

---

**SYNOPSIS OF MICHIGAN PREMISES LIABILITY LAW**

---

Prepared by: Michael F. Schmidt  
Nathan Peplinski  
HARVEY KRUSE, P.C.  
1050 Wilshire Dr., Ste. 320  
Troy, MI 48084  
(248) 649-7800  
Fax (248) 649-2316

## TABLE OF CONTENTS

INTRODUCTION .....	1
I. DUTIES TO CLASSES OF PLAINTIFFS .....	1
A. INTRODUCTION .....	1
B. CLASSIFICATIONS .....	1
1. Invitees .....	1
2. Licensees .....	2
3. Trespassers .....	3
C. FINAL NOTES REGARDING CLASSIFICATIONS .....	4
II. FACTORS AFFECTING LIABILITY .....	5
A. LIABILITY REQUIRES POSSESSION AND CONTROL .....	5
B. LIABILITY REQUIRES ACTUAL KNOWLEDGE OR CONSTRUCTIVE NOTICE .....	6
C. OPEN AND OBVIOUS CONDITION AS A COMPLETE DEFENSE .....	9
1. Background and Early Cases .....	10
2. <i>Lugo v Ameritech, Inc</i> .....	11
3. Open and Obvious Doctrine Post- <i>Lugo</i> .....	12
a) “Black Ice” / Hidden Ice .....	12
b) Ice / Snow / Wet Surfaces .....	14
c) Steps .....	17
d) Changes in Elevation / Uneven Surfaces .....	18
e) Clutter / Objects on Ground .....	21
f) Lighting .....	22
g) Code Issues .....	28
h) Miscellaneous .....	29
D. COMPARATIVE NEGLIGENCE OF THE PLAINTIFF .....	30
E. APPLICABILITY OF OPEN AND OBVIOUS DEFENSE IF A STATUTORY DUTY APPLIES .....	31

HARVEY KRUSE, P.C.

1. Lessor’s Duty to Maintain Premises in “Reasonable Repair” .....	31
2. Governmental Entity’s Duty to Maintain and Repair Under the Highway Exception to Governmental Immunity .....	33
III. LIABILITY ARISING FROM THE OWNERSHIP AND OPERATION OF BUSINESS .....	34
A. STOREKEEPER'S LIABILITY .....	34
1. Abrogation of the Alleged “Distracted Customer” Exception to the Open and Obvious Defense .....	35
B. INJURIES CAUSED BY THE CRIMINAL ACTS OF THIRD PARTIES .....	36
1. Business Owners .....	37
2. Special Relationships .....	39
a. Landlords .....	39
b. Doctors .....	40
c. Employers .....	40
d. Teachers/Student .....	41
e. Psychiatrist .....	42
f. Nursing Homes .....	42
g. Gun Owners .....	43
h. Innkeepers .....	43
IV. LIABILITY FOR TEMPORARY CONDITIONS-ICE & SNOW .....	44
A. TRESPASSERS .....	44
B. LICENSEES .....	44
C. INVITEES .....	45
V. LIABILITY FOR SNOW REMOVAL CONTRACTORS .....	46
VI. LIABILITY FOR CONDITIONS ON ADJACENT PROPERTY .....	46
VII. RECREATIONAL USE ACT .....	48

VIII. POLICE AND FIREMAN'S RULE.....49

IX. EXCLUSIVE REMEDY PROVISION OF THE WORKER'S  
DISABILITY COMPENSATION ACT .....50

CONCLUSION.....50

## INTRODUCTION

This outline discusses the liability of owners and occupiers of real property for personal injuries sustained by entrants upon the land. The terms "owner" and "occupier," along with "possessor" and "landowner," are used interchangeably throughout this outline.

### I. DUTIES TO CLASSES OF PLAINTIFFS

#### A. INTRODUCTION

Premises liability suits are like other negligence claims in that the plaintiff must prove that the possessor breached a duty of care. *Moning v Alfonso*, 400 Mich 425, 437 (1977). In Michigan, the duty owed by a possessor is dependant upon the status of the plaintiff as an invitee, a licensee, or a trespasser at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000); *Stanley v Town Square Coop*, 203 Mich App 143, 147 (1993); *Doran v Combs*, 135 Mich App 492, 495 (1984). The classification of a plaintiff in a premises liability suit has a profound impact upon the potential liability of an insured possessor, and, in turn, the amount of settlement or judgment the possessor's insurance carrier may be required to pay. Accordingly, careful consideration should be given to the legal classification of an injured party when evaluating a claim. The following is a discussion of the three classifications and a possessor's duty to each class.

#### B. CLASSIFICATIONS

##### 1. Invitees

An invitee is owed the highest duty under premises liability law. "In order to establish invitee status, it must be shown that the premises were held open for a **commercial** purpose of some sort." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604 (2000). To be considered an invitee, the person entering the premises must have done so for purposes that would have benefited the owner or occupant of the premises, or been of mutual benefit to the owner/occupant and the invitee. p. 605. The type of benefit can either be of a business, commercial, monetary, or other tangible nature to the possessor. *White v Badalamenti*, 200 Mich App 434, 436 (1993); *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347 (1987); *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 480 (1992).

Possessors of land owe four duties to invitees:

- (1) Possessors have a duty to maintain the premises in a reasonably safe condition;

HARVEY KRUSE, P.C.

- (2) Possessors must exercise ordinary care to protect an invitee from unreasonable risks known to the possessor, or that should have been known to the possessor with the exercise of ordinary care;
- (3) Possessors must warn invitees of dangers that are known, or that should have been known to the possessor unless the dangers are open and obvious. Possessors must, however, warn of open and obvious dangers if the possessor should expect that an invitee would not discover the danger or would not protect himself against it; and
- (4) Possessors have a duty to inspect the premises to discover possible dangers of which they are not aware.

SJI2d 19.03; see also *Riddle v McLouth Steel Prod Corp*, 440 Mich 85 (1992); *Kroll v Kratz*, 374 Mich 364 (1965).

## 2. Licensees

A licensee is one who is on the premises for a purpose other than business, with the express or implied permission of the owner or person in control of the premises. *Kreski*, 429 Mich at 359-60. Social guests and members of the possessor's household are generally considered licensees rather than invitees, even though they may have been expressly invited onto the premises. *Preston v Sleziak*, 383 Mich 442, 447 (1970); Restatement (Second) of Torts, § 330, p. 175, comment h. However, members of an owner's or possessor's own family can be business invitees, if they are conferring a benefit to the owner or possessor of the premises. *Leveque v Leveque*, 41 Mich App 127, 131-32 (1972).

The Michigan Supreme Court has decided in a case of first impression that a church visitor, on church property for non-commercial reasons, is one type of licensee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604 (2000).

An owner or possessor of land is liable to a licensee for injuries caused by a condition on his or her premises only if:

- (1) The possessor knew or should have known of the dangerous condition, should have realized that it involved an unreasonable risk of harm, and should have expected that the licensee would not have discovered or realized the danger;

HARVEY KRUSE, P.C.

- (2) The possessor failed to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and risk; and
- (3) The licensee did not know or have reason to know of the condition and the risk involved.

*Preston*, 383 Mich at 453; *Forche v Gieseler*, 174 Mich App 588, 596 (1989), citing Restatement (Second) of Torts, § 342, p. 210.

There is no duty on behalf of the possessor in regard to a licensee to inspect for or warn of dangers, except for concealed or hidden dangers about which the possessor has actual knowledge. *Stitt v Abundant Life Fellowship*, 462 Mich 591, 596 (2000). In contrast, the duty owed to invitees requires a possessor to inspect for potentially dangerous conditions.

### 3. Trespassers

A trespasser is one who enters upon another's property without the owner's or possessor's consent. *Stitt*, 462 Mich at 596. Trespassers are afforded the lowest level of care. The duty owed to a trespasser is dependant upon whether the trespasser is an adult or a child and whether the trespasser is known or unknown to the possessor of the land.

- (a) **Undiscovered Adult Trespasser:** If the owner does not know of the trespasser's presence on the land, and, in the exercise of ordinary care, could not have known of it, the owner has **no** duty to either (1) make the premises safe, or (2) warn of conditions on the premises. *Blakeley v White Star Line*, 154 Mich 635 (1908).
- (b) **Discovered Adult Trespasser:** Once an owner is aware that a trespasser is on the land, or in the exercise of ordinary care should have known of the trespasser's presence, the owner is subject to liability for bodily harm caused by the possessor's failure to use due (ordinary) care while engaging in an activity involving a risk of death or serious bodily harm. *Nielsen v Harry H Stevens, Inc*, 359 Mich 130 (1960); *Lyshak v City of Detroit*, 351 Mich 230, 249 (1958). In short, owners and possessors generally do **not** owe a duty to a known trespasser for a naturally occurring condition on the premises. Liability can arise, however, if the condition was created by the owner or possessor. *Supra* at 248-49.

HARVEY KRUSE, P.C.

- (c) **Child Trespasser:** Michigan law recognizes special rules that relate to child trespassers. A child is afforded a higher legal duty under the "attractive nuisance" doctrine, under which a possessor of land is subject to liability for physical harm to children caused by an **artificial** condition upon the premises, if:
- (i) The possessor knows or has reason to know that children are likely to trespass on the premises where the condition exists;
  - (ii) The possessor knows or has reason to know that the condition involves an unreasonable risk of death or serious bodily harm;
  - (iii) The children, because of their youth, do not discover the condition or realize the risks involved;
  - (iv) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight compared to the risk involved; and
  - (v) The possessor fails to exercise reasonable care to eliminate the dangers or to otherwise protect the children.

*Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-41 (1989);  
*Gilbert v Sabin*, 76 Mich App 137, 141-42 (1977).

Liability under the above-cited rule is imposed **only if** the injury is caused by an **artificial** condition on the land **and** all five conditions are satisfied.<sup>1</sup> *Rand*, 178 Mich at 740-41.

### C. FINAL NOTES REGARDING CLASSIFICATIONS

A plaintiff's classification is determined at the time of his or her injury. *Doran v Combs*, 135 Mich App 492, 495 (1984). For example, in *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511 (1992), *lv den* 441 Mich 925 (1993), an invitee of a business establishment relinquished his status as an invitee and became a trespasser, when he wandered into a particular

---

<sup>1</sup> It should be noted that it is not necessary that the children be on the land because of the nuisance. That is, it is not necessary that the "attractive nuisance" actually attracted the children onto the land. *Pippin v Atallah*, 245 Mich App 136, 146 n 3 (2001).

area of the defendant's store without permission. *Constantineau*, 195 Mich App at 515-16.

Additionally, it should be noted that a single visitor can be an invitee as to one individual and a licensee to another. For example, a social guest is a licensee with respect to a tenant the guest is visiting, even though the guest may be an invitee with respect to the owner of the premises if the injury occurred in a common area. See *Stanley v Town Square Cooperative*, 203 Mich App 143 (1993); *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535 (1993).

## **II. FACTORS AFFECTING LIABILITY**

### **A. LIABILITY REQUIRES POSSESSION AND CONTROL**

In most instances, one person or entity is both the owner and possessor of the land, so no question arises as to that person's or entity's responsibility for the safe maintenance of the premises. Where ownership and possession are divided, however, the general rule is that the person or entity that has possession and control of the premises is exposed to any liability that may arise.

All premises liability claims are conditioned upon the concurrence of the defendant's possession and control over the land upon which the plaintiff's injury occurred. *Merritt v Nickelson*, 407 Mich 544, 552 (1980). In order for liability to attach, there must be a unity of possession and control. *Id.* at 553. The right to control the premises is not, by itself, sufficient for liability to attach; rather, one must exercise that right. *Id.* at 554. The rationale underlying this legal principal is that the person or entity in possession of the land is best able to prevent harm to others. *Id.* at 552.

In premises liability actions, a "possessor" of land can be found liable for injuries occurring on the land or for injuries caused by a condition. A "possessor", for the purpose of premises liability suits, is defined as:

- (a) A person who is in occupation of the land with intent to control it; or
- (b) A person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or
- (c) A person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).  
*Merritt*, 407 Mich at 552.

Liability for negligence does not depend on title to the property. A person is liable for an injury resulting from his negligence in respect to a place which is in his control and possession even though he is not the titled owner of that property. *Nezworski v Mazanec*, 301 Mich 43, 56 (1942).

The duty and potential liability of any property managers would have to be judged in light of their specific control and possession of the subject property. Even if they are not owners, they may still be held liable for premises liability if they are in control of the property. *Id.* For instance, in *House v Grand Rapids Housing Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket No. 248465), the actual owner of the apartment complex was Mt. Mercy Limited. But Mt. Mercy contracted with the Grand Rapids Housing Commission (GRHC) for GRHC to provide management regarding any land, buildings, and improvements of the apartment complex. The plaintiff brought a cause of action against both Mt. Mercy and GRHC. The court noted that Mt. Mercy gave GRHC possession of the apartment complex even though Mt. Mercy had ultimate authority over the complex. GRHC had actual control because it had the power to manage and oversee the complex. The court noted that GRHC as the manager of the property was in the best position to prevent plaintiff's harm. Therefore, it was in possession of the property. The Court of Appeals has noted that questions regarding whether a defendant was actually a possessor of the subject property and how much control the defendant retained over the property are questions of fact to be resolved by the fact finder. *Poole v Hamon Co*, unpublished opinion per curiam of the Court of Appeals issued May 24, 2007 (Docket No. 272833).

The doctrine of possession and control is particularly important when the property is leased to a tenant. Depending on the provisions, a lease can be equivalent to a sale of the premises for the lease term, with the tenant becoming subject to all of the responsibilities of one in possession. In such situations, the landlord will generally not be liable for injuries occurring in the areas within the exclusive possession of the tenants. See *McCurtis v Detroit Hilton*, 68 Mich App 253 (1976); *Whinnen v 231 Corp*, 49 Mich App 371 (1973). However, it is important to note that the landlord remains in possession of all common areas on the premises and may be liable for injuries sustained by entrants while in those areas. *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 407 (1975). Also, it is possible for two parties to share the required possession and control. *Rockwell v Hillcrest Country Club, Inc*, 25 Mich App 276, 289-290 (1970). See Section III(B).

Another area relating to the doctrine of possession and control is vendor liability. While a vendor of land is generally not liable for harm caused by defects on the premises arising after the vendee has taken possession, the vendor has a duty to disclose any unreasonably dangerous condition of which he knows, or has reason to know, and which he has reason to believe the vendee will not discover. Restatement (Second) of Torts, § 351. The vendor's duty continues until the vendee has had a reasonable opportunity to discover and remedy the condition. § 351.

