STATE OF MICHIGAN

IN THE SUPREME COURT

FRANK ANTHONY SCOLA,

Plaintiff-Appellant,

v

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

Defendants-Appellees,

and

KATHLEEN SCOLA and ESTATE OF JOHN BARROW BROWN (DECEASED), and CITY OF WAYNE, Jointly and Severally,

Defendants.

Supreme Court No. 158903

Court of Appeals No. 338966

Wayne County Circuit Court
No. 15-002804-NI
Hon. John A. Murphy

MICHIGAN DEFENSE TRIAL COUNSEL'S BRIEF *AMICUS CURIAE*

Respectfully submitted by,

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Order Appealed From and Jurisdictional Statement

Amicus curiae, Michigan Defense Trial Counsel (MDTC), agrees with the parties' statements of the basis for this Court's appellate jurisdiction.

Statement of Interest

MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case[1].

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect contribution, financial or otherwise, to the preparation or submission of this brief.

Statement of Questions Presented

I.

Claims arising from dangerous conditions on the land sound exclusively in premises liability, even if the injuries occur off the premises. Here, Scola alleges that Chase created a dangerous condition by failing to install warning signs at an exit from its parking lot to a one-way road. Those allegations implicate Chase's duties arising from the possession and control of its property. Does Scola's claim sounds exclusively in premises liability under longstanding Michigan law?

The Court of Appeals answered, "Yes."

Plaintiff-appellant answers, "No."

Defendants-appellees answers, "Yes."

Amicus Curiae MDTC answers, "Yes."

II.

The open-and-obvious doctrine has been a well-established part of Michigan premises-liability law for more than 20 years. Scola asks this Court to do away with it. But he fails to show that any of this Court's open-and-obvious opinions were wrongly decided, or that the *Robinson* factors favor overruling them. Does *stare decisis* militate against getting rid of the open-and-obvious doctrine?

The Court of Appeals answered, "Yes."

Plaintiff-appellant answers, "No."

Defendants-appellees answers, "Yes."

Amicus Curiae MDTC answers, "Yes."

Statement of Facts

MDTC relies on the Statements of Facts contained in defendants-appellees JPMorgan Chase Bank, N.A., and JPMorgan Chase & Co.'s (collectively, "Chase") Answer and Supplemental Answer to plaintiff-appellant Frank Anthony Scola's Application for Leave to Appeal.

Standard of Review

MDTC relies on the Standard of Review contained in Chase's Answer and Supplemental Answer to Scola's Application for Leave to Appeal.

Argument I - Gravamen

Claims arising from dangerous conditions on the land sound exclusively in premises liability, even if the injuries occur off the premises. Here, Scola alleges that Chase created a dangerous condition by failing to install warning signs at an exit from its parking lot to a one-way road. Those allegations implicate Chase's duties arising from the possession and control of its property. So Scola's claim sounds exclusively in premises liability under longstanding Michigan law.

A. Premises-liability law applies to claims that arise out of alleged violations of a landowner's duty to maintain their property in a reasonably safe condition.

It's well-settled that the gravamen of an action is determined by reading the complaint as a whole and by looking "beyond mere procedural labels to determine the exact nature of a claim." *Altobelli v Hartman,* 499 Mich 284, 299; 884 NW2d 537 (2016). That is, to determine "what the grievance complained of is, and the manner in which the wrong was inflicted, the whole count must be taken and construed together," including "[t]he facts and circumstances alleged." *Smith v Holmes*, 54 Mich 104, 112; 19

NW 767 (1884); *Botsford v Chase*, 108 Mich 432, 438; 66 NW 325 (1896) (Determining "the gravamen of the claim" by considering the "allegation[s] in the declaration").

"Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012), lv den 493 Mich 901; 822 NW2d 796 (2012); see *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998), lv den 459 Mich 948; 616 NW2d 170 (1999) (concluding that to determine the gravamen of a claim, courts "look beyond a plaintiff's choice of labels" for a cause of action and examine "the true nature of the plaintiff's claim"). As a result, a plaintiff cannot transform a premises-liability claim into an ordinary negligence claim through "artful pleading." *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497 n 4; 595 NW2d 152 (1999). Rather, as noted above, "the gravamen of an action is determined by reading the complaint as a whole." *Buhalis*, 296 Mich App at 692 (citation omitted).

In a premises-liability action, like any other negligence action, the plaintiff must establish four elements: (1) duty; (2) breach; (3) cause; and (4) harm. *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 95, 96 n 10; 485 NW2d 676 (1992). The difference between premises-liability and other types of negligence (i.e., ordinary negligence claim) is that the duty element of a premises-liability claim arises out of defendant's status as a landowner—i.e., the possession and control of land. *Id.* at 90, 95. As this Court noted in *Riddle*, it is "well-settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury." *Id.* at

90; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995) ("The invitor's legal duty is to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." (citations and quotation marks omitted)

Because it is based on a landowner's duty to maintain their property in a safe condition, premises liability law applies to injuries "caused by a dangerous condition on the land." *Bertrand*, 449 Mich at 609-610. That is, "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence." *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 913-914; 781 NW2d 806 (2010) (holding that because "the plaintiff … alleg[ed] injury by a condition on the land…his claim sounds **exclusively** in premises liability" (emphasis added)). "[T]his is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692.

B. Scola alleges that Chase negligently failed to put up signs or traffic control devices warning drivers that they were exiting onto a one-way street. In other words, he alleges that a dangerous condition on Chase's property caused his injuries. So his claim against Chase sounds exclusively in premises liability (and not ordinary negligence).

Here, Scola argues that the Court of Appeals erred by holding that his claim against Chase sounds in premises liability. He bases that argument on his contention that the dangerous condition that caused his injuries was the other car that was involved in the accident. But, based on Scola's "entire claim" against Chase, that simply isn't true. *Altobelli*, 499 Mich at 299.

Scola's first amended complaint alleges that Chase had a duty "to post signs and other traffic control devices" near the exit from its parking lot to "advis[e] the public" that Michigan Avenue is a one-way street at that location.[2] He also alleges that Chase had a duty to "inspect and maintain that intersection with reasonable signage and other traffic control devices and warnings."[3] The basis for that duty is Scola's allegation that Chase "assumed responsibility for placement of traffic controls, lane markings, channelization, and all other matters relating to the design, construction, and maintenance of its parking lot driveway where it meets West Michigan Avenue so that entering West Michigan Avenue would be reasonably safe and convenient for public travel."[4]

Scola alleges that Chase breached the duty that he believes it owed to him by failing "to design, construct, and maintain the parking lot/driveway" in "reasonably safe" condition.[5] Specifically, he claims that the exit from Chase's parking lot to Michigan Avenue "was an unsafe and defective condition" because it "lacked traffic control signs and devices controlling the parking lot/driveway."[6] Further, in his view, Chase's "failure to consider and place the traffic control devices, signage, and warnings…created a dangerous condition."[7]

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[2] *Id.* at ¶¶46-47, Appellee's Appendix at 000120b.
[3] *Id.* at ¶48, Appellee's Appendix at 000120b.
[4] Scola's First Amended Complaint at ¶43, Appellee's Appendix at 000119b.
[5] *Id.*at ¶¶49-50, Appellee's Appendix at 000121b.
[6] *Id.* at ¶45, Appellee's Appendix at 000120b.
[7] *Id.* at ¶51, Appellee's Appendix at 000122b.

