THE BLIND PLAINTIFF POST-*LUGO V. AMERITECH*: FALLING AWAY FROM THE RESTATEMENT IN "OPEN AND OBVIOUS" JURISPRUDENCE IN MICHIGAN

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I. INTRODUCTION

In 2001, the Michigan Supreme Court decided *Lugo v. Ameritech*, officially adopting a revised open and obvious doctrine in Michigan.[1] *Lugo* effectively supplemented the common law of premises liability, and allowed landowners to escape liability so long as a danger was "open and obvious," and without "special aspects" rendering it effectively unavoidable or unreasonably dangerous.[2] This Note first outlines the

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1. Lugo v. Ameritech, 464 Mich. 512, 629 N.W.2d 384 (2001).

2. *Id.* at 517, 629 N.W.2d at 386–87.

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

history of premises liability, as well as the subsequent impacts of the *Lugo* decision on injured plaintiffs in Michigan.[3] Next, this Note analyzes the unrecognized deviation from the Restatement (Second) of Torts in Michigan jurisprudence.[4] Finally, this Note ultimately concludes that former Justice Cavanagh of the Michigan Supreme Court, while frequently dissenting in cases concerning the open and obvious doctrine, correctly interpreted the Restatement as applied to this doctrine.[5]

Beginning with *Lugo* and continuing in subsequent cases, the Michigan Supreme Court has stated that the outcomes reached in each case concerning the open and obvious doctrine were in line with that of the Restatement.[6] However, as this Note will explore, the Restatement views a plaintiff's case through the lens of that individual plaintiff, as opposed to only examining the danger itself.[7] Thus, the Restatement is concerned with an *individual plaintiff's* ability to recognize or appreciate a hazard.[8] Frequently to Justice Cavanagh's dismay, the Michigan Supreme Court has misinterpreted the intended application of the Restatement to litigation surrounding open and obvious dangers.[9] As a result, many injured litigants in Michigan have been deprived of recovery for their injuries since *Lugo*.[10] As a solution, this Note suggests a revised rule that premises possessors who know or have reason to know that a particular danger on their premises would not be obvious to *certain* patrons (e.g., blind patrons) must remedy the hazard by using reasonable care to make it safe for *those* patrons.[11]

> regard to open and obvious dangers, the critical question is *whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects'* of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

Id. (emphasis added).

3. *See infra* Part II.
4. *See infra* Part II.B–C.
5. *See infra* Part III.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part III.
9. *See infra* Part III.
10. *See infra* Part III.
11. *See infra* Part III.B.1.

II. BACKGROUND

A. The Historical Common Law Approach to Premises Liability

Premises liability law historically resulted from judge-made common law.[12] An owner of land could be held liable under premises liability depending on the status of the entrant.[13] The common law provided that if an entrant was a trespasser, he or she had no legal relief for injuries sustained while on the landowner's property.[14] However, the "modern rule requires that landowners refrain from willful and wanton conduct."[15] An entrant might also be a licensee who enters the landowner's premises with permission.[16] In such case, the landowner is obligated to inform the licensee of the existence of any unobvious dangers if the landowner either knows or has reason to know of such dangers.[17] Finally, invitees have historically experienced the greatest legal protection under the common law, either as public invitees or business invitees.[18] The Restatement (Second) of Torts defines a public invitee as one "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."[19] It defines a business invitee as one "who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land."[20] Typically, invitees provide some benefit to the landowner, and as a result, experience greater legal protection as compared with licensees.[21]

Prior to the decision in *Lugo v. Ameritech*, the Michigan Supreme Court looked to the Restatement