## **B. LIABILITY REQUIRES ACTUAL KNOWLEDGE OR CONSTRUCTIVE NOTICE**

The mere existence of a defective condition in a store or public place of business does not, as a matter of law, render the proprietor liable to an invitee for an injury caused by the condition, unless the proprietor knew, or in the exercise of reasonable care ought to have known, of the defect. *Berryman v K-Mart*, 193 Mich App 88, 92 (1992); 62 Am Jur 2d, Premises Liability, § 37. Thus, in

HARVEY KRUSE, P.C.

premises liability cases, a defendant's knowledge of the danger, whether actual or constructive, is an essential element of the duty of care upon which liability must be predicated. § 37.

If an injured party is unable to establish that the owner or possessor had actual knowledge of the dangerous condition that caused the injury, such knowledge can be imputed to the possessor. An owner or possessor is said to have constructive notice of a defective condition and is exposed to liability under certain circumstances. Such circumstances include:

- Proof of notice is unnecessary where an employee of a premises possessor creates a dangerous condition through an **unreasonable** act or omission that breaches a duty owed to a visitor on the land. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604 (1999). *See also Williams v Borman's Foods*, 191 Mich App 320, 321 (1991) (The defendant's negligence in maintaining a drainage system created pools of water on the floor of the defendant's supermarket on which the plaintiff slipped and fell).
- Evidence that the particular defect that caused the plaintiff's injury existed for a sufficient amount of time that the landowner or possessor should have discovered the defect. *Berryman*, 193 Mich App at 92.

Following are several recent examples of cases in which the court determined that the defendant did *not* have sufficient actual or constructive knowledge of an alleged dangerous condition to impose liability:

- In *Williams v Frankenmuth Bavarian Inn, Inc*, unpublished<sup>2</sup> opinion per curiam of the Court of Appeals, issued November 13, 2008 (Docket No. 283898), the plaintiff, an invitee, slipped and fell on water forty to fifty feet down a hallway from the entrance of defendant's building. The Court of Appeals affirmed summary disposition for the defendant based on lack of notice to defendant that the allegedly dangerous condition existed. The plaintiff testified that she did not know how long the water had been on the floor. Nothing in the record suggested that any of the defendant's other invitees had complained about the hallway's condition. And there was no evidence that any of defendant's employees knew that the water existed. *Id.* at slip op p. 4. The plaintiff argued that the defendant should have known of the condition because it had been snowing all day and invitees had been tracking water into the building on their shoes. The Court of Appeals found this unpersuasive because the defendant had taken precautions that it believed would be sufficient in putting down mats by the door and

---

<sup>2</sup> The cases throughout this brochure designated as "unpublished" carry no binding precedential effect on Michigan trial courts. They are referred to merely as illustrations of how some courts have reasoned given a set of particular facts.

because any knowledge that the plaintiff wished to charge to defendant with regard to water being tracked inside the building would also be reasonably assigned to the plaintiff. That is, if defendant should have known of the water being tracked in, then the plaintiff should have known of the water being tracked in and taken sufficient precaution. *Id.* at slip op p. 4.

- In *Stevenson v B. I. G. Enterprises, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2008 (Docket No. 280778), the plaintiff tripped and fell over a splinter of wood while bowling. Plaintiff would be an invitee. The evidence showed that defendant's employees generally understood that the flooring would dry out and splinter during the winter months due to running the furnace. But the Court of Appeals found no constructive notice of the defect. The Court noted that other bowlers used the lane with no complaints. It also noted that plaintiff had bowled at least one frame before the incident. The Court of Appeals stated that a jury would have to speculate to conclude that the dangerous condition was present for a sufficient amount of time to impose constructive notice. *Id.* at slip op p. 3.
- In *Fantozzi v Dequindre/Hamlin Dev.*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273004), the plaintiff, an invitee, slipped and fell on black ice in the parking lot of the defendant's 7-11 store. The evidence showed that there had been a major snowstorm in the area two days before plaintiff's fall, but there had been no significant precipitation since that snow. The parking lot had been plowed and salted after the snowfall. The Court also noted that the temperature had risen to approximately thirty-four degrees Fahrenheit on the morning of plaintiff's fall. The Court concluded that under these circumstances, the plaintiff had failed to create a genuine issue of material fact as to whether the defendant had notice of the icy condition. The Court noted that the plaintiff relied heavily on an affidavit submitted by a meteorology expert stating that the ice had to have formed from the snowfall two days earlier. The Court stated that this testimony is "silent with respect to the relevant issue: whether defendant knew or should have known about the presence of ice in the parking lot at the time when the temperature was above freezing and there had been no precipitation for two days." *Id.* at slip op p. 3.
- In *Coulter v Michigan First Credit Union*, unpublished opinion per curiam of the Court of Appeals, decided March 16, 2006 (Docket No. 257881), plaintiff, an invitee, slipped and fell on ice on a sidewalk while attempting to enter defendant's building. Summary disposition was granted in favor of defendant landowner on the basis that they did not have any knowledge of the icy condition. The only testimony was from a maintenance employee who stated that there "may" have been puddles on the sidewalk earlier in the day. Plaintiff attempted to present weather data showing thaw and re-freeze conditions as evidence that the defendant had constructive knowledge of the icy condition. The Court rejected this claim. The Court stated, "[c]onstructive notice of a

HARVEY KRUSE, P.C.

hazardous condition can be supported by reasonable inferences drawn from the evidence, but such inferences must amount to more than mere speculation or conjecture.” *Id.* at slip op p. 2.

- In *Kahl v Borman’s*, unpublished opinion per curiam of the Court of Appeals, decided April 6, 2006, (Docket No. 267267), plaintiff, an invitee slipped and fell on a substance believed to be shampoo while shopping defendant’s store. Summary disposition in favor of defendant was affirmed. Prior to plaintiff’s fall, a cashier was notified that there was a spill in “aisle six.” The cashier inspected the spill, and found what appeared to be shampoo drizzled down the aisle. She called for clean up. About the time that the cleanup on aisle six began, plaintiff slipped and fell on an identical substance in a separate area of the store. Plaintiff asserted that defendant had knowledge of the condition before she fell, and was thus liable for her injuries. However, the Court of Appeals rejected this argument, finding that the defendant had knowledge of the condition in aisle six, but was not charged with knowledge that a similar condition may have existed in a completely separate area of the store. “The drizzle of shampoo in an aisle where it was not stocked may have indicated a leaking bottle and the possibility that the substance may have leaked in other areas. That may establish awareness of *potential* for a hazard in another location. Although such knowledge may be relevant to constructive notice, it does not suffice as *actual* awareness of a hazard.” *Id.* at slip op p. 2.
- In *Henschel v United Artists Theatre Circuit*, unpublished opinion per curiam of the Court of Appeals, decided April 27, 2006 (Docket No. 258834), plaintiff, an invitee, slipped and fell on an unknown substance while finding a seat in a dark theater. Summary disposition in favor of defendant theater was affirmed. The Court found that the theater had no actual knowledge of the slippery condition. Plaintiff attempted to argue that the theater had constructive knowledge of the condition because no other patrons were sitting in the area where plaintiff fell, and the theater normally cleaned the floors after each show. The Court rejected this argument, finding that it was based on “impermissible conjecture and speculation.” *Id.* at slip op p. 2.

### C. OPEN AND OBVIOUS CONDITION AS A COMPLETE DEFENSE

The discussion of the “open and obvious” doctrine will be presented in three segments – the background of the defense and the early cases addressing it, the landmark Michigan Supreme Court case of *Lugo v Ameritech*, 464 Mich 512 (2001), and lastly, notable cases dealing with the open and obvious doctrine that were decided after *Lugo*. Please note that under some circumstances, facts that give rise to a premises liability action can also support an ordinary negligence claim, which would not be barred by the open and obvious defense. *Laier v Kitchen*, 266 Mich App 482 (2005).

## 1. Background and Early Cases

In general, it is well established that a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995).

Notably, prior to the Michigan Supreme Court's decision in *Riddle v McLouth Steel Prod Corp*, 440 Mich 85 (1990), the Court of Appeals indicated that the "open and obvious" doctrine had been abolished with the adoption of comparative negligence. (Comparative negligence is discussed below.) However, in *Riddle*, the Michigan Supreme Court affirmed the doctrine's viability in premises liability cases, stating specifically that when dangers are known to an 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 the invitor should anticipate harm to the invitee, despite the invitee's knowledge of the danger. *Supra* at 96.

Several other early cases help provide a background to understanding the development and application of the open and obvious defense before 2001.

In *Novotney v Burger King (On Remand)*, 198 Mich App 470 (1993), summary disposition in favor of defendant restaurant owner was ultimately affirmed. Plaintiff had fallen on a handicap access ramp. The Court determined that a handicap ramp is an open and obvious danger. In *Novotney*, the Court of Appeals determined that the danger presented by a handicap access ramp upon which the plaintiff was injured was open and obvious and that the defendant had no duty to warn the plaintiff of that danger, because the danger was apparent upon casual inspection by an average user with ordinary intelligence. *Supra* at 474-75. The court stated:

However, the analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious. The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger? With respect to an inclined handicap access ramp, we conclude that it is. *Novotney*, 198 Mich App at 474-75.

In *Bertrand v Alan Ford, Inc*, 449 Mich 606 (1995), summary disposition at the trial court level in favor of the defendant automobile dealership was reversed, and the matter remanded for trial. Plaintiff, an invitee, had fallen on a step by a door in the service area of the dealership, in the vicinity of vending machines and the cashier's window. The trial court granted summary

disposition in favor of the defendant dealership. The Court of Appeals reversed, and defendant dealership appealed. The Supreme Court determined that a fact question remained as to whether defendant breached its duty to protect invitees against an unreasonable risk of harm by not installing a guardrail along the steps, and thus summary disposition was inappropriate. If the hazard did present an unreasonable risk of harm, then the open and obvious doctrine would not apply.

## 2. **Lugo v Ameritech Corp, Inc**

In 2001, the landmark case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512 (2001) was decided. In *Lugo*, the plaintiff fell after stepping in a pothole in the defendant's parking lot. The plaintiff admitted that she was not looking at the ground, and that if she had, nothing would have prevented her from seeing the pothole. The circuit court granted summary disposition in favor of the defendant, finding that plaintiff's claim was barred by the open and obvious doctrine. The Court of Appeals reversed, stating that principles of comparative negligence can only reduce the amount of a recovery, not eliminate altogether a defendant's liability.

Defendant appealed the decision of the Court of Appeals to the Michigan Supreme Court. The Supreme Court reversed, reinstating the grant of summary disposition in favor of defendant. The Court stated, "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Supra* at 516. They also restated the general rule:

the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Supra* at 517.

The Court gave two examples of "special aspects" of an open and obvious condition that would make it unreasonably dangerous:

- A commercial building with only one exit for the general public, where the floor is covered with standing water – the condition is open and obvious, but a customer wishing to exit the store must leave the store through the standing water. *Supra* at 518.
- A parking lot with an unguarded thirty-foot deep pit in the middle – the condition is open and obvious, but would present such a substantial risk of death or severe injury that the condition is unreasonably dangerous. *Supra* at 518.

The *Lugo* decision is also important because it provides that unless there is a factual dispute as to the exact nature and extent of the condition, the open and obvious defense is a question of law for the court to decide.

The Court also stressed that whether a condition is open and obvious should be determined **objectively** rather than from the plaintiff's subjective viewpoint: "it is important for courts in deciding summary disposition motions by premises possessors in "open and obvious" cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Supra* at 523-24. However, the court on occasion has considered subjective factors, such as the plaintiff's familiarity with the subject area and the plaintiff's particular knowledge.

### **3. Open and Obvious Doctrine Post-*Lugo***

A number of cases have been decided by Michigan appellate courts subsequent to the *Lugo* decision. For this synopsis, they have been divided into the following categories – black ice/hidden ice, ice/snow/wet surfaces, steps, changes in elevation/uneven surfaces, clutter/objects on ground and miscellaneous cases.

#### **a) Black Ice / Hidden Ice**

In an attempt to defeat the open and obvious doctrine, a plaintiff may try to claim that their injury was a result of "black ice." The argument is that, by definition, black ice is ice that cannot be seen from a normal walking height, and thus was not open and obvious to a casual observer.

In *Kenny v Kaatz Funeral Home*, 264 Mich App 99 (2004) *rev'd by* 472 Mich 929 (2005), the Court of Appeals reversed a grant of summary disposition in favor of defendant funeral home owner where plaintiff slipped and fell on "black ice", covered by snow, in the parking lot. The trial court granted summary disposition in favor of defendant because it determined that plaintiff had sufficient notice of the condition and that the open and obvious doctrine precluded liability. The Court of Appeals reversed, finding that the ice was covered by snow, and thus not readily apparent to a casual observer. They also stated "[c]onsidering that 'black ice' coated the area, it is questionable that the ice would be observable even without the snow covering it." *Supra* at 111. Following the decision of the Court of Appeals, defendant filed for leave to appeal to the Michigan Supreme Court.

While *Kenny* was on appeal to the Michigan Supreme Court, the Court of Appeals decided another "black ice" case that relied on the logic of the Court of Appeals' decision in *Kenny*. In *Kantner v Ann Arbor Tower Plaza Condominium Ass'n*, unpublished opinion per curiam of the Court of Appeals, decided November 16, 2004 (Docket No. 250202), summary disposition in favor of the defendant was reversed where plaintiff slipped and fell on "black ice." The Court determined that a fact issue remained as to the nature and extent of the "black ice" condition.

Subsequently, the Supreme Court decided the *Kenny* appeal. In *Kenny v Kaatz Funeral Home*, 472 Mich 929 (2005), instead of hearing the case, the Court summarily reversed the decision

of the Court of Appeals “for the reasons stated in the dissenting opinion”, thus reinstating the grant of summary disposition in favor of defendant.

The dissenting opinion in the Court of Appeals, *Kenny*, 264 Mich App 99, determined that the open and obvious doctrine did apply to the instant case. In determining this, the dissent noted that plaintiff was seventy-nine years old and had lived her entire life in Michigan. It was also noted that plaintiff, who arrived at the funeral home in the same car as a number of other individuals, was the last one to exit the vehicle. Before exiting, she acknowledged that she saw her companions holding onto the vehicle with one hand for support, while they walked around it. The dissent stated “[a]s a lifelong resident of Michigan, she should have been aware that ice frequently forms beneath snow during snowy December nights.” *Supra* at 119. The dissent further noted “[i]n my view, after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery.” *Supra* at 120.