Based on the allegations in Scola's complaint as a whole (and the evidence presented in this matter), the gravamen of his claim against Chase is that: (1) Chase had a duty to maintain its property, including the exit from its parking lot to Michigan Avenue, in a reasonably safe condition by installing warning signs or traffic control devices; (2) Chase breached that duty by failing to install signs warning drivers that they were exiting onto a one-way street, thereby creating a dangerous condition on their property; and (3) Chase proximately caused his injuries by creating a dangerous condition on its property in breach of its duty to maintain its parking lot exit in a reasonably safe condition. In other words, even if he alleges that there were other proximate causes (such as the negligence of his mother and the other driver), Scola alleges that his injuries arose out of—and were proximately caused by—an "allegedly dangerous condition on the land" that Chase created. See *Kachudas*, 486 Mich at 913-914. So Scola's claim against Chase "sounds in premises liability rather than ordinary negligence," even though he alleges that "the premises possessor"—i.e., Chase—"created the condition giving rise to the plaintiff's injury." *Id.*; *Buhalis*, 296 Mich App at 692.

Accordingly, the Court of Appeals correctly concluded that Scola's claim against Chase sounds exclusively in premises liability.

C. Michigan law recognizes that claims like Scola's—where the plaintiff claims that a landowner's allegedly negligent maintenance of its property caused a car accident that occurred outside the premises—sound exclusively in premises liability.

Scola argues that his claim against Chase doesn't sound in premises liability because, in his view, "Michigan common law recognizes that personal injury claims like [his] claim against Chase Bank are ordinary negligence claim."[8] To support that contention, Scola cites *Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (1984), in which the Court of Appeals concluded that an owner of a shopping center had a duty develop and maintain the shopping center, including the parking area and its exit and entryways, so as not to injure a motorist traveling on an adjacent highway. According to Scola, *Langen* stands for the proposition that a tort claim alleged against a possessor of land sounds in ordinary negligence claim if "the danger posed to motorists like the plaintiff was not on the defendant's land nor was the plaintiff injured on the defendant's land."[9] He's wrong.

Although *Langen* didn't use the phrase "premises liability," it also didn't use the phrase "ordinary negligence." That isn't surprising because, as even Scola acknowledges, the distinction between ordinary-negligence and premises-liability claims didn't gain importance until *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), which this Court decided more than 15 years after *Langen*. And, the fact that *Langen* referred to a "negligence" claim isn't dispositive because, as noted above,

[8] Scola's Supplemental Brief at 16.
[9] Scola's Supplemental Brief at 18

premises-liability claims are negligence claims. Premises-liability claims employ the same duty-breach-cause-harm analysis as any other negligence claim; they are just focused on the duties arising out of a defendant's status as a landowner. Further, the Court of Appeals' duty analysis in *Langen* centered on the duty of individuals who are in possession and control of land to maintain it in reasonably safe condition—i.e., the exact duty that forms the basis for a premises-liability negligence.

As noted above, *Langen* involved a situation where the plaintiff was involved in a car accident with a vehicle that had just exited the defendant's shopping center. *Langen*, 138 Mich App at 674-676. The plaintiff sued the defendant for negligently maintaining its premises in such a way that trees on its property prevented drivers who were exiting the parking lot from seeing oncoming traffic. *Id.* at 675. The trial court concluded that the defendant didn't owe the plaintiff a duty that would support such a claim. The Court of Appeals disagreed and reversed. The members of the panel explained that, based on the relevant public-policy considerations, "we think it wholly just to impose a burden upon a defendant landowner to design, develop and maintain a parking area so as to prevent an unreasonable risk of harm to motorists traveling on adjacent highways." *Id.* at 678. But the court's decision wasn't based solely on public policy; rather, the panel noted that "[o]ur courts have long held that a landowner must maintain his or her own land so as not to injure users of an abutting street." *Id.* at 678-679, citing *Bannigan v Woodbury,* 158 Mich 206, 207; 122 NW 531 (1909) and *Grimes v King,* 311 Mich. 399; 18 NW2d 870 (1945).

