+ (Mich. Sep 17, 2002) (NO. 119578); *Woodbury v. Bruckner*, 629 N.W.2d 401, 401+, 464 Mich. 875, 875+ (Mich. Jul 05, 2001) (NO. 113709); *Stramler v. St. John Medical Center Resources Group*, 2003 WL 694998, *1+ (Mich.App. Feb 28, 2003) (NO. 239509); *Gratopp v. Tanger Properties, Ltd.*, 2003 WL 697106, *2+ (Mich.App. Feb 28, 2003) (NO. 237663); *Damic v. Dupuis*, 2003 WL 550019, *1+ (Mich.App. Feb 25, 2003) (NO. 238158); *Solano v. Standard Federal Bank*, 2003 WL 462407, *1+ (Mich.App. Feb 21, 2003) (NO. 238107); *Vitale v. Borman's, Inc.*, 2003 WL 462455, *1 (Mich.App. Feb 21, 2003) (NO. 238976); *Sullivan v. Graham Court Professional Center Ass'n*, 2003 WL

defendant prevailed in 66 of these decisions. Of the remaining six decisions, in which summary disposition was denied, only two were because the condition was not open and obvious,²⁰⁰ and in four decisions, the court determined that although the condition was open and obvious, there was a genuine issue of material fact as to whether the danger was unreasonable despite its openness and obviousness.²⁰¹ In the remaining 66 decisions, the Court of Appeals upheld the motion for summary disposition or directed verdict on behalf of the defendant on the basis that the defendant owed the plaintiff no duty because the condition was open and obvious and plaintiff failed to present evidence of “special aspects” which would give rise to a duty of the possessor to warn or make safe the dangerous condition despite its openness and obviousness.

462461, *1 (Mich.App. Feb 21, 2003) (NO. 238846); Morgan v. Makowski, 2003 WL 462535, *1 (Mich.App. Feb 21, 2003) (NO. 238037); Bender v. Saph, 2003 WL 327944, *2+ (Mich.App. Feb 11, 2003) (NO. 237189); McMinn v. Borman's, Inc., 2002 WL 31938727, *2 (Mich.App. Nov 22, 2002) (NO. 234503); Eftekar v. Weber's Inn, 2002 WL 31930764, *1+ (Mich.App. Nov 15, 2002) (NO. 233732); Kelbaugh v. Gwinn Ace Hardware, 2002 WL 31930796, *1 (Mich.App. Nov 15, 2002) (NO. 235303); Laurain v. Edward W. Sparrow Hosp. Ass'n, 2002 WL 31379727, *1+ (Mich.App. Oct 22, 2002) (NO. 233429); Valente v. Fountain Park West, 2002 WL 1963753, *1+ (Mich.App. Aug 23, 2002) (NO. 232428); Hale v. Auburn Heights Apartments, 2002 WL 1965542, *1 (Mich.App. Aug 23, 2002) (NO. 233131); Borrelli v. General Growth Properties, Inc., 2002 WL 1897676, *1+ (Mich.App. Aug 16, 2002) (NO. 232378); Shaw v. Lord of Lord Missionary Baptist Church, 2002 WL 1746769, *2 (Mich.App. Jul 26, 2002) (NO. 232423); Cohen v. SLC Operating Ltd. Partnership, 2002 WL 857584, *1+ (Mich.App. Apr 26, 2002) (NO. 229313); Meredith v. Somerset Collection, GP, Inc., 2002 WL 551104, *2 (Mich.App. Apr 12, 2002) (NO. 228740); Ashford v. Lloyd, 2002 WL 533866, *1+ (Mich.App. Apr 09, 2002) (NO. 222119); McDonald v. First Savings Bank, 2002 WL 342219, *1 (Mich.App. Feb 26, 2002) (NO. 227526); Forner v. Speedway Superamerica, L.L.C., 2002 WL 172171, *1+ (Mich.App. Feb 01, 2002) (NO. 226907); Hojara v. Daimler Chrysler Corp., 2002 WL 187190, *2 (Mich.App. Feb 01, 2002) (NO. 226925); Peterson v. Madison-Flint Properties, LLC, 2001 WL 1654797, *1 (Mich.App. Dec 21, 2001) (NO. 226879); Goodstein v. Crown Life Ins. Co., 2001 WL 1657313, *1+ (Mich.App. Dec 18, 2001) (NO. 224703); Timmerman v. Auto Zone, Inc., 2002 WL 31956272, *3 (Mich.App. Dec 20, 2002) (NO. 234779); Hoover v. Premium Sports, Inc., 2002 WL 1804081, *1 (Mich.App. Aug 06, 2002) (NO. 231259).

²⁰⁰ See *Dunkle v. Kmart Corp.*, No. 218789, 2001 WL 1480816 (Mich.App. Nov. 20, 2001) (Pallet on floor of store not open and obvious); *Wolfrom v. Hillcrest Mem'l Gardens*, No. 204746, 2002 WL 226902 (Mich. App. Feb. 12, 2002) (step not open and obvious).