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61 (2006), the Court of Appeals initially relied on the Court of Appeals decision in *Kenny*, 264 Mich App 99. The Supreme Court vacated the initial opinion in *Ververis* and remanded to the Court of Appeals in light of the Supreme Court’s reversal of *Kenny*. *Ververis* involved a plaintiff that slipped and fell while attempting to enter a bowling alley. The plaintiff slipped on snow-covered ice in the parking lot. *Ververis*, 271 Mich App at 62-63. In reviewing *Kenny* and other cases reversed by the Michigan Supreme Court, *Ververis* concluded that “as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery.” The Court concluded that this is true even though there were no other factors that would have alerted the plaintiff to the danger other than the snow-covered surface. *Id.* at 67.

The Court of Appeals followed *Ververis* in *Royce v Chatwell Club Apartments*, 276 Mich App 389 (2007). In *Royce*, the plaintiff, a resident of the apartment complex, slipped and fell on black ice covered with snow in the apartment parking lot. *Id.* at 390-391. The Court concluded that the potential slipperiness of the snow-covered parking lot was an open and obvious danger as a matter of law. It reiterated that this was true even absent some other feature beyond the snow, suggesting that the surface was slippery. *Id.* at 394.

But the Court of Appeals more recently dealt with the issue of black ice existing without the presence of snow in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474 (2008). In that case, plaintiff injured her back when she slipped and fell while an invitee at the defendant’s gas station. The plaintiff slipped and fell at one in the morning, but the Court noted that it had been sunny during the day. It had not snowed during the prior week. Plaintiff was not able to observe any ice or snow. And the parking lot was paved with black asphalt. *Id.* at 475-476. The Court of Appeals noted that the overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent or nearly transparent. “Such definition is inherently inconsistent with the open and obvious danger doctrine. Consequently, we decline to extend the

HARVEY KRUSE, P.C.

doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without any indicia of a potentially hazardous condition.” *Id.* at 483. The Court rejected the argument that the fact that it was wintertime in northern Michigan should be enough to render any weather related situation open and obvious. The Court noted that weather conditions in Michigan ranged even in winter. The Court also rejected the argument that, because it had started to rain, the condition was open and obvious. The Court stated that the risk presented by a wet surface is not the same as presented by an icy surface. The Court of Appeals affirmed the denial of summary disposition and found that a question of fact remained regarding whether an average person of ordinary intelligence would have been able to discover the danger of the black ice. *Id.* at 483-484.

The Court of Appeals reconciled *Kenny* and *Slaughter* in *Ball v Micu*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2009 (Docket No. 280762). In *Ball*, the plaintiff slipped and fell on “invisible” ice on a tiled porch. The Court stated that the ice was open and obvious because plaintiff was a long time Michigan resident who was familiar with Michigan winters, was aware it had snowed recently, was aware the adjacent ground surrounding the porch was clearly snow-covered, and was aware that it was very cold the morning of the accident. The Court noted that unlike *Slaughter*, the plaintiff was aware of the snowy conditions and even recognized the possible presence of ice on the porch on her way into the house. Plaintiff had testified that the porch had looked “shiny”. All of these factors combined would alert a reasonable person of the foreseeable danger of slipping on the ice while walking across a shiny white ceramic tile porch during a Michigan winter. *Id.* at slip op p. 2-3.

These cases demonstrate that snow-covered black ice will be considered open and obvious. But uncovered black ice may not be automatically considered open and obvious. Whether or not a reasonable person should know of the black ice depends on the conditions surrounding the ice. As *Ball* indicated, if the weather conditions, surrounding ground, and general observations demonstrate that the ice may be in the area, the black ice may still be open and obvious. Therefore, it is highly important to develop the factual record of the conditions surrounding the ice. It is not sufficient just to note that ice existed.

#### **b) Ice / Snow / Wet Surfaces**

- *Joyce v Rubin*, 249 Mich App 231 (2002), (published), invitee, summary disposition in favor of the defendants affirmed where plaintiff slipped and fell on icy, snow covered sidewalk. The Court held that the open and obvious doctrine applied to claims of failure to maintain premises.
- *Canady v Country Club of Lansing*, unpublished opinion per curiam of the Court of Appeals, decided November 16, 2001 (Docket No. 224699), invitee, summary disposition in favor of the defendant affirmed where plaintiff slipped and fell on a wet wooden walkway. The Court noted that even before examining whether a condition

HARVEY KRUSE, P.C.

- is “open and obvious,” the Court must determine whether a dangerous condition existed in the first place. In the instant case, a wet sidewalk is not a dangerous condition, and thus there could be no liability.
- *Borrelli v General Growth Properties, Inc*, unpublished opinion per curiam of the Court of Appeals, decided August 16, 2002 (Docket No. 232378), invitee, summary disposition in favor of the defendant affirmed where plaintiff slipped and fell on wet tile in defendant’s entryway. View of the floor in the entryway was not obstructed and plaintiff simply failed to watch where she was going.
  - *Holmes v Shopco Group, Inc*, unpublished opinion per curiam of the Court of Appeals, decided December 13, 2002 (Docket No. 232404), invitee, summary disposition in favor of the defendant affirmed where plaintiff, while trying to cross over a quarter mile long snow bank, slipped and fell. The Court noted that, even though the snow bank was a quarter mile long, there were still alternate routes around it. It was also noted that the fact that a snow bank might be slippery was well known.
  - *Buckenmeyer v Office Max, Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 21, 2003 (Docket No. 242953), invitee, summary disposition in favor of the defendant affirmed where plaintiff, who fell on ice while entering defendant’s store, knew that the walkway was “slipperier than she first thought.” Actual visual identification of the ice was irrelevant, as she had knowledge that the walkway was in fact slippery.
  - *McFarlin v Ross Properties*, unpublished opinion per curiam of the Court of Appeals, decided December 2, 2003 (Docket No. 242416), summary disposition in favor of the defendant affirmed where plaintiff knew that parking lot and sidewalks of strip mall were icy. The Court did note that snow and ice were not always to be automatically considered open and obvious.
  - *Haden v Walden Pond Condominium Ass’n*, unpublished opinion per curiam of the Court of Appeals, decided December 21, 2004 (Docket No. 249476), trial court’s refusal to order summary disposition for defendant was reversed by Court of Appeals. Plaintiff, a resident of condominium complex, slipped and fell on a leaf covered sidewalk. Plaintiff testified that he saw the leaves completely covering the sidewalk. The Court noted that it is well known that leaves on the ground in fall can be slippery, and thus the leaves were an open and obvious condition.
  - *Drake v JWG Investments, LLC*, unpublished opinion per curiam of the Court of Appeals, decided August 23, 2005 (Docket No. 260786), invitee, trial court’s refusal to order summary disposition for defendant was reversed by Court of Appeals. Plaintiff, a tenant of defendant apartment complex, slipped and fell on an icy sidewalk. Court

found that plaintiff had failed to meet her burden of showing that the ice was not open and obvious, as she testified that she was not paying attention to where she was walking. Her testimony that the area was poorly lit and that rust stains “may” have obscured the ice was insufficient to preclude summary disposition. Additionally, the Court of Appeals determined that the statutory duty of repair (MCL 554.139) did not apply in this case, as the fall occurred in a common area of defendant’s property rather than in the “leased premises.”

- *Henderson v PKT, Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 4, 2005 (Docket No. 253439), invitee, summary disposition in favor of the defendant where plaintiff slipped and fell on a one foot wide “trail of water.” Plaintiff claimed that because the sidewalk where she fell was dark and crowded, the trail of water was not open and obvious. However, testimony revealed that plaintiff, as well as her companions, saw the water after the fall occurred. The fact that plaintiff believed the ground was generally dry that evening did not alter the open and obvious nature of the trail of water.
- *Deslover v Ryan’s Steak House*, unpublished opinion per curiam of the Court of Appeals, decided November 22, 2005 (Docket No. 255660), invitee, summary disposition in favor of defendant affirmed where plaintiff slipped and fell on ice outside of defendant’s restaurant. Plaintiff claimed that the condition of the roof and sidewalk, which had caused the ice to form, constituted a violation of applicable building codes and thus presented an unreasonable risk of harm. The Court disagreed, finding that building code violations are insufficient to impose a legal duty of care on an invitor.
- *Fortuna v Lake Ted, Inc*, unpublished opinion per curiam of the Court of Appeals, decided January 19, 2006 (Docket No. 264636), invitee, summary disposition in favor of the defendant affirmed where plaintiff slipped and fell on alleged “black ice.” The Court noted that the ice was actually seen by plaintiff’s sister when she went to help plaintiff after the fall. Plaintiff also testified that she saw the ice when she was lying on the ground. Therefore, the ice was deemed to be an open and obvious condition.
- *Cottrell v The Holiday Inn Southfield*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2008 (Docket No. 275295), plaintiff slipped and fell on wet tile in front of an ice machine while a guest at defendant’s hotel. The plaintiff and her ex-boyfriend testified that the water simply was not visible on the tile without knowing exactly where to look and what you were looking for. The Court of Appeals found that summary disposition was inappropriate given this testimony. From the plaintiff and her boyfriend’s testimony, a jury could reasonably infer that a casual inspection would not have revealed the water on the glossy tiled floor. The Court noted

HARVEY KRUSE, P.C.

that to find otherwise would require it to impermissibly review the credibility of the witness' testimony.

- *Batn v 231 MAC LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket Nos. 276755, 280035, 280109), a licensee slipped and fell on ice located on the defendant's premises. The Court found the ice open and obvious because the plaintiff admitted he saw the ice after he fell. Two other witnesses also testified that they saw the ice when they arrived on the scene.
- *Shattuck v Hotel Baronette, Inc*, unpublished opinion per curiam the Court of Appeals, issued February 10, 2009 (Docket No. 281065), invitee slipped and fell on wet tile placed around a bathtub. The Court of Appeals concluded that an average user of ordinary intelligence would have been able to discover upon casual inspection the risk posed by hard wet tile or the wet interior of a bathtub. A reasonable person would foresee the danger posed by stepping out of a bathtub or water with wet feet onto a hard tile step without first drying oneself off or placing a towel on the floor. *Id.* at slip op p. 3.

### c) Steps

- *Bertrand v Alan Ford, Inc* (consolidated with *Maurer v Oakland Co Parks and Rec Dept*), 449 Mich 606 (1995), invitees, summary disposition in favor of defendants was reversed by the Court of Appeals. The Supreme Court reinstated summary disposition in favor of Defendant in *Maurer*, but refused to reinstate summary disposition in favor of Defendant in *Bertrand*. In *Maurer*, the plaintiff stumbled and fell on an unmarked cement step at a county park. In *Bertrand*, the plaintiff fell backwards off a step at defendant's dealership. With respect to *Maurer*, the Court noted that the plaintiff's only asserted basis for finding that the step was dangerous was that she did not see it. She failed to establish anything unusual about that step. Thus, summary disposition in favor of defendant was reinstated. With respect to *Bertrand*, the Court found that an issue of fact remained regarding whether the construction of the step, when considered with the placement of nearby vending machines and a cashier's window, created an unreasonable risk of harm. Thus, the reversal of summary disposition in favor of defendant dealership by the Court of Appeals was affirmed.
- *Stratton v Somerset Pontiac-GMC, Inc*, unpublished opinion per curiam of the Court of Appeals, decided December 2, 2003 (Docket No. 242298), invitee, summary disposition in favor of the defendant affirmed where plaintiff tripped and fell over a step between showrooms. The Court noted that "[d]ifferent floor levels in buildings are such a common occurrence that the landowner does not owe a duty to make ordinary steps foolproof or to protect invitees from any harm they present unless special aspects of the steps make the risk of harm unreasonable."

HARVEY KRUSE, P.C.

- *Mitchell v Black Law Office, PLC*, unpublished opinion per curiam of the Court of Appeals, decided October 26, 2004 (Docket No. 248442), invitee, summary disposition in favor of the defendant affirmed where plaintiff slipped and fell while descending the main entrance stairs of defendant, and attempting to avoid books that were stacked on a step. The Court determined that the stack of books did not present any special aspects, and were clearly noticeable and avoidable.
- *Cipollone v Haynes*, unpublished opinion per curiam of the Court of Appeals, decided January 17, 2006 (Docket No. 264789), invitee, summary disposition in favor of the defendant reversed where plaintiff was descending dark basement stairs and slipped on a cloth on the stairs. The Court remanded the case to the trial court for further findings on whether the nature of the cloth was open and obvious.
- *Pringle v Langolf*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 277102), plaintiff was a tenant in a rental home. She tripped on a silver metal strip placed at the edge of a black rubber mat on a hardwood staircase. The Court of Appeals noted that steps are generally open and obvious. It noted no difference here. The Court of Appeals noted that the metal strip was silver and the surrounding rubber mat was black, which contrasted well with the wooden steps. Given the contrast, a reasonable person would have noted the metal strip. *Id.* at slip op p. 3.

**d) Changes in Elevation / Uneven Surfaces**

- *Anderson v Montgomery Ward & Co*, unpublished opinion per curiam of the Court of Appeals, decided November 2, 2001 (Docket No. 225699), invitee, summary disposition in favor of defendant affirmed where plaintiff tripped and fell on an uneven, heavily patched sidewalk, despite the fact that plaintiff had been told she had to use the sidewalk to reach defendant's catalog pickup area. The Court determined that the uneven, heavily patched nature of the sidewalk was clearly visible if plaintiff had paid attention to her route.
- *Goodstein v Crown Life Ins Co*, unpublished opinion per curiam of the Court of Appeals, decided December 18, 2001 (Docket No. 224703), invitee, summary disposition in favor of defendant affirmed where plaintiff fell off of an 11-inch high loading platform. Plaintiff allegedly expected at least one step down after the edge, but there was not one. The Court determined that the height of the platform might not have been readily apparent from the nearby doorway that plaintiff passed through, but, because of markings, she should have known that there was a stepdown that would need to be observed.