After reviewing that precedent, the Court of Appeals stated that "[w]e cannot subscribe to a rule of law which would relieve the modern urban landowner from responsibility for foreseeable consequences caused by activity which poses an unreasonable risk of harm." *Id.* at 680-681. It reasoned that the landowner's failure to maintain an exit from a parking lot in reasonably safe condition created a dangerous condition: "If, upon exiting from defendant's shopping center parking lot, the view of the road is completely blocked and a motorist must enter the road before oncoming traffic can be seen, the condition of the exitway presents a serious risk of harm that is relatively foreseeable." *Id.* at 681. But, in concluding that the defendant showing-center owner owed a duty to "minimize the possibility of accidents at parking lot exits or entrances," the court didn't rely on the general duty that all members of the public have to act reasonably or refrain from unreasonably injuring others.

Instead, the court focused on the defendant's duties arising out of its status as the landowner of the shopping center: "Imposition of a duty upon defendant to develop and maintain its shopping center, including the parking area, so as not to injure a motorist traveling on adjacent highways *is a logical outgrowth of the settled duty of a landowner toward passing-by-foot travelers*." *Id.* at 679 (emphasis added). In other words, the duty that the defendant in *Langen* owed to the plaintiff arises out of the same source as the duty that this Court would later hold is subject to the open-and-obvious doctrine—possession and control of land. *Riddle*, 440 Mich at 90; *Bertrand*, 449 Mich at 609-610.

It follows that, contrary to Scola's assertion, *Langen* stands for the proposition that, with respect to claims like his—where a plaintiff alleges that a landowner maintained the exits from its parking lots onto a public street in a purportedly dangerous manner—the relevant duty flows from the possession and control of the land and, thus, sounds exclusively in premises liability.

The authority that *Langen* relied on to support its holding confirms that the duty it imposed arose out of the defendant's status as the possessor and controller of land. For example, this Court's opinion in *Grimes v King,* 311 Mich 399, 18 NW2d 870 (1945), involved a situation where coping stone, brick, and mortar fell from defendant's building and killed a person walking by on a public sidewalk. In finding the defendant liable for the decedent's death, this Court relied on various cases involving unmaintained buildings that had resulted in injuries to people along the public streets. *Id.* at 412-413. The Court explained that "it was the duty of one in control and possession to keep the premises in a safe condition" so as to protect persons using the adjacent public sidewalks and streets. *Id.* at 411-413, citing *Bannigan v Woodbury*, 158 Mich 206; 122 NW531 (1909).

Similarly, in *Bannigan v Woodbury*, 158 Mich 206; 122 NW 531 (1909), a window glass fell from the third story of a building and injured a pedestrian. This Court held that the unsafe condition of the windows as alleged in the complaint constituted a cause of action for which somebody should be held responsible and that an individual who was "lawfully in the possession of the real estate" and "[was] in charge and control of the building" has a duty "to keep it in a safe condition, so as to protect travelers along

the streets." *Id.* at 207-208; see also *Brown v Nichols*, 337 Mich 684, 688; 60 NW2d 907 (1953) (Premises owners have a duty to maintain their properties so that they don't pose a danger to individuals who are using the adjoining public streets and sidewalks).

Finally, *Langen* cited to the civil jury instructions, specifically SJI2d 19.09. See *Langen*, 138 Mich App at 679 n 2. The current version of the model civil jury instructions contained an identically worded analogue, M Civ JI 19.09, which appears in the chapter containing instructions related to "Premises Liability" and covers the "Duty of Possessor of Land, Premises, or Place of Business to Persons Traveling along Adjacent Street or Way." That instruction states that "[a] possessor of [land / premises / a place of business] has a duty to exercise ordinary care in maintaining [his / her] premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent [street / or / sidewalk / or other / public way]." M Civ JI 19.09. While the model jury instructions aren't mandatory or binding authority, they support the conclusion that claims like Scola's implicate duties arising from possession and control of land and, thus, sound in premises-liability.

Other cases involving purportedly dangerous conditions on the land that allegedly caused car accidents off of the property further demonstrate that the Court of Appeals colored well within the lines when it held that Scola's claims sounded in premises liability. For example, in *Holcomb v GWT, Inc*, unpublished opinion of the Court of Appeals, issued March 1, 2016 (Docket No. 325410); 2016 WL 805635,[10] a

[10] Attached as **Attachment 1**.

bicyclist who was hit by a car exiting a restaurant's parking lot sued the restaurant, claiming that two trees planted at the intersection of the sidewalk and driveway obscured his view of vehicles leaving the parking lot. The circuit court determined that this obstruction of view was an open and obvious condition on the land and granted summary disposition.