²⁰¹ See *Woodbury*, *supra* at 349 (unrailed rooftop porch was open and obvious, yet in light of the absence of guardrails, the height of the porch, and the inherent dangerousness of the condition, there exists a genuine issue of material fact as to whether the risk of falling from the roof remained unreasonable); *Winningham*, *supra* at *6 (220 volt line with exposed splice laying on the ground was open and obvious, nevertheless there existed a genuine issue of material fact as to whether the line presented an unusual circumstance that involved a high risk of severe harm); *Brousseau*, *supra* at *3 (plaintiff presented sufficient evidence to establish that the mound of snow, although an open and obvious risk, contained “special aspects” such that a reasonable juror could conclude that it nonetheless constituted an unreasonable danger because it is “effectively unavoidable” blocking the only entrance to defendant’s loading dock with no reasonable alternative); *Hale*, *supra* at *1 (danger of falling off balcony was open and obvious but, given the lack of guardrails, the height of the balcony, and the inherent dangerousness of the condition, there was a question of fact as to whether the danger remained unreasonable).

Arguably, under the new rule, premises possessors now have little incentive to reduce the hazards of snow and ice once required under *Quinlivan*. This is so because the more open and obvious the ice and snow are, the less likely the plaintiff will be able to recover. Few buildings only have one exit, and the court has indicated that if there is a dangerous condition on the property when you are trying to enter, you should wait and come back when the condition is gone or the landowner has taken steps to correct the condition.

The Court has given little regard to the fact that juries have properly applied negligence principles in all other areas of tort law. Furthermore, modern jurors are likely to be landowners themselves and as such, are unlikely to impose standards upon another that they would not be willing to comply. In a recent study, using a sample of 75 of the nation's largest counties in 1992, the mean plaintiff win rate for all jury cases was 49%, for premises liability cases, 43%.²⁰² The study found that typical jury awards are "modest" with a median jury verdict, including punitive damages at \$52,000.²⁰³ However, because of some very high awards, the arithmetic mean of those awards was \$455,000. In fact, 85% of all awards were less than the mean and only 8% of awards exceeded 1 million.²⁰⁴ Additionally, the study demonstrated that judge and jury agreed on liability 78% of the time, with disagreement split evenly between plaintiffs and defendants.²⁰⁵

The rationales for imposing a reasonableness standard outweigh the arguments against it. First, the landowner is in the best position to make the premises safe and should incur the lower cost of removing or preventing unsafe conditions rather than imposing the high cost on the

²⁰² See Brian Ostrem et al., A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 *Judicature* 233 (1996).

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

individual who was not “paying attention to where they were walking.” Under the Lugo rule, the more open and obvious a condition is, the more likely the landowner will prevail; this is especially true with snow and ice. The costs to the public by not imposing such a duty upon the landowner such as increases in health care costs, costs to employers and the costs to those individuals who are injured as a result of the landowner’s negligence. Storeowners and business proprietors are in a better position to spread the costs than the injured plaintiff is and imposing liability upon them, is a significant incentive to conduct their affairs in a reasonable manner.

The classifications of the entrant and the open and obvious nature of the condition should be factors in determining the reasonableness of the landowner’s activity. The inquiry should be whether the landowner’s conduct was reasonable under the circumstances. Therefore, the court should consider all of the circumstances instead of limiting its focus on the specific condition, such as the foreseeability that the plaintiff would have been engaging in an activity that may have prevented her from noticing the condition. Alternatively, that the plaintiff may be handicapped or elderly and encountering the condition is unreasonably dangerous to them. The court should adopt the Restatement Second approach where the surrounding circumstances that caused the plaintiff not to notice or avoid the condition should be taken into consideration in determining whether summary disposition is appropriate rather than “special aspects” of the condition itself.

V. Conclusion

Returning to the scenario presented at the beginning of this paper, the court found the condition was open and obvious and granted summary judgment on behalf of the defendant.²⁰⁶ Even though Plaintiff was unable to see the condition of the floor because of her blindness, the

²⁰⁶ See *Lauff v. Wal-Mart Stores, Inc.*, 2002 U.S. Dist. LEXIS 19080 (W.D.Mich. 2002).

court found that the condition possessed no special aspects that would remove it from the open and obvious doctrine.²⁰⁷ Plaintiff did not show that the defendant should have expected that she would not have discovered the unsafe condition or fail to protect herself from it.²⁰⁸

The fact that Michigan is part of a small, conservative minority of jurisdictions with respect to tort common-law is of no consequence to the Michigan Supreme Court. By reviving the harsh, technical rules that the majority of other jurisdictions have rejected, Michigan's Supreme Court is sending the message that it will not tolerate suits for personal injury, irrespective of the facts of the individual cases. These rules allow defendants in premises liabilities to avoid reaching the jury. The Michigan Supreme Court has demonstrated its mistrust of the jury and its distaste for plaintiffs in premises liability cases by adopting a narrow interpretation of what constitutes an invitee, and redefining that duty owed by inviters to exempt conditions that are open and obvious, no matter the likelihood of injury.

²⁰⁷ *See id.*

²⁰⁸ *See id.*