- *Moore v Varsity Lincoln-Mercury, Inc*, unpublished opinion per curiam of the Court of Appeals, decided July 23, 2002 (Docket No. 232320), invitee, summary disposition in favor of the defendant affirmed where plaintiff fell from a concrete apron in front of defendant dealership. Plaintiff claimed he had been distracted by the vehicles he was looking at, and simply forgot that he was on the concrete apron a step above the sidewalk. The Court determined that the height differential between the concrete apron and the adjacent sidewalk was readily apparent if plaintiff had cared to observe, and the fact that he was distracted by the automobiles was irrelevant to the analysis.
- *Partin v Two With Everything, Inc*, unpublished opinion per curiam of the Court of Appeals, decided August 30, 2002 (Docket No. 231666), invitee, summary disposition in favor of the defendant affirmed where plaintiff tripped and fell over uneven pavement. “Common pavement defects do not create an unreasonable risk of harm or an unusually high likelihood of injury.” p. 2.
- *Adams v National Church Residence, Inc*, unpublished opinion per curiam of the Court of Appeals, decided December 11, 2003 (Docket No. 242107), summary disposition in favor of the defendant affirmed where plaintiff, who fell while entering a senior citizens residence, **was familiar with the entrance** and had used it numerous times. Plaintiff asserted that because one area of the entrance was barricaded with caution tape, it was reasonable to assume that any unmarked areas were safe, and made the remaining area unavoidable. The Court disagreed with these assertions.
- *Mead v Barrett Paving Materials, Inc*, unpublished opinion per curiam of the Court of Appeals, decided August 30, 2005 (Docket No. 261197), invitee, summary disposition in favor of the defendant reversed where plaintiff, while delivering fuel to defendant’s business, slipped and fell off of a poorly maintained ladder. The ladder was determined to be the only way for plaintiff to access the fuel storage area. Thus, while the poor condition of the ladder was open and obvious, it was also “effectively unavoidable”, because it was the only way to access the fuel storage area.
- *Jackson v Lone Star Steakhouse & Saloon of MI, Inc*, 475 Mich 882 (2006), invitee, the decision of the Court of Appeals reversing a grant of summary disposition in favor of defendant landowner was reversed, thus reinstating summary disposition for defendant. Plaintiff, while opening his car door, stepped back over a curb and into a depression concealed by snow, causing him to fall. The trial court granted summary disposition in favor of defendant, finding that the claim was barred by the open and obvious doctrine. The Court of Appeals reversed, determining that a question of fact existed regarding whether the nature and extent of the depression was discoverable upon a casual inspection of the area. Defendant appealed, and the Michigan Supreme Court reversed the Court of Appeals, “for the reasons stated in the Court of Appeal dissenting opinion.” *Id.* at slip op p. 1. The dissenting opinion, *Jackson v Lone Star Steakhouse &*

- Saloon of MI, Inc*, unpublished opinion per curiam of the Court of Appeals, decided December 8, 2005 (Docket No. 256332), stated “[t]he change in elevation between the parking lot and the land behind the curb was visible in photographs.” *Id.* at slip op p. 1. Further, “the snow covering the curb area put plaintiff on notice that he could not see the surface beneath. Thus, after identifying the presence of a curb partially obscured by snow, an average user would be put on notice of the potential danger of stumbling on an unseen uneven surface beneath the snow and behind the curb.” *Id.* at slip op p. 1.
- *Morton v CbyM Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, decided February 2, 2006 (Docket No. 255150), invitee, summary disposition in favor of the defendant affirmed where plaintiff tripped and fell on an uneven brick walkway. Plaintiff had argued that the defects in the brick walkway were essentially unavoidable because the regular exit was blocked by a large group of tourists. The Court disagreed, noting that the Plaintiff could have waited for the tourists to leave, walked through them, or taken another exit route. The large group of tourists was not the type of “special aspects” set forth in *Lugo*.
  - *Simmons v Bob Thibodeau, Inc*, unpublished opinion per curiam of the Court of Appeals, decided February 21, 2006 (Docket No. 264215), invitee, summary disposition in favor of the defendant affirmed where plaintiff fell as a result of a height differential between an elevated waiting room floor and a lower adjacent hallway floor, even though the doorway was the only exit from the waiting room. Plaintiff **had traversed the area multiple times** and defendant had posted adequate warnings regarding the height differential.
  - *Shutes v St. Mary’s Medical Center of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2007 (Docket No. 265749), plaintiff, an invitee, fell when she tripped on uneven adjacent slabs in a sidewalk. The trial court denied the defendant’s summary disposition based on the testimony of a security guard that walked the same route often and had not seen the alleged defect in the sidewalks. The Court of Appeals found their reliance on this testimony amounted to speculation and conjecture because there was no testimony from the security guard that she was in the habit of making casual inspection of the ground and that there was no testimony or evidence that the defect existed when the security guard walked over the same area.
  - *Hansen v Ironwood Oil Company*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2008 (Docket No. 274807), invitee plaintiff tripped over uneven and overlapping mats in the entranceway of the store. The Court of Appeals found the uneven mats open and obvious and affirmed summary disposition. The Court noted that the photographs clearly showed the uneven mats. And it noted that plaintiff even referred to the photos to demonstrate that the mats were uneven. Given that the

uneven mats could be detected easily in the photos, the Court found them open and obvious.

**e) Clutter / Objects on Ground**

- *Roberts v Old Country Buffet*, unpublished opinion per curiam of the Court of Appeals, decided November 5, 2002 (Docket No. 233517), invitee, summary disposition in favor of the defendant affirmed where plaintiff tripped and fell over a child while at defendant's restaurant. The child was determined to be an open and obvious condition that did not present a "high risk of severe harm."
- *Bates v Burlington Coat Factory Warehouse*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2004 (Docket No. 249749), invitee, summary disposition in favor of the defendant affirmed where plaintiff tripped and fell over an "endcap" with merchandise. The endcap was open and obvious regardless of whether it contained merchandise meant for viewing.
- *Bandera v Dollar Tree Stores Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 25, 2005 (Docket No. 263307), invitee, summary disposition in favor of defendant affirmed where plaintiff, carrying a shopping bag, tripped and fell over a parking blockade while leaving defendant's store. The Court found that, had plaintiff not been carrying the bag, she would have seen the blockade, and thus would not have fallen. The fact that a shopping bag from defendant's store, carried by plaintiff, blocked her view was irrelevant to the open and obvious analysis.
- *Pilette v Luokala*, unpublished opinion per curiam of the Court of Appeals, issued July 10, 2008 (Docket No. 278033), plaintiff, a licensee, slipped and fell on a broken piece of tile hidden underneath some branches that were scattered about defendant's backyard. Even if the tile was completely covered, it is reasonable to expect that an average person would appreciate the danger posed by walking in a yard full of branches and limbs. Like black ice under snow, the Court concluded that a reasonable person would anticipate that a yard covered in branches and limbs could contain tripping or slipping hazards. The Court of Appeals affirmed summary disposition to defendants.
- *Skuba v Gomez*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2009 (Docket No. 281296), the plaintiff tripped and fell over a cantaloupe size rock in the defendant's yard while walking backwards away from the sound of a large dog's chain. The plaintiff was an invitee. The plaintiff attempted to argue that the need to back away from what he perceived to be a large dog caused him to trip over the rock, which he could not see when walking backwards. The Court of Appeals rejected this argument. Regarding the dog, the Court noted that the plaintiff perceived at least the sound of the dog's chain. The plaintiff perceived the danger when he heard the chain

HARVEY KRUSE, P.C.

coming from a carport and this is why he reacted by backing away. Because the plaintiff perceived the danger, the Court concluded that it was discoverable on casual inspection. The Court noted that there was no evidence that the rock was not open and obvious. The Court noted that the rock was large and clearly visible on a sunny day. The Court found that tripping on a rock is equivalent to stepping in a pothole. The fact that the plaintiff fell over another open and obvious danger when reacting to the open and obvious danger of the dog does not negate the classification of both dangers as open and obvious. The Court also noted that the dangers did not pose a special aspect. The Court noted that nothing prevented the plaintiff from glancing backwards while walking away from the dog and that there was no evidence that walking over the rock was the only safe way for the plaintiff to exit property. But even assuming that plaintiff had no other option but to walk backwards, a large rock would still not pose an unreasonable risk of harm. The Court also concluded that the chained dog did not present any type of “unusual” distraction that would have relieved the plaintiff from his obligation to watch where he was walking.

#### **f) Lighting**

- *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119 (1992), the plaintiff, a business invitee, fell off a loading dock of approximately 4-5 feet in a vacant warehouse that he was showing as a real estate agent. The plaintiff had known the building was dark before entering, and, in fact, he instructed his potential buyers to bring a flashlight. The buyers had left with the flashlight before the plaintiff fell. The plaintiff could not recall if he had his own flashlight on at the time of his fall. *Id.* at 121. The Court concluded that the lack of adequate lighting was both obvious and known to the plaintiff, but the actual defect that caused the plaintiff’s injury was an unknown, unexpected, and unseen drop off, which was virtually undetectable in the dark interior. The Court concluded that this amounted to a hidden or latent condition. *Id.* at 127-128.
- *Abke v Vandenberg*, 239 Mich App 359 (2000), the plaintiff went to the defendant’s supply barn to purchase hay. The defendant led plaintiff through a sliding door that exited out to a loading dock. After closing the door, the plaintiff fell into a truck bay. The defendant argued that the loading dock truck bay constituted an open and obvious condition as a matter of law. The trial court and the Court of Appeals disagreed. The Court of Appeals noted that the plaintiff specifically testified that the loading dock area in which he fell was dark and that he could only see the defendant’s silhouette as the defendant walked away from him. The Court noted that this created a factual discrepancy concerning the visibility of the truck bay and that the trial court properly denied the defendant’s motion for directed verdict and for judgment notwithstanding the verdict as a result of this factual discrepancy. The Court noted that a question of fact also existed whether the condition was unreasonably dangerous given

that the truck bay was only 8 inches from the door and the heavy door required a person to use two hands to close it.<sup>3</sup>

- *O'Donnell v Garasic*, 259 Mich App 569 (2003), overruled on other grounds by *Mullen v Zerfas*, 480 Mich 989 (2007), the plaintiff was injured when she fell down a flight of stairs as she attempted to traverse them in the dark while spending the night at the defendant's inn. The plaintiff argued that the defect in the stairs was not open and obvious because the inn patrons would not be able to see them as they moved from the loft level to the main floor in the darkness. The Court of Appeals rejected the plaintiff's argument noting that the plaintiff viewed the stairs in the loft when she was on the main floor of the cabin earlier in the evening when the overhead light was illuminated. The plaintiff also had opportunity to take note of any apparent dangers when she traversed the stairs when she went to bed.
- *Trapani v MJR Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2006 (Docket No. 255696), the plaintiff, an invitee, tripped and fell on frayed and ripped carpeting on the stairwell of a dimly lit movie theater. The Court of Appeals reversed summary disposition granted to the defendant. The Court noted that folded and torn carpeting on a dimly lit theater stairway is not normally anticipated or easily detected and avoided with the exercise of ordinary observation and reasonable care.
- *Dover v Westchester Ltd Dividend Housing Ass'n, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258654), the plaintiff, an invitee, tripped and fell over a garden hose on a sidewalk outside of her apartment building while walking at night. The Court of Appeals noted that the garden hose on the sidewalk by itself would be open and obvious. It also noted that the factual evidence did not support the claim by the plaintiff that darkness caused her not to see the garden hose. The plaintiff testified that she could see the garden hose after the fall. The evidence also suggested that there were six lights near the front entrance of the apartment complex, which illuminated the location in excess of the minimum required by the local building code. Therefore, the Court of Appeals concluded that the hose was open and obvious regardless of the allegedly dark conditions. The Court of Appeals also concluded that the darkness in the area of plaintiff's fall was not a special aspect.
- *McConnal v West Side Concrete Co*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2006 (Docket No. 267390), the plaintiff was walking on a public sidewalk recently repaired by the defendant when she inadvertently stepped off the pavement and into a hole in the ground. The plaintiff pointed out that she was

---

<sup>3</sup> *Abke* and *Knight* both predate *Lugo*, but they are important to note because several unpublished cases have relied on *Abke* and *Knight* subsequent to *Lugo*.

walking in the darkness of night without any illumination. The Court noted that the plaintiff failed to cite any authority for the proposition that the nighttime darkness itself could change an open and obvious hazard into an actionable condition. The Court stated: “A pedestrian exercising ordinary care and prudence should simply take the darkness into account, trying all the harder to identify hazards lying ahead. In plaintiff’s situation, the darkness should at least have caused her to take all the more care to remain on the paved portion of the walkway.” *Id.*

- *Cohen v Redcoat Tavern, Inc*, unpublished decision per curiam of the Court of Appeals, issued October 3, 2006 (Docket No. 269044), the plaintiff, an invitee, tripped and fell over a threshold entering a vestibule to the defendant’s restaurant. Plaintiff argued that the threshold, in conjunction with the restaurant’s inadequate lighting, constituted an unreasonably dangerous condition on the defendant’s premises. The Court of Appeals rejected this. Specifically, the Court of Appeals noted that the lighting condition inside the vestibule and inside the restaurant were simply irrelevant given that the plaintiff was entering from the outside. The Court noted that the plaintiff was entering during the daytime and that the outdoor lighting would be sufficient to allow the plaintiff to see the threshold.
- *Marchetto v Kiss*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 270722), the plaintiff, an invitee, tripped and fell on the defendant’s driveway. The plaintiff argued that the cracked concrete of the driveway was not open and obvious because it was difficult to see at night. The Court rejected this stating “Individuals who work outside in the dark can easily ensure their own safety by carrying a flashlight.” The Court of Appeals also rejected the argument that the lighting created a special aspect. The Court concluded that the defendant’s decision to leave her porch light off did not make the harm unavoidable because the lighting had no bearing on which route the plaintiff took to reach the defendant’s porch on any given occasion. The Court also noted that the absence of lighting did not transform the harm into the type that would cause substantial risk of death or severe injury.
- *Lennon v Bilkovic*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 2007 (Docket No. 271243), the plaintiff, an invitee, struck his head on covered duct work of a ceiling of the defendant’s finished basement as he walked into the basement. The plaintiff claimed that the lighting was dim and that a beam of light coming through an open doorway compromised his eyes’ adjustment to the lighting in the basement. But the plaintiff also testified that the lighting was sufficient to enable him to see his friends at the bar. The Court of Appeals concluded that, if the lighting was sufficient for the plaintiff to see the people at the bar, it was adequate for him to see the drop ceiling that he encountered as he went to greet those people.

- *Russell v Ramsey Holding, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 273144), the plaintiff, an invitee, drove a forklift into the dock area of the defendant's facility. The plaintiff indicated that the area was poorly lit and, as a result, he did not notice a pit located immediately in front of the docking bay until he crashed into it. The Court of Appeals concluded that a question of fact existed concerning the open and obvious character of the pit. The Court stated that although an average user of ordinary intelligence would normally be able to discover the danger and risk presented by the pit on casual inspection, given the testimony about the lighting, the Court concluded that there was a question of fact as to whether the pit constituted an open and obvious condition. The plaintiff had noted that the building lighting was not "intense," and that the lighting became darker as he approached the pit. The Court also noted a question of fact regarding whether a special aspect existed. The Court noted that the pit was in an area where individuals were regularly operating forklifts and that it created the potential for severe bodily harm or death should a forklift encounter the pit.
  