On appeal, just like Scola, the plaintiff "assert[ed] that his claims sounds in ordinary negligence, not just premises liability." *Id.* at *2. The Court of Appeals disagreed, concluding that the plaintiff's "claim sounded in premises liability alone." *Id.* at *1. Citing *Laier* and *Buhalis*, the court explained that the plaintiff's injuries weren't caused by the restaurant undertaking some "affirmative negligent action that directly and swiftly caused an injury." *Id.* at *2-*3. Rather, the plaintiff merely "asserted that the existing landscape obscured the line of sight between southbound travelling pedestrians and vehicles exiting via the driveway." *Id.* at *3. So the plaintiff's claim that the defendant "fail[ed] to adequately maintain the trees" sounded exclusively in premises liability. *Id.* And, "since the visual instruction was open and obvious," the Court of Appeals affirmed the trial court's grant of summary disposition. *Id.* at *3-*4, *9.

Stevens v Drekich, 178 Mich App 273; 443 NW2d 401 (1989) is also instructive. There, the minor plaintiff was injured when the motorcycle on which he was riding collided with another vehicle near an intersection. He sued defendant landowners, claiming that a tree growing on the defendant's property obstructed the view of a yield sign at the intersection where the accident occurred. *Id.* at 275-276. In affirming the trial court's grant of summary disposition in favor of the defendants, the Court of Appeals

first stated that "[u]nder the principles of premises liability, the right to recover for a condition or defect of land or for an activity conducted on the land requires that the defendant have legal possession and control of the premises." *Id.* The court explained that there, unlike in this case, the allegedly dangerous condition that the defendant had allegedly failed to maintain—the tree—wasn't located on the defendant's property; rather, it was located in a public right-of-way abutting their home. *Id.* at 276. The panel held that the plaintiffs' cause of action against the defendants sounded in premises-liability, but was precluded because the defendants didn't have possession and control over the public right of way. *Id.* at 277. Further, in response to the plaintiffs' negligence claim involving the tree, the Court held that unless the landowner had committed some act that increased the existing hazard or created a new hazard, the landowner would not be liable. *Id.*

In sum, Michigan's appellate courts—including this Court in *Grimes*, *Bannigan*, and *Brown*—have consistently treated off-premises injuries arising from conditions on or of the property as premises-liability claims against the individual or entity in possession and control of the property.

D. Conclusion

In sum, regardless of how Scola attempts to reframe his allegations, his claim against Chase "arises from an allegedly dangerous condition on the land." *Compau*, 498 Mich at 928. Thus, with respect to Chase, this action sounds *exclusively* in premises liability rather than ordinary negligence, despite Scola's allegations that Chase created the dangerous condition. See *Kachudas*, 486 Mich at 913; *Buhalis*, 296 Mich App at 692.

And that's true even though Scola's injuries occurred off of Chase's property. As a result, the Court of Appeals properly applied black-letter Michigan premises-liability law in its decision affirming the trial court's grant of summary disposition based on the open-and-obvious doctrine.

Argument II – Open-and-Obvious Doctrine

The open-and-obvious doctrine has been a well-established part of Michigan premises-liability law for more than 20 years. Scola asks this Court to do away with it. But he fails to show that any of this Court's open-and-obvious opinions were wrongly decided, or that the *Robinson* factors favor overruling them. So *stare decisis* militates against getting rid of the open-and-obvious doctrine.

In addition to arguing that his claim against Chase sounds exclusively in ordinary negligence, Scola argues that the Court of Appeals erred by affirming summary disposition based on the open-and-obvious doctrine. In its response to Scola's application, Chase argued that any danger posed by the lack of signage on its property was open and obvious because a reasonably prudent person who was exiting its parking lot would have observed upon casual inspection the one-way road markings, traffic flow on Michigan Avenue, and the previously encountered "one way" and "no left turn" signs on Wayne Road and avoided turning the wrong way onto Michigan Avenue.[11] MDTC agrees with and relies on Chase's argument regarding this aspect of the Court of Appeals' opinion, and will not address the issue further.

[11] Chase's Response to Scola's Application for Leave to Appeal at 27-36.

But Scola doesn't stop at claiming that the Court of Appeals applied the open-and-obvious doctrine incorrectly—he attacks the existence of the doctrine itself. For example, he argues that the doctrine "exonerates defendants from any potential liability in similar such cases for failing to sue reasonable care to protect individuals from being harmed by known dangerous conditions."[12] In his view, "[s]uch unjust outcomes unduly punish injured persons for failing to recognize potential hazards even though such considerations are better left for the jury to assess when fault is apportioned."[13] Scola also contends that the open-and-obvious doctrine "empowers judges to determine what conditions pose a danger that is open and obvious when such fact questions are better left to the jury to assess when fault is apportioned."[14] As a result, Scola invites this Court to do away with the open-and-obvious doctrine, or, as he puts it, "further consider whether the traditional rules applied to premises liability claims in Michigan have outlived their usefulness generally…."[15]

Scola's approach—getting rid of the open-and-obvious doctrine—would require this Court to overrule *Riddle*, *Lugo*, *Hoffner*, and at least 18 other orders and opinions it has issued, as well as more than 50 published Court of Appeals decisions. Doing so would run afoul of *stare decisis* without any compelling reason to do so. So this Court should reject Scola's invitation to dismantle the open-and-obvious doctrine.

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[12] Scola's Application for Leave to Appeal at 3
[13] *Id.*
[14] *Id.* at 9.
[15] *Id.* at 10.

A. *Stare decisis* militates against getting rid of the open-and-obvious doctrine in premises-liability cases.

Under the doctrine of *stare decisis*, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996), overruled on other grounds by *Rowland v Washtenaw County Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) (citation and quotation marks omitted). While this Court shouldn't apply *stare decisis* "mechanically," following it is "generally the preferred course because it promotes the evenhanded, predictable, consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).

When considering whether to overrule a prior opinion, this Court's first question "should be whether the earlier decision was wrongly decided." *Robinson*, 462 Mich at 464. Here, there is no indication that *Riddle*, *Lugo*, *Hoffner*, or any of this Court's other decisions addressing the open-and-obvious doctrine were wrongly decided. Indeed, Scola doesn't argue to the contrary or provide any compelling legal basis for overruling decades of this Court's premises-liability jurisprudence. Instead, he merely contends that they reflect bad policy and have negatively affected premises-liability plaintiffs (and their lawyers).

But even if any this Court's cases where it applied the open-and-obvious doctrine to premises-liability claims were wrongly decided (they weren't), that "by itself, does

not necessarily mean that overruling it is appropriate." *City of Coldwater v Consumers Energy Company*, 500 Mich 158, 172; 895 NW2d 154 (2017). Rather, when evaluating whether to overrule a wrongly-decided opinion, this Court should consider three factors: (1) "whether the decision defies practical workability," (2) "whether reliance interests would work an undue hardship were the decision to be overruled," and (3) "whether changes in the law or facts no longer justify the decision." *Id.* at 173. None of those factors militate in favor of overruling the open-and-obvious decisions issued by this Court.

The first factor—practical workability—weighs in favor of retaining the open-and-obvious doctrine. While Scola contends that Michigan courts have struggled to apply *Riddle*, *Lugo*, and their progeny in premises-liability cases, that simply isn't the case. The Michigan Court of Appeals has issued hundreds of opinions in which it applied the open-and-obvious doctrine to premises-liability claims.[16] Yet this Court has only issued opinions or precedential orders in just over 20 of those cases. And, where it has reversed the Court of Appeals, it has often done so to hold that summary disposition was proper.[17]

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[16] A Westlaw search revealed that there have been 782 opinions issued by the Michigan Court of Appeals that contain the phrases "open and obvious" and "premises liability."