- *Kaseta v Binkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2007 (Docket No. 2173215), the plaintiff, an invitee, slipped and fell on black ice on the defendant's driveway. The trial court and the Court of Appeals concluded that the plaintiff had established a question of fact whether the black ice constituted an open and obvious condition. The plaintiff's testimony indicated that the ice was essentially unnoticeable due to the time of day and lack of lighting. The Court of Appeals concluded that the trial court properly denied summary disposition given that the evidence showed that the ice was not snow covered and there was no lighting from the house. The Supreme Court reversed the decision of the Court of Appeals for the reasons stated in the Court of Appeals dissent. *Kaseta v Binkowski*, 480 Mich 939 (2007). The Court of Appeals dissent failed to deal with the issue of lighting. The Court of Appeals dissent relied on the fact that snow had fallen earlier in the day, that the temperature had risen, and that the temperatures then again decreased causing melting snow to freeze. The dissent also noted that there were mounds of snow next to the driveway. Given the temperature fluctuations of the day, a reasonable person would note the possibility of ice forming on the driveway, particularly on the edges of the driveway, particularly on the edges of the driveway which were adjacent to the snow. Therefore, the Court of Appeals dissent concluded that the condition was open and obvious.
  
- *Galliher v Trinity Health-Michigan*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2007 (Docket No. 267185), the plaintiff, an invitee, stepped into a pothole in the defendant's parking lot causing her to sustain injuries requiring treatment. The plaintiff and her granddaughter described the parking lot as dark, without lighting, and in shadows from surrounding hospital buildings. They both testified that they could not see what was on the ground because it was too dark. The

defendant moved for summary disposition arguing that the pothole was open and obvious. The circuit court denied the defendant's motion for summary disposition. The Court of Appeals affirmed. The Court of Appeals concluded that a condition that normally would be discoverable by an average user of ordinary intelligence on casual inspection may not be open and obvious if the hazard is not discoverable upon casual inspection because of darkness. Even though a pothole is typically open and obvious, the Court of Appeals found a question of fact in light of the testimony of the plaintiff and her granddaughter regarding the visibility of the pothole under the lighting conditions existing at the time of the plaintiff's fall.

- *Jepson v Edward F. Sparrow Hosp Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 275748), the plaintiff, an invitee, tripped and fell when she stepped into an expansion joint in the defendant's parking structure. The plaintiff argued on appeal that a special aspect existed because her plaintiff testified that the lighting was "questionable" when the plaintiff fell. The Court of Appeals rejected this argument. The Court concluded that even if the area were dimly lit, it would not modify the situation regarding the expansion joint so as to give rise to a uniquely high likelihood of harm or severity of harm. Therefore, the Court concluded that the questionable lighting could not rise to the level of a special aspect.
- *Jacobs v Onge*, unpublished decision per curiam of the Court of Appeals, issued January 29, 2008 (Docket No. 276719), the plaintiff was present at an auction at a house owned by the defendant. The plaintiff went into the basement to see items for sale in the auction at the direction of the auctioneer. While in the basement, the plaintiff struck his head on an overhead low beam. The plaintiff testified that the basement was dark and only lit by the light from a small casement window. The trial court found the condition open and obvious. The Court of Appeals reversed. The Court of Appeals noted testimony that indicated that the basement was "very dark." Given the testimony about the lighting, the Court concluded that a question of fact existed regarding whether the beam constituted an open and obvious condition at the time of the incident.
- *Jewett v Goodman*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 278014), the plaintiff, an invitee, slipped and fell as she exited her daughter's rental home through a side door. The side door did not have any lighting. The plaintiff claimed that she missed the single step connecting the side door porch with the ground because of the darkness. Plaintiff admitted that she was warned by her daughter to watch her step. The Court noted that the plaintiff was aware of the dark condition given that she commented that it was awfully dark before leaving. Therefore, the Court of Appeals concluded that she was aware of the risk. It also concluded that nothing prevented the plaintiff from exiting via the lighted front entrance.

- *Hodgins v Crossbow Inn, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2008 (Docket No. 278340), the plaintiff claimed that she slipped and fell in defendant's poorly lit parking lot on black ice that had accumulated in a depression on the parking surface as a consequence of the downspouts on the defendant's building. The plaintiff attempted to argue that, even if the ice he slipped on was open and obvious, a special aspect existed that made summary disposition inappropriate. Specifically, the plaintiff argued that the darkness of the parking lot, the lack of snow on the surface of the parking lot, and the invisible nature of the ice constituted special aspects. The Court of Appeals rejected this argument. The Court stated that darkness and the lack of snow covering did not create an unreasonable risk of harm and did not give rise to a uniquely high likelihood of harm or severity of harm if the risk was not avoided.
  
- *Schump v Home Depot USA, Inc*, unpublished opinion memorandum of the Court of Appeals, issued October 23, 2008 (Docket No. 279256), the plaintiff, an invitee, tripped over a 2 x 4 board protruding from beneath a hot tub on the concrete entryway to a Home Depot store. The plaintiff alleged that inadequate lighting, shadowing from the hot tub, night darkness, harsh weather, lack of color differentiation, and a slight protrusion, precluded the condition from being characterized as open and obvious. The Court of Appeals disagreed. "The determination of an open and obvious condition is not premised on individual factors, but rather based on whether a person of ordinary intelligence would have discovered the danger upon casual inspection. Review of the record reveals that an ordinary person upon casual inspection would have discovered the danger." *Id.*
  
- *Gorges v Kenna*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2009 (Docket No. 280665), at approximately 1:00 a.m. the decedent slipped and fell on an icy sidewalk while leaving the defendant's house after visiting relatives. The Court noted that, when the decedent arrived at the defendant's house, it was late at night and there was a freezing rain. Given the time of night and the weather conditions, the Court concluded a reasonable person would have anticipated and foreseen that there could be ice on the sidewalks. Therefore, the Court concluded that the condition was open and obvious. The plaintiff claimed that the sidewalk was unreasonably dangerous because it was not level and because there was no lighting due to a broken porch light. The Court of Appeals rejected this argument. Dark nights and uneven sidewalks are encountered on a daily basis, and the decedent was certainly aware that it was dark outside late at night. The plaintiff also noted that the sidewalk and the broken porch light violated applicable building codes. The Court of Appeals noted that even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous. It found that the condition was open and obvious and that there were no special aspects that rendered the condition unreasonably dangerous.

**g) Code Issues**

- *O'Donnell v Garasic*, 259 Mich App 569 (2003), overruled on other grounds by *Mullen v. Zrfas*, 480 Mich 589 (2007). The plaintiff and her friends rented a resort cabin from the defendants. The cabin included a loft that connected to the main floor by a narrow set of stairs, but the stairs left a narrow gap in between the stairs and a guardrail on the top of the loft. The loft also had a low ceiling preventing someone from standing up. The plaintiff fell down the stairs when attempting to walk down them in the dark. *O'Donnell*, at 259 Mich App at 271-272. The plaintiff argued that the stairs, stairway, and loft presented an unreasonable risk of harm because they were not in compliance with building codes. The Court of appeals noted that a violation of a building code may be some evidence of negligence, but not all building code violations will support a special aspect factor analysis in avoidance of the open and obvious dangerous doctrine. *Id.* At 578. The Court concluded that the critical question is whether there is something unusual about the alleged defect that gives rise to an unreasonable risk of harm. Therefore, for a building code to create a question of fact under the open and obvious doctrine, it would still have to meet the special aspect test articulated in *Lugo*. *Id.* At 578-579.
- *Kennedy v Great Atlantic & Pacific Tea Co.*, 274 Mich App 710 (2007), the plaintiff slipped and fell on a crushed grape while shopping at the defendants' grocery store. *Id.* at 712. The plaintiff argued that the open and obvious danger doctrine could not bar recovery because the defendants breached a separate and independent duty created by the International Property Maintenance Code. The court noted that the application of a code does not remove a case from the open and obvious doctrine. Even when a hazardous condition results from a code violation, the critical inquiry is whether there is something unusual about the alleged hazard that gives rise to a reasonable risk of harm. *Id.* at 720. The court noted that there was nothing unusual about a crushed grape. The plaintiff also argued that the defendants breached a separate and distinct duty imposed by the Michigan Occupational Safety and Health Act (MIOSHA) in that the grape constituted an unsafe work place. *Id.* at 720-721. The Court of Appeals rejected this noting that MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees. Therefore, they do not create duties that run in favor of third parties. MIOSHA cannot be used to impose a statutory duty in favor of third parties in negligence context. Therefore, the Court concluded that there was no separate statutory duty towards the plaintiff that could give rise to a cause of action separate from the open and obvious doctrine. *Id.* at 721.
- *Gorges v. Kenna*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2009 (Docket No. 280665), the plaintiff sued on behalf of his decedent wife who slipped and fell on an ice covered sidewalk. The plaintiff argued that

the crack in a sidewalk and the broken porch light violated applicable building codes. The Court of Appeals noted that, even in cases of code violations the relevant inquiry remains whether any special aspect renders the otherwise open and obvious condition unreasonably dangerous. As explained above, the court found the condition open and obvious with no special aspects.

#### **h) Miscellaneous**

- *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004), (published), invitee, jury verdict in favor of plaintiff, visibly intoxicated patron who slipped and fell in parking lot of bar, reversed. Open and obvious doctrine applies regardless of whether cause of action is a dramshop act claim. The Court also emphasized that an objective standard was to be applied in determining whether any special aspects existed under *Lugo*.
- *Valinski v Little Mexico Restaurant*, unpublished opinion per curiam of the Court of Appeals, decided September 24, 2002 (Docket No. 233446), invitee, summary disposition in favor of the defendant affirmed where plaintiff burned his hand on a hot skillet. Serving food on a hot skillet can be considered an activity or condition on land, or a form of a product, and thus subject to the open and obvious argument.
- *Sanders v Bellinger*, unpublished opinion per curiam of the Court of Appeals, decided February 12, 2004 (Docket No. 245825), summary disposition in favor of the defendant affirmed where plaintiff, who was rendered a paraplegic while diving headfirst into a shallow pool, knew the dangers associated with diving headfirst into a pool.
- *Jacob v Continental Lanes, Inc*, unpublished opinion per curiam of the Court of Appeals, decided March 4, 2004 (Docket No. 244506), invitee, summary disposition in favor of the defendant affirmed where plaintiff collided with an employee of defendant in an aisle. The Court determined that this was actually a premises liability action, and that defendant's employee **was clearly seen by plaintiff**, thus constituting an open and obvious danger.
- *Matuszewski v Central Michigan Inns, Inc*, unpublished opinion per curiam of the Court of Appeals, decided August 16, 2005 (Docket No. 253252), invitee, summary disposition in favor of the defendant reversed where plaintiff was sitting on a planter, and the planter fell over on her leg causing serious injuries. The trial court found that the planter was an open and obvious condition. However, the Court of Appeals reversed, ordering additional testimony on whether the possibility of the planter tipping over was actually an open and obvious condition.

- *Kiran v Great Atlantic and Pacific Tea Company*, 274 Mich App 710 ( 2007), the plaintiff slipped and fell on crushed grapes while shopping at the defendant's grocery store. Despite the grapes being brown and the grocery store floor being beige, the plaintiff admitted that the grapes were visible if you looked down. Therefore, the Court of Appeals concluded that the grapes were open and obvious. *Id.* at 713-714. The plaintiff argued that he could not be expected to see the crushed grape in the supermarket given all of the distractions. The Court of Appeals concluded that mere distractions are not sufficient to prevent the application of the open and obvious doctrine. The condition must either be effectively unavoidable or unreasonably dangerous. The Court concluded that the grapes were neither.
- *Richardson v Rockwood Center*, 275 Mich App 244 (2007), the plaintiff, an invitee, was leaving a store located in defendant's shopping center. He was struck by a vehicle traveling in the parking lot traffic lane. *Id.* at 245. The defendant moved for summary disposition based on the open and obvious doctrine. The trial court denied summary disposition. The Court of Appeals reversed. The Court concluded that the hazards posed to pedestrians by motor vehicles moving through parking lots, getting into parking spaces and backing out of spaces is open and obvious on the most casual of inspections by the average pedestrian. The lack of signs or other traffic control devices and/or markings is a common condition that is not unique. Therefore, the Court concluded that it does not amount to a special aspect. Therefore, the Court of Appeals determined that summary disposition was appropriate.
- *Jim Koski v Shupe*, \_\_\_ Mich App \_\_\_ (Docket No. 279580, 2008) (published), the defendant was loading seven hundred pound straw bails onto a truck for plaintiff when one of the bails became stuck. Apparently the bail was frozen to other bails leaving it hanging in the air with nothing supporting it. Defendant left the bail like this and continued to load the truck. The bail eventually fell and crushed the plaintiff. The trial court denied summary disposition to defendant and the jury returned a verdict for plaintiff. The Court of Appeals affirmed noting that even if the bail was open and obvious, a special aspect existed. The straw bail that killed the plaintiff was extremely heavy and hanging in the high air in a position where, if it became dislodged, it would fall with sufficient speed to cause significant damage. Given the inevitability of the bail collapsing, its height, and its weight, there was sufficient evidence to constitute a special aspect because of the foreseeable severity of harm it could cause.

#### **D. COMPARATIVE NEGLIGENCE OF THE PLAINTIFF**

In *Placek v City of Sterling Heights*, 405 Mich 638 (1979), the Michigan Supreme Court adopted a pure comparative negligence system. Under that system, a plaintiff's damages are reduced in proportion to the percentage of the plaintiff's own negligence in causing the injury.

HARVEY KRUSE, P.C.

*Jennings v Southwood*, 446 Mich 125, 130 (1994); *Zalut v Anderson & Associates, Inc*, 186 Mich App 229, 234 (1990). The percentage of plaintiff's own negligence in causing his or her injury is a question of fact to be determined by the jury. The Court reduces the jury award by the percentage of plaintiff's negligence in causing the injury.

## **E. APPLICABILITY OF OPEN AND OBVIOUS DEFENSE IF A STATUTORY DUTY APPLIES**

Two examples of statutory duties are a lessor's duty to maintain a leased premises in "reasonable repair" and a governmental entity's duty to maintain and repair under the highway exception to governmental immunity. The application of the open and obvious defense to each of these statutory duties will be presented below.