[17] See, e.g., *Ragnoli v North-Oakland-North Macomb Imaging*, 500 Mich 967; 892 NW2d 377 (2017) (Reversing the Court of Appeals and reinstating summary disposition because "[t]he trial court correctly held that…the presence of wintery weather conditions and ice on the ground elsewhere on the premises rendered the risk of a black ice patch open and obvious such that a reasonably prudent person would foresee the danger of slipping and falling in the parking lot" (quotation marks and citations omitted)); *Compau v Pioneer Resource Co, LLC*, 498 Mich 928; 871 NW2d 210 (2015) (Reversing the Court of Appeals and reinstating summary disposition because "[t]he railroad tie was

To support his contention that there is widespread confusion about how to apply the open-and-obvious doctrine, Scola points to this Court's order denying leave to appeal in *Fowler v Menard*, 500 Mich 1025; 897 NW2d 166 (2017). In his view, by denying leave to appeal in *Fowler*, this Court "added to existing confusion over how such cases should be analyzed."[18] But that simply isn't true. The Court of Appeals' opinions in both this case and *Fowler* were unpublished and, thus, non-binding. Further, Scola's speculation about the meaning of the denial order in *Fowler* is misplaced because "denials of leave to appeal do not establish a precedent." *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313 n 3; 901 NW2d 577 (2017); see also MCR 7.301(E) ("The reasons for denying leave to appeal ... are not to be regarded as precedent."); *Tebo v Havlik*, 418 Mich 350, 363 n 2, 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) ("A denial of leave to appeal has no precedential value."); *Frishett v*

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an allegedly dangerous condition on the land, but it was open and obvious. Thus, the plaintiffs' recovery is barred by the open and obvious danger doctrine."); *Cole v Henry Ford Health System*, 497 Mich 881; 854 NW2d 717 (2014) (Reversing the Court of Appeals and remanding for entry of summary disposition because "[a] reasonably prudent person would foresee the danger of icy conditions on the mid-winter night the plaintiff's accident occurred."); *Hoffner v Lanctoe*, 492 Mich 450, 481-482; 821 NW2d 88 (2012) (Reversing and remanding for entry of summary disposition under the open-and-obvious doctrine); *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010) (Reversing the Court of Appeals and reinstating the trial court's grant of summary disposition based on the open-and-obvious nature of the condition at issue); *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 913-914; 781 NW2d 806 (2010) (Reversing the Court of Appeals and reinstating summary disposition because "the circuit court properly ruled that the alleged hazardous condition was open and obvious."); *McKim v Forward Lodging, Inc*, 474 Mich 047; 706 NW2d 202 (2005) (Reversing the Court of Appeals and reinstating summary disposition because "the hazard giving rise to plaintiff's injuries was open and obvious, and there was no special aspect present.").

[18] Scola's Application for Leave to Appeal at x.

State Farm Mut Auto Ins Co, 378 Mich 733, 734 (1966) (When denying leave to appeal, "the Supreme Court expresses no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals.").

As a result, there is simply no basis for this Court to conclude that Michigan's bench and bar are struggling to apply this Court's premises-liability precedent. So the open-and-obvious doctrine doesn't defy practical workability.

The second factor—reliance interests—also weighs against overruling this Court's open-and-obvious precedent. This factor focuses on "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. That is exactly the case with this Court's open-and-obvious precedent. As noted above, the open-and-obvious doctrine has been part of this Court's premises-liability jurisprudence since it decided *Riddle* in 1992. And *Riddle* didn't create the doctrine out of whole cloth. In *Riddle*, this Court noted that "[i]t is well-settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury," including "hidden or latent defects." *Id.* at 90-91, citing *Beals v Walker*, 416 Mich 469, 480; 331 NW2d 700 (1982), *Smith v Peninsular Car Works*, 60 Mich 501, 504; 27 NW 662 (1886), and *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164; 13 NW 499 (1882).