### **1. Lessor's Duty to Maintain Premises in "Reasonable Repair"**

MCL 554.139(1) sets forth the statutory duty, and states:

In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

Previously, there has been a conflict in the Michigan Court of Appeals regarding whether an open and obvious defense could apply to the statutory duty imposed by MCL 554.139(1). The Michigan Supreme Court ended this dispute in *Allison v AEW Management, LLP*, 481 Mich 419 (2008). In *Allison*, the plaintiff fractured his ankle when he fell while walking across the snow-covered parking lot at his apartment complex. The snow had hidden an accumulation of ice. *Id.* at 423. The plaintiff sued the company operating his apartment complex for negligence and breach of the covenant to maintain and repair the premises, MCL 554.139(1). The trial court granted defendant summary disposition, concluding that the danger was open and obvious. The Court of Appeals initially affirmed on the basis of existing published precedent from the Court of Appeals stating that the open and obvious doctrine applied to MCL 554.139(1), but it later granted

reconsideration and found that the open and obvious doctrine did not apply. The Michigan Supreme Court granted leave because of this conflict. *Allison*, 481 Mich at 423-424.

The Michigan Supreme Court explained that the protections offered by MCL 554.139 were contractual in nature.

MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law. The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy. [*Allison*, 481 Mich at 425-426 (emphasis original).]

That is, the plaintiff could not make a negligence claim based on breaching the statute. Instead, the plaintiff would merely be allowed to bring a claim for breach of contract against the landlord and would be limited to contractual recoveries.

The Supreme Court noted that the statute did not define “common area.” Therefore, the Court gave the phrase its common understanding, “those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants.” *Id.* at 427. The Court concluded that the parking lot within the residential property met this definition. *Id.* at 428.

Because the parking lot was a common area, under MCL 554.139(1)(a), the defendant had a contractual duty keep the parking lot “fit for the use intended by the parties.” The Supreme Court noted that the intended purpose of the parking lot is to allow the parking of cars. Therefore, it concluded that MCL 554.139(1)(a) is satisfied as long as the entrance to and exit from the lot is clear, vehicles can access the parking spaces, and the tenant has reasonable access to their parked vehicles. *Allison*, 481 Mich at 429. The Court concluded that the two inches of snow at issue in the case and the ice underneath the snow was not sufficient to prevent the intended use of the parking lot. The Court implied that the amount of snow necessary would have to be very significant:

While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtained in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most assessable condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere

inconvenience of access, or the need to remove snow and ice from parked cars will not defeat the characterization of a lot as being fit for its intended purposes. [*Allison*, 481 Mich at 430.]

The Court further noted the limitations of the requirements placed on the lessor. A tenant using the common area for purpose other than that for which the area is intended is not protected by the covenant for fitness. *Id.* at 431. The Court also emphasized that a non-tenant could never recover under the covenant for fitness because a lessor has no contractual relationship with a non-tenant. *Id.*

The Supreme Court next turned to the lessor's duty under MCL 554.139(1)(b). The Court noted that the Legislature used different language in the two sections of the provision. Subsection (a) applied to "the premises and all common areas," while subsection (b) applies only to "the premises." The Court concluded that this difference must mean that common areas are not covered by MCL 554.139(1)(b). Any other conclusion would not give meaning to the specific mention of common areas in subsection (a). *Allison*, 481 Mich at 431-432. Beyond MCL 554.139(1)(b) not applying to common areas, the Court also noted that it would not apply to the removal of snow and ice. The Court concluded that the phrase reasonable repair merely meant that the landlord must restore and amend damage to the property. The accumulation of snow and ice does not constitute a defect in the property. MCL 554.139(1)(b) would only apply if the snow and ice damaged the premises. *Allison*, 481 Mich 433-434. "A lessor has no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice." *Allison*, 481 Mich at 435.

Thus, MCL 554.139 is not covered by an open and obvious defense. But the plaintiff is limited to a contract cause of action. And the plaintiff can only prevail when common areas are not "fit for their intended use." The Supreme Court indicated that it would take significant snow and ice to prevent the intended use.

## **2. Governmental Entity's Duty to Maintain and Repair Under the Highway Exception to Governmental Immunity**

MCL 691.1402(1) states "[e]xcept as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." However, it is also important to note MCL 691.1402a(1)(section 2a), which states:

(1) Except as otherwise provided by this section, a municipal corporation has **no duty to repair or maintain**, and is not liable for injuries arising from, **a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other**

HARVEY KRUSE, P.C.

**installation.** This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage. (emphasis added).

Thus, the duty established in MCL 691.1402(1) does not extend to sidewalks, crosswalks, etc. **unless** the thirty-day notice requirement of MCL 691.1402(1)(a) has been satisfied. Where the statutory duty does apply, the open and obvious defense will not absolve the municipality of liability. *Jones v Enertel, Inc.*, 467 Mich 266, 269 (2002). But the **natural accumulation** of snow and ice on a sidewalk would not constitute a “defect” covered by MCL 691.1402. *Haliw v Sterling Heights*, 464 Mich 297, 308-309 (2001).

### **III. LIABILITY ARISING FROM THE OWNERSHIP AND OPERATION OF BUSINESS**

#### **A. STOREKEEPER'S LIABILITY**

In Michigan, a shopkeeper's duty to provide reasonably safe aisles for its customers is well established:

It is the duty of a storekeeper to provide reasonably safe aisles for customers and is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, were known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it. [*Berryman v K-Mart*, 193 Mich App 88, 92 (1992); (further citation omitted) see also: *Hampton v Waste Management of Michigan, Inc.*, 236 Mich App 598, 604 (1999).]

HARVEY KRUSE, P.C.

## 1. Abrogation of the Alleged “Distracted Customer” Exception to the Open and Obvious Defense

Generally, a storekeeper is entitled to raise the open and obvious defense in response to any injuries that may occur on their premises. However, arguments have been raised that there exists a “distracted customer” exception to the open and obvious defense. The argument essentially claims that if a plaintiff was “distracted” by something a premises possessor had on their property, and the plaintiff was injured when they failed to notice an open and obvious danger while distracted, then the open and obvious defense would be inapplicable. We now know that there is no such exception.

The theory was allegedly first raised in a Louisiana Court of Appeals decision, *Provost v Great Atlantic & Pacific Tea Co*, La App 3 Cir, 154 So2d 597 (1963). In *Provost*, the Court stated in dicta<sup>4</sup> that a defendant’s self-service-type store has merchandise displayed on its counters or shelves so the customers could inspect the merchandise as they walked in the aisles or passageways of the store. It is notable, however, that the open and obvious defense was not even an issue in the *Provost* case. Thus, this case, which was not precedentially binding in Michigan in any event, did not even create an exception to the open and obvious defense in Louisiana.

The distracted customer exception was conceptually approved by the Michigan Supreme Court in *Jaworski v Great Scott Supermarkets*, 403 Mich 689 (1978) and incorporated into former Standard Jury Instruction SJI2d 19.04 (M Civ JI 19.04). But it was subsequently rejected by subsequent Courts noting that the concept was inconsistent with the Supreme Court’s explanation of the open and obvious doctrine in *Lugo*.

*Miller v Bass Pro Shop Outdoor World*, unpublished opinion per curiam of the Court of Appeals, decided December 29, 2005 (Docket No. 263364) appears to lay to rest any claims that there is a “distracted customer” exception to the open and obvious defense. In *Miller*, Plaintiff was injured when she tripped over the base of a display sign while walking down the main aisle in defendant’s store. Plaintiff claimed that she did not notice the display sign because she was “distracted” by the store’s display of taxidermy mounts. The trial court ordered summary disposition in favor of defendant and plaintiff appealed. On appeal, the Court of Appeals affirmed, expressly stating, “[w]e further reject plaintiff’s contention that there presently exists a ‘distracted customer’ exception to the open and obvious doctrine. The Michigan Supreme Court held in *Lugo v Ameritech Corp* that the special aspects analysis is the sole exception to the open and obvious doctrine.” *Supra* at p. 3 (citations omitted). The Court further rejected plaintiff’s argument that the “distraction” created by the taxidermy mounts was a special aspect that made the store’s main aisle unreasonably dangerous. *Supra* at p. 2.

---

<sup>4</sup> The term “dicta” refers **not** to the actual holding of the case, but merely a view expressed by the court in an opinion on a point not necessarily arising from or involved in the case or necessary for determining the rights of the parties involved.

In *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710 (2007), the plaintiff slipped and fell on grapes on the floor of a shopping market. The plaintiff indicated that he was distracted from seeing the grapes by the various merchandise and displays. The plaintiff attempted to rely on *Jaworski* to make his argument. The Court of Appeals rejected this argument. The Court of Appeals noted that *Jaworski* was no longer good law because it dealt with the doctrine of contributory negligence, which is now repudiated. The Court of Appeals also concluded that every day distractions simply are not enough to overcome the open and obvious doctrine:

We readily concede that shoppers in modern grocery stores are often distracted by displays and merchandise. But mere distractions are not sufficient to prevent application of the open and obvious danger doctrine. *Lugo*, supra at 522, 629 NW2d 384. Instead to prevent application of the open and obvious danger doctrine to a typical and obvious condition, the condition must be “effectively unavoidable” or “unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.” *Id.* at 518, 629 NW2d 384. “However, typical open and obvious dangers ... do not give rise to the special aspects.” *Id.* at 520, 629 NW2d 384.

Like the plaintiff in the present case, who argues that he was distracted by the display and merchandise in defendant’s supermarket, the plaintiff in *Lugo* argued that she did not notice or observe a potentially hazardous pothole because she was “distract[ed]” by moving vehicles in the parking lot. *Id.* at 522, 629 NW2d 384. The *Lugo* Court ruled that the relevant inquiry was not merely whether the plaintiff was distracted, but whether there was anything “unusual” about the plaintiff’s distraction that would preclude application of the open and obvious danger doctrine. [*Kennedy*, 274 Mich App at 716-717.]

The Court of Appeals concluded that it would not extend *Jaworski* to create a broad rule that all supermarket shoppers are distracted by supermarket displays and merchandise. The Court saw no reason to create a special standard of care for supermarket patrons. *Kennedy*, 274 Mich App at 719.

Jury instruction M Civ JI 19.04 was deleted April 1, 2004, because it was believed it did not accurately state the law.

## **B. INJURIES CAUSED BY THE CRIMINAL ACTS OF THIRD PARTIES**

Generally, landowners have no duty to protect a trespasser, licensee, or invitee from the criminal acts of third parties, as long as the landowner does not actively create or maintain the

HARVEY KRUSE, P.C.

criminal activity or fail to act reasonably to end criminal activity that takes place in his presence. *Ellsworth v Highland Lakes*, 198 Mich App 55, 63-64 (1993), *lv den* 443 Mich 875. Specific duties and rules of liability are discussed below.

## 1. Business Owners

Courts have refrained from imposing liability upon business owners for injuries sustained by invitees from criminal acts of third parties. Imposing such liability would all but judicially mandate that business owners provide police protection. Accordingly, courts have consistently dismissed claims against business owners for injuries sustained as a result of the criminal acts of third parties. See *Scott v Harper Recreation, Inc*, 444 Mich 441 (1994); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495 (1988); *Krass v Tri-County Sec, Inc*, 233 Mich App 661 (1999); *Douglas v Elba, Inc*, 184 Mich App 160 (1990), *lv den* 437 Mich 987 (1991).

In *Williams*, the plaintiff was a customer who was shot during a robbery at the defendant's store. The plaintiff brought suit alleging that the defendant had breached its duty of reasonable care by failing to supply armed, visible security guards. The trial court entered a directed verdict for defendant, holding that the defendant had no duty to protect the plaintiff from the unforeseeable acts of a third party. The Court of Appeals affirmed. In affirming the dismissal of the plaintiff's action, the Supreme Court stated:

[A] merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties. We decline to extend defendant's duty that far in light of the degree of control in a merchant's relationship with invitees, the nature of harm involved, and the public interest in imposing such a duty. *Williams*, 429 Mich at 501.

In *Scott*, the defendant advertised that it provided lighted and guarded parking in its nightclub parking lot. The plaintiff was shot by an unidentified gunman in the parking lot. Thereafter, the plaintiff brought suit against the defendant alleging that defendant had voluntarily assumed the duty to protect him from the assault and then breached that duty. The circuit court granted defendant's motion for summary disposition on the assumed-duty count. The Court of Appeals reversed and remanded the case, holding that the case was distinguishable from *Williams*, because the defendant had voluntarily assumed the duty to provide security. *Scott*, 192 Mich App 137, 142-143 (1991). However, the Michigan Supreme Court reversed the Court of Appeals, and affirmed the dismissal of the assumed-duty count, holding:

The central holding of *Williams* is that merchants are ordinarily not responsible for the criminal acts of third persons. The present suit is an attempt to circumvent that holding by invoking the principle that a person can be held liable for improperly discharging a voluntarily

undertaken function. However, the rule of *Williams* remains in force, even where a merchant voluntarily takes safety precautions. Suit may not be maintained on the theory that the safety measures are less effective than they could or should have been. *Scott*, 444 Mich at 452.

As discussed above, business owners are generally not responsible for the criminal acts of third persons. However, a business owner does have a duty to exercise “reasonable care” for the protection of business invitees. The Supreme Court, in *MacDonald v PKT, Inc*, 464 Mich 322, 336 (2001), noted that a business owner’s duty to exercise “reasonable care” for the protection of business invitees is limited to making “reasonable efforts to contact the police.”

In *MacDonald*, the plaintiff attended a concert at the outdoor amphitheater Pine Knob. Several concert goers began throwing sod ripped from the hill of the amphitheater. Various performing bands announced and asked that the sod throwing stop. Several people were ejected after the first sod throwing incident. The plaintiff was injured in a second sod throwing incident when she fell while attempting to avoid being struck by a piece of sod. Record evidence showed that there were previous sod throwing incidents at previous concerts. *Id.* at 326-327. The Supreme Court concluded that a premises owner’s duty is limited to responding reasonably to a situation occurring on the premises because, as a matter of public policy, because inviters should not be expected to assume that others will disobey the law. This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only the present situation on the premises, not any past incidents that creates a duty to respond. *Id.* at 335. The court made clear that, as a matter of law, fulfilling the duty to respond required only a merchant to make reasonable efforts to contact the police. *Id.* at 336.

The Michigan Court of Appeals recently dealt with a tangentially related issue in *Tosa v Yono*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 274301). Tosa was a business invitee leaving the building owned by defendant Yono. Tosa was confronted by a stray dog in the business parking lot. When Tosa turned to flee from the dog, he tripped on a crack in the parking lot. Tosa brought an ordinary negligence claim stating that Yono owed him a duty to protect him from the stray dog. *Id.* at slip op p. 1-2. The Court of Appeals concluded that the claim was actually a premises liability claim centered on the crack in the parking lot. The Court noted that the dog did not amount to a special aspect or make the crack unavoidable. Tosa could have gotten into his vehicle or simply taken a different route when fleeing from the dog. Further, because the plaintiff had heard of stray dogs being in the area from others, he should have anticipated the dog. This also meant that the dog was not an unusual condition as would be required under *Lugo*. *Tosa*, slip op p. 4-5. The Court further explained that a stray dog was equivalent to a criminal on the property. Both are undesirable and both can be dangerous, but the conduct of both is irrational and unpredictable. The landowner has no duty to control the incidents of stray dogs roaming onto his property, even in an area where stray dogs are known to be common occurrences.

HARVEY KRUSE, P.C.

Yono was not required to provide a safer environment on his premises than the rest of the community at large. Therefore, Yono had no duty to install a fence to protect Tosa from stray dogs confronting him in the parking lot. *Tosa*, slip op p. 5-6.

In *Hodges v ECS Partnership*, unpublished opinion in per curiam of the Court of Appeals issued January 8, 2009 (Docket No. 280630), the plaintiff was a mentally incapacitated adult invitee at the defendant's McDonald's restaurant. While the plaintiff was waiting for his food, one of the defendant's employees began cursing at the plaintiff and eventually told him to "shut up" and threatened to kick the plaintiff's ass. The plaintiff informed a supervisor, who attempted to calm the employee, but the employee attacked the plaintiff without any provocation. The supervisor failed to follow the defendant's policy of moving the upset employee to the back or sending him home. *Id.* at slip op p. 2. Despite this and despite the fact that there were specific verbal threats made to the customer, the Court of Appeals found that summary disposition was appropriate for the defendant. The Court noted that a threat to kick someone's ass is often simply a way to vent anger or used as a warning, rather than as an expression of actual intent to fight. Therefore, the Court concluded that the defendant would not know that this was an imminent threat of an attack. The threat did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. *Id.* at slip op p. 2. The Court also reasoned that even if this was sufficient notice, the defendant's supervisor acted reasonably to the situation by calling the police and intervening on the plaintiff's behalf once the attack began. The Court concluded that this meant that the defendant was not negligent even if a duty existed. *Id.* at slip op p. 2.

## 2. Special Relationships

Although the courts have not imposed a duty on business owners to protect invitees from the criminal acts of third parties, such a duty has been imposed in certain situations upon owners and possessors that have a special relationship with their invitees. The basis for finding a special relationship is control. One person entrusts himself to the control and protection of another. He has lost the ability to protect himself. *Williams*, 429 Mich at 499.

- (a) **Landlords:** A landlord has a duty to protect tenants from foreseeable criminal acts of third parties in the common areas of the landlord's premises. *Stanley v Town Square Cooperative*, 203 Mich App 143, 149 (1993); *Holland v Liedel*, 197 Mich App 60, 62-63, *lv den* 442 Mich 937 (1992). Whether the risk of harm from third-party criminal activity is foreseeable in a particular case is a question of fact for the jury. *Holland*, at 63.

In *Stanley*, the plaintiff was visiting a friend who lived in the defendant's cooperative. After leaving her car, she was confronted by a man with a gun, robbed, and raped. *Stanley*, 203 Mich App at 146. The Court of Appeals noted that landlords generally have a duty to protect their invitees from the foreseeable

criminal acts of third parties in the common areas of the landlord's premises, but, this duty is not absolute. *Id.* at 149-150. The court noted that the landlord does not owe a duty to invitees to make open parking lots safer than the adjacent public streets. It concluded that the possibility of rape was an obvious and apparent risk throughout the Detroit metropolitan area. Therefore, the defendants had no duty to protect the plaintiff in that case.

In *Holland*, the plaintiff alleged that she was abducted from the parking lot of an apartment building owned by the defendant. The plaintiff rented an apartment and a parking space from the defendant. *Holland*, 197 Mich App at 61. The Court of Appeals noted that plaintiff presented evidence that the doors of the parking garage were defective and that the defendant knew of repeated problems with the doors. Plaintiff further presented evidence that, although defendant installed a camera system for security, the employees responsible for watching the camera monitors were often too busy with other duties to actually watch. *Id.* at 63. The court concluded that this evidence raised genuine issues of material facts because the plaintiff's allegations of negligence were not limited to the question of whether the defendant had to provide security guards. The Court of Appeals also noted a question of fact because once a defendant assumes a voluntary duty to provide security, a cause of action could exist if he was negligent in discharging that voluntarily assumed duty. *Id.* at 64-65.

- (b) **Doctors:** The Court of Appeals addressed the special relationship between patients and doctors and assaults by a third party in *Doe v Shapiro*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2008 (Docket Nos. 273950, 273962). In that case, the plaintiff alleged that she was assaulted by an anesthesiologist as she was coming to after surgery. Plaintiff sued a variety of individuals, including the landowner and the doctor that leased the premises. The Court of Appeals concluded that merely leasing office space to a doctor was insufficient to create a special relationship with the plaintiff. Therefore, the Court concluded that summary disposition was appropriate for the landlord. *Id.* at slip op p. 8. On the other hand, the Court noted that a special relationship did exist between the doctor leasing the premises because he served as the plaintiff's doctor. But the Court stated that the special relationship merely created a duty to guard against readily identifiable foreseeable danger. Actual or constructive knowledge is a critical factor in determining whether a duty existed. The Court of Appeals found that the plaintiff's case failed on this point. The plaintiff failed to demonstrate that the doctor or his institute had actual or constructive knowledge that the anesthesiologist might sexually assault a patient. *Id.* at slip op p.9.
- (c) **Employers:** Michigan courts have recognized the possibilities of a special relationship between an employer and an employee. *Graves v Warner Bros*, 253

Mich App 486, 494 (2002). In *Brown v Brown*, 478 Mich 545 (2007) the plaintiff was raped by a coworker. The rapist had made repeated crude comments of a sexual nature to the plaintiff before the rape. The defendant took no action despite knowledge of this pattern of crude comments. *Id.* at 548-549. This Supreme Court held that the criminal acts were not foreseeable despite the pattern of making crude sexual comments to the plaintiff. “[A]n employer can assume that its employees will obey our criminal laws. Therefore, they cannot reasonably anticipate that an employee’s lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of a eminent risk of harm to a specific victim.” *Id.* at 555. The Court noted that the rapist had not specifically threatened to rape the plaintiff. Therefore, the rape was not foreseeable. *Id.* at 555-556.

- (d) **Teachers/Student:** The Court of Appeals has recognized a special relationship between a teacher and a student. *Wilson v Detroit School of Industrial Arts*, unpublished opinion per curiam of the Court of Appeals, issued May 9, 2006 (Docket No. 265508). But the duty is contemporaneous with the teacher’s presence at school. *Id.* at slip op p. 6. In *Wilson*, the plaintiff was sexually assaulted by a teacher during school hours. She sued various defendants including the school, the principal, the vice principal, and the school management services. The Court of Appeals concluded that the plaintiff did not sufficiently establish a special relationship because she did not demonstrate that the assault was foreseeable. The existence of a duty depends in part on whether it was foreseeable that the actors conduct may create a risk of harm to the victim. *Id.* at slip op p. 6. The Court noted that plaintiff failed to satisfy her burden because she presented no documentary evidence to indicate that defendants either knew or should have known that the man that assaulted her might sexually assault a student. The Court noted that the defendants ran a background check on the teacher that only demonstrated one non-sexual based felony arrest. *Id.* Therefore, summary disposition was appropriate. *Id.* The Court of Appeals reached the opposite conclusion in *Ewards v Oakland Livingston Human Services Agency*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2006 (Docket No. 263738). In that case, plaintiff’s daughter was attending a head start program. The daughter was sexually assaulted by another student when the head teacher left the room for a period. *Id.* at slip op p. 1. Plaintiff argued that the individual defendants owed her daughter a duty to protect her from the conduct of the boy. The trial court granted the defendant summary disposition. The Court of Appeals reversed. The Court recognized that a special relationship may exist between a school agent or employee and a student, which would impose a duty to aide or protect the student. *Id.* at slip op p. 4. The Court noted that the defendants had known of the boy’s behavioral problems, which included violent behavior to other children. The defendants had known of this

behavior and had instituted a policy that one of the assistant directors of the head start program had to be in the classroom with the boy at all times. *Id.* The Court noted that it did not matter that the specific acts known to the defendants were not sexual in nature. A foreseeable consequence of the failure to provide supervision to a child with violent propensities is that child might engage in violent or inappropriate behavior with other children. Although the exact mechanism of the injury that the plaintiff's daughter received may not have been foreseeable, the Court concluded that it was sufficient that it was foreseeable that the plaintiff's daughter might be injured by the boy if he was not properly supervised. *Id.* at slip op p. 5.

- (e) **Psychiatrist:** The Michigan Legislature had created a statute dealing with the duties of a mental health professional towards a third party. MCL 330.1946 indicates that if a patient communicates to a mental health professional a threat of physical violence against a reasonably identifiable third person and the patient has the apparent intent and ability to carry out the threat in the foreseeable future, a mental health professional has a duty to hospitalize the patient or make reasonable attempts to communicate the threat to the third person. The statute indicates that "except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in the subsection or to protect the third person." The Legislature intended to modify or abrogate any other conceivable duty that a mental health professional may have to protect others in enacting the statute. *Dawe v Dr. Reuvan Bar-Levav & Assoc PC*, 279 Mich App 552 (2008).
  
- (f) **Nursing Homes:** In *Hall v Cadillac Nursing Home*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2000 (Docket No. 209010), the Court of Appeals concluded that a special relationship could exist in a nursing home case because the defendants assumed care of the decedent knowing that he suffered from dementia, paranoia, and other disorders. The Court of Appeals reversed summary disposition to the nursing home finding that a question of fact existed regarding the special relationship between the nursing home and the patient. The patient was killed by a third party when he left the nursing home unsupervised, drank alcohol, became disoriented, and attacked the third party. Defendants had actual notice of the decedent's mental illness, confusion, seizure disorder, alcoholic dementia, and occasional aggressive and violent conduct towards others. Defendants were aware that decedent often attempted to leave the premises without authorization in order to buy alcohol, which he was not allowed to drink due to his medication. The Court concluded that under these facts, there was evidence supporting that decedent was not killed simply as a victim of random and unforeseeable criminal conduct unrelated to the defendant's duty of care. The evidence suggested that the decedent's foreseeable behavior provoked the assault

that caused his death. Therefore, the Court of Appeals concluded that the Circuit Court erred in determining that reasonable minds could not defer regarding whether the defendant's actions were a proximate cause of the decedent's death. *Id.* at slip op p. 8.

Of course, nursing homes have become a highly regulated area. The Public Health Code has a special section dealing with nursing homes, MCL 333.2170 *et seq.*

- (g) **Gun Owners:** The Court of Appeals has imposed liability upon possessors of land who, with knowledge that there have been in the past, and are presently, young children on the property accompanying business visitors, nevertheless failed to take steps to insure that in the course of the children's wandering the children do not come into possession of loaded weapons. *Gilbert v. Sabon*, 76 Mich App 137, 148 (1977). The Court of Appeals has also concluded that a question of fact may exist whether a gun owner was negligent in seeing a third party possess the gun owner's gun and not stopping its use. *Riste v Helton*, 139 Mich App 404, 410-411 (1984). But the Court has concluded that a landlord does not owe a duty to a tenant to prevent convicted felons living in the residence from obtaining firearms. The Court noted that an individual's general knowledge that a person has served a prison sentence is not sufficient to make it reasonably foreseeable that the person will appropriate and then misuse a firearm if its location is known. *Lelito v Monroe*, 273 Mich App 416, 421 (2006).
- (h) **Innkeepers:** Michigan law generally recognizes that an innkeeper and their patrons have a special relationship. *Kendrick v Ritz Carlton Hotel Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 256696). But actual or constructive knowledge on the part of the defendant of some danger to protect against is typically a critical factor in determining whether this special relationship exists. *Id.* at slip op p. 4. In *Kendrick*, the plaintiff was assaulted by an employee of the innkeeper who was later determined to be a registered sex offender. Despite the fact that the employee was a registered sex offender, the Court still found no special relationship duty because the defendant actually had no knowledge of the prior convictions. The Court stated that the mere fact that the sexual offender registry is a public record does not create a legal duty to keep abreast of such records. *Id.* at slip op p. 4. Moreover, the mere fact that a person has a criminal record does not in and of itself establish the fact that the person had a violent or vicious nature so that an employer would be negligent in hiring him to meet the public. *Id.* at slip op p. 5. The Court also noted that the employee had not used the key to enter the hotel room; he merely knocked, and plaintiff let him in. Under the circumstances, the Court concluded that the plaintiff and not the defendant was in the best position to guard against the potential harm. Thus, entrustment to the control and protection of another and the corresponding

loss of the ability to protect oneself which is the basis for finding a special relationship between an innkeeper and a guest was not the basis of the alleged harm in this case. *Id.* at slip op p.5.

#### **IV. LIABILITY FOR TEMPORARY CONDITIONS - ICE & SNOW**

A large number of premises liability suits involve claims relating to slips and falls on natural accumulations of ice and snow. As with all premises liability cases, the duty owed to a particular person is dependant upon their status as a trespasser, licensee, or an invitee.

##### **A. TRESPASSERS**

Generally, landowners and possessors owe no duty to trespassers for injuries caused by the natural accumulation of ice and snow.