However, the *Riddle* Court stressed that the duty wasn't unlimited, citing several prior Supreme Court cases in support. For example, in *Caniff v Blanchard Navigation Co*,

66 Mich 638, 647; 33 NW 744 (1887), the Court denied a cause of action to a plaintiff who fell through a hatch on a boat because he had reason to know that the hatch was open. Similarly, in *Nezworski v Mazanec*, 301 Mich 43, 61; 2 NW2d 912 (1942), this Court concluded that premises owners owe a duty to warn invitees of "hidden dangers" related to conditions on their land—i.e., if the dangers are known or obvious, there is no duty to warn. Finally, the *Riddle* Court noted that in *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988), this Court "held that a possessor of land does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated or of dangers that are so obvious and apparent that an invitee may be expected to discover them himself." *Riddle*, 440 Mich at 94. Based on that precedent, this Court held "that the 'no duty to warn of open and obvious dangers' rule remains viable in Michigan." *Id.* at 99-100.

In the 27 years since *Riddle*, the open-and-obvious doctrine has become firmly entrenched in Michigan's premises-liability jurisprudence. The doctrine has been applied by this Court in more than 20 decisions and by the Court of Appeals in more than 50 published decisions as well as hundreds of unpublished decisions.

Because the open-and-obvious doctrine is so well-established—and plays such a key role in resolving premises-liability disputes—it affects the advice that attorneys on both sides of the "v" give to their clients in premises-liability matters. For almost three decades, MDTC's members have advised their premises-liability clients about every aspect of their cases—including trial strategy, settlement negotiations, and potential risk exposure—based on the principles of the open-and-obvious doctrine that this Court has

articulated. If this Court were to overrule *Riddle*, *Lugo*, and *Hoffner*, it would harm the individuals and business that have relied on that advice. As a result, the open-and-obvious doctrine "has become so embedded, so accepted, so fundamental, to everyone's expectations," that if this Court were to do away with the open-and-obvious doctrine, "it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

Finally, the last *Robinson* factor—"whether changes in the law or facts no longer justify the questioned decision"—also weighs against overruling this Court's open-and-obvious decisions. See *Coldwater*, 500 Mich at 162. Simply put, there hasn't been any changes in the law or facts that would justify getting rid of a rule of law that has been a key part of Michigan's premises-liability jurisprudence for almost 30 years.

The basis for the doctrine is Michigan's "overriding public policy of encouraging people to take reasonable care for their own safety." *Hoffner*, 492 Mich at 460. That policy hasn't changed. And, as noted above, the open-and-obvious doctrine has been addressed and applied in a constant and steady stream of opinions by both levels of Michigan's appellate courts from 1992 to the present. See, e.g., *McMaster v DTE Electric Co*, ___ Mich ___; 933 NW2d 42 (Supreme Court Dkt. No. 159062, September 27, 2019) ("The open and obvious doctrine is applicable to a claim that sounds in premises liability."); *Buhl v City of Oak Park*, ___ Mich ___; ___ NW2d ___ (COA Dkt. No. 340359, August 29, 2019) (Holding that "the condition was open and obvious, and the trial court properly granted defendant's motion for summary disposition on this ground.").

In sum, all three of the *Robinson* factors weigh in favor of retaining the open-and-obvious doctrine. And, since the Court of Appeals correctly applied the doctrine in its unpublished opinion, this Court should deny leave to appeal. Alternatively, if it decides to issue a decision, it should affirm the trial court's open-and-obvious ruling.

Conclusion

For the reasons stated above, MDTC asks this Court to deny Scola's application for leave to appeal. Alternatively, this Court should affirm the Court of Appeals and reiterate that: (1) claims alleging violations of a duty arising out of the possession and control of land sound exclusively in premises liability, regardless where the injury occurs; and (2) that the open-and-obvious doctrine applies in premises-liability cases like this one.

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Dated: November 27, 2019