##### **B. LICENSEES**

Generally, the protection of licensees would be subject to the open and obvious doctrine discussed above. But there is further case law regarding the natural accumulation of ice and snow. Landowners owe no duty to pedestrians to clear public sidewalks of the natural accumulation of ice and snow. *Taylor v. Saxton*, 133 Mich App 302, 306, (1984). Also, local ordinances to clear snow and ice create a public rather than a private duty. *Id.* In *Taylor*, the sidewalks adjacent to the defendant's property became covered with 10 to 12 inches of snow and ice. This forced the plaintiff and his daughter to walk in the street along a very busy highway. *Id.* at 304-305. A city ordinance required that the occupant of property keep the abutting sidewalks clear of ice and snow. The plaintiff argued that this ordinance created a special cause of action under which the plaintiff could sue the land owner for failing to clear the sidewalk. The Court of Appeals rejected this contention. The court concluded that the ordinance merely created a public duty for which there is no private right of action. *Id.* at 306. The Supreme Court explained the reasoning behind this in *Levendoski v. Geisenhaver*, 375 Mich 225 (1965). The Court noted that the primary responsibility for maintenance and control of a sidewalk falls to the city. The city is also generally responsible for the liability to those injured by defective sidewalks. In the absence of any express provision imposing liability on the property owner, the court will assume that no such liability exists. *Id.* at 228. Instead, the duty imposed by the statute will be to the city, which has the primary responsibility for the maintenance and control of the sidewalks. *Id.*

The natural accumulation doctrine applies only to public property and sidewalks. It does not apply to private property. *Altairi v Alhaj*, 235 Mich App 626, 633 (1999). In *Altairi*, the plaintiff slipped and fell on snow covered steps leaving the defendant's private property. The plaintiff alleged that the defendant breached his duty to the plaintiff as a licensee by not warning him about the ice and snow. The defendant argued that he was insulated from liability by the natural accumulation doctrine. *Id.* at 628. The Court noted the history of the doctrine and concluded that

the proposition only applies to public property because it is simply unreasonable to hold a municipality liable for injuries stemming from the natural accumulation of snow and ice because the municipality does not have the means to ensure that every walk is clear at all times. *Id.* at 636. The Court concluded that the same reasoning does not apply to private property owners. Therefore, the Court found that the natural accumulation doctrine does not apply to the licensor or licensee context when the injury occurs on the possessor's private property. *Id.* at 638. But the Court of Appeals noted that summary disposition was still appropriate because nothing in the record suggested that the defendant knew before the plaintiff's accident that there was ice under the snow. *Id.* at 640-641.

There are also two exceptions to the natural accumulation rule.

(1) **INCREASED HAZARD:** Liability may arise if the landowner has taken affirmative action to alter the natural accumulation and, in doing so, increased the hazard. *Weider v Goldsmith*, 353 Mich 339, 340-341 (1958); *Morrow v Boldt*, 203 Mich App 324, 327 (1994); *Zielinski v Szokola*, 167 Mich App 611, 615 (1988), *lv den* 432 Mich 859 (1989). To establish liability under this exception, a plaintiff must prove that the defendant's act of removing the ice and snow introduced a new element of danger not previously present. *Zielinski, supra*. For example, in *Hampton v Master Products, Inc.*, 84 Mich App 767 (1978), the defendant was deemed liable for injuries suffered by a pedestrian who slipped and fell while attempting to walk over a snowdrift that had resulted from road plowing. The court held that a jury could reasonably find that the snow bank was an unnatural accumulation. p. 772.

It should be noted that courts are unwilling to find liability under this exception where the landowner has salted an icy surface, causing melting and refreezing. In *Zielinski*, the court stated that the act of salting an icy surface does not introduce a new hazard, but rather, temporarily alleviated a hazard, which already existed, and therefore, liability should not attach merely because the forces of nature reassert themselves and a salted surface refreezes. *Zielinski*, at p. 621.

(2) **ALTERATION OF SURFACE:** Liability may arise if the landowner has taken steps to alter the sidewalk or walking surface, thereby causing the unnatural accumulation of ice and snow. *Zielinski*, at p. 617; *Buffa v Dyck*, 137 Mich App 679, 682-683 (1984).

### C. INVITEES

Prior to the landmark case of *Quinlivan v Great Atlantic & Pacific Tea Co.*, 395 Mich 244 (1975), a landowner had no duty to remove a natural accumulation of ice and snow from any location. In *Quinlivan*, however, the Michigan Supreme Court set forth the rule that a landowner or occupier has a duty to take reasonable measures within a reasonable period of time after the accumulation of ice and snow to diminish the hazards of injury to an invitee. *Id.* at 261.

In *Mann v Husteric Enterprises, Inc*, 470 Mich 320 (2004), the Supreme Court clarified that a premises possessor must protect an invitee against an open and obvious danger only if such danger contains special aspects that make it unreasonably dangerous. In the context of accumulation of snow and ice, this means that, when such an accumulation is “open and obvious,” a premises possessor must take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard only if there is some special aspect that makes such an accumulation unreasonably dangerous. *Id.* at 332. There is no absolute duty on a premises possessor. The duty only arises when there is a special aspect making the accumulation unreasonably dangerous. *Id.* at 332-333.

## **V. LIABILITY FOR SNOW REMOVAL CONTRACTORS**

The Michigan Supreme Court dealt with potential liability of snow removal contractors in the seminal case of *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004). In *Fultz*, the plaintiff fell and injured her ankle while walking across a snow covered parking lot. The defendant CML had previously entered an oral contract to provide snow and salt services for the lot. At the time that the plaintiff fell, CML had not plowed the lot at approximately 14 hours and had not salted the parking lot. *Id.* at 462. The plaintiff argued that, by contracting to plow and salt the parking lot, CML owed a common law duty to plaintiff to exercise reasonable care in performing its contractual duties. The plaintiff argued that CML’s failure to plow or salt the parking lot breached that duty and created a common law tort cause of action. *Id.* at 463. The Supreme Court noted that the central analysis to any negligence cause of action is whether a duty exists on the part of the defendant to the plaintiff. Specifically, the defendant must owe a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations. If no independent duty exists, no tort action based on a contract will lie. *Id.* at 467. Applying this rule to the case, the Supreme Court noted that plaintiff’s claims against CML were merely that CML breached its contract with defendant Comm-Co by failing to perform its contractual duty of plowing or salting the parking lot. The plaintiff alleged no duty owed to her independent of that contract. Therefore, the Supreme Court concluded that the plaintiff failed to satisfy the threshold requirement establishing a duty that CML owed to her under the separate and distinct approach created in this case. *Id.* at 468. The Supreme Court supplied an example of when such a duty may exist. It noted that a defendant may breach a duty separate and distinct from its contractual duty when that defendant creates a new hazard by placing snow on a portion of the premises when it knows or should know that the snow would melt and freeze into ice on the abutting sidewalks, steps, and/or walkway and create a danger and hazardous condition to individuals who traverse those areas. *Id.* at 468-469.

## **VI. LIABILITY FOR CONDITIONS ON ADJACENT PROPERTY**

As a general rule, a landowner is liable only for conditions existing on his own premises and not for conditions on adjacent property, unless the landowner exercises possession and control over the abutting property.

In *Rand v Knapp Shoe Stores*, 178 Mich App 735 (1989), the plaintiff, an eight-year-old boy, was struck by an automobile while riding his bicycle in an alley behind the defendant shoe store. The evidence showed that the collision took place in the alley and not on the premises owned by the shoe store's landlord. The trial court granted summary disposition to the defendants, and the Court of Appeals affirmed, holding:

In short, the general rule is that the **law normally does not impose a duty on business establishments beyond their premises.** [*Id.* at 740 (emphasis added).]

In *Rodriguez v Sportsmen's Congress*, 159 Mich App 265 (1987), the plaintiff attended a picnic that was held on land owned by the Detroit Sportsmen's Congress. The land was located on the Clinton River, which was neither owned nor controlled by Sportsmen's Congress, and swimming in the river was prohibited. The plaintiff and some of his friends who were also attending the picnic went swimming in the Clinton River. They used a tree on the opposite bank of the river as a diving platform, and on one of the plaintiff's dives the branch of the tree broke, causing him to fall and sustain permanent injury. *Id.* at 268-69.

The court noted the general rule that a landowner's duty does not ordinarily extend beyond the area over which he has possession and control. The plaintiff attempted to argue that the park could still be held liable for providing access to the river, but the Court of Appeals disagreed, holding:

**We believe, however, that imposing a duty on defendants** to protect invitees from the hazards of the river and the adjacent riverbank, under the facts of this case, **would extend the logic of premises liability beyond acceptable limits.** Defendants did not in any manner increase the hazards, which might be encountered by one swimming or diving in the river. Also, no action or inaction on the part of the defendants created a hazard, which did not already exist. While the record does indicate that it may have been foreseeable that, contrary to instructions, guests at the picnic might enter the river to swim, this fact does not alter the fact that the diving accident in this case occurred off defendant's premises and on DNR property, which they did not own or control. [*Rodriguez*, 159 Mich App at 272-73 (emphasis added).]

In addition to the above, it is well established in Michigan law that a premises owner generally may not be held liable for defective conditions on adjacent public property, including streets, sidewalks, and driveway approaches. At common law, a property owner is also under no obligation to repair and maintain abutting public property. *Bivens v Grand Rapids*, 443 Mich 391, 395 (1993). Such an obligation arises only when it is imposed pursuant to authority granted by the

HARVEY KRUSE, P.C.

state, which does not give rise to a private cause of action against the landowner. *Id.* at 395. See Section IV(B) for more detail on this issue.

Under the principles of premises liability, the right to recover for a condition or defect in the land or for an activity conducted on the land requires that the defendant have legal possession and control of the premises. “The defendant’s duty ends at the boundaries of his premises.” *Stevens v Drekich*, 178 Mich App 273, 276 (1989). But a defendant may be liable if he actually exercises control over the adjacent property. The landowner may be liable for conditions in an adjacent area if he has physically intruded into the area or has committed some act, which increases the existing hazard or creates new hazards. *Id.* at 277.

## VII. RECREATIONAL USE ACT

Michigan’s Recreational Land Use Act is part of the Natural Resources and Environmental Protection Act, MCL 324.101, et seq. MCL 324.73301(1) (hereinafter “RUA”) provides:

[A] cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

The purpose of the RUA is to open and make available for public recreational use vast areas of private vacant lands. *Thone v Nicholson*, 84 Mich App 538, 543 (1978), *ly den* 405 Mich 819 (1979).

The Michigan Supreme Court has addressed the RUA in *Neal v Wilkes*, 470 Mich 661 (2004), overruling the previous case of *Wymer v Holmes*, 429 Mich 66 (1987). In *Wymer*, the Court held that the RUA was only applicable to “large track of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the RUA.” *Id.* at 79. However, this holding was specifically overruled by the Court in *Neal*. In *Neal*, the Court held “[t]he RUA makes no distinction between large tracts of land and small tracts of land, undeveloped land, vacant land and occupied land, land suitable for outdoor recreational uses and land not suitable for outdoor recreational uses, urban or suburban land and rural land, or subdivided land and unsubdivided land.” *Neal*, 470 Mich at 667. Rather, the statute applies to “specified activities that occur ‘on the land of another....’” *Id.* at 667. Thus, it is the character of the activities taking place on land that is important, **not** the character of the land itself.

HARVEY KRUSE, P.C.

Specifically, in *Neal*, plaintiff was injured while riding an All Terrain Vehicle (“ATV”) on defendant’s eleven-acre lot, zoned residential, within the Village of Dimondale. The trial court held in favor of defendant, finding that the RUA barred plaintiff’s claim. However, the Court of Appeals reversed on the basis of *Wymmer*, because the ATV was not being operated on a “large track of undeveloped land.” The Supreme Court reversed the Court of Appeals, reinstating the opinion of the trial court on the basis of the language quoted previously. Because the riding of the ATV was an “outdoor recreational use” according to the language of the RUA, there could be no cause of action against the defendant. *Id.* at 667.

## VIII. POLICE AND FIREMAN'S RULE

The police and fireman's rule prevents police officers and firefighters from recovering for injuries sustained in the course of duty. *Woods v City of Warren*, 439 Mich 186, 190 (1992). The scope of the rule includes both negligence in causing the incident, which requires the presence of an officer or firefighter at the scene and the risks inherent in fulfilling their respective duties. *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 372 (1987). The rationale for the adoption of the rule is that the purpose of these safety professions is to confront danger, and, therefore, the public should not be liable for damages for injuries occurring in the performance of the very function police officers and firefighters are intended to fulfill. *Woods*, 439 Mich at 190-91.

The police and fireman's rule was first embraced in Michigan in *Kreski* and *Reetz v Tipit, Inc*, a case which was consolidated and decided with *Kreski*. In *Kreski*, a firefighter was killed when a portion of a burning roof fell on him. In *Reetz*, a police officer incurred injuries when she fell down a trap door while investigating a burglary on the defendant's premises. The Court held:

[A]s a matter of public policy, we hold that firefighters or police officers may not recover for injuries occasioned by the negligence, which caused their presence on the premises in their profession capacities. This includes injuries arising from the normal, inherent, and foreseeable risks of the chosen profession. *Kreski*, 429 Mich at 372.

The Michigan Legislature codified the police and firefighter rule by enacting MCL 600.2965 *et seq.* *Boulton v Fenton TWP*, 272 Mich App 456, 460 (2006). MCL 600.2967 states the limited causes of action that a firefighter or police officer may bring to recover damages for injuries or death arising from the normal, inherent, and foreseeable risk of his or her profession while acting in his or her official capacity. A firefighter or police officer may bring suit for an injury or death caused by a person’s gross negligence, willful, wanton or intentional acts, or conduct that results in a conviction of a crime. MCL 600.2967(1)(a). MCL 600.2967 also creates a limited possibility of a negligence cause of action brought by a police officer or firefighter. But such a cause of action may not be brought against someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity. MCL 600.2967(1)(c)(iii). MCL 600.2967 does

HARVEY KRUSE, P.C.

not affect a right or remedy that is otherwise provided by statute or common law. MCL 600.2967(2). The Court of Appeals has concluded that this means that a firefighter or police officer could bring a cause of action such as a dram shop claim. *Tull v WTF, Inc*, 268 Mich App 24, 31-32 (2005).

#### **IX. EXCLUSIVE REMEDY PROVISION OF THE WORKER'S DISABILITY COMPENSATION ACT**

A claim for worker's compensation benefits is an employee's exclusive remedy against his employer for an injury sustained on his employer's premises, unless the injury was a result of an intentional tort. MCL 418.131. "An employer shall be deemed to have intended to injure an employee if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 138-139 (1991), 439 Mich 947 (1992). But a careful consideration must be made of who actually owns the property. For instance, in *Bitar v Wakin*, 456 Mich 426 (1998), the defendant wholly owned the stock of the company where the plaintiff worked and was injured, but she owned the property under her own name rather than the company name. *Id.* at 430. The Supreme Court stated the defendant was not entitled to the protection of the exclusive remedy provision. *Id.* at 431.

#### **CONCLUSION**

Premises liability law in Michigan has evolved into a "landowner friendly" area, especially in terms of the open and obvious doctrine. As discussed above, the keys are to determine the classification of the plaintiff at the time of injury in order to determine what, if any, duties may have been breached, and to determine the relationship of the defendant to the property to determine what duties may be owed.

HARVEY KRUSE, P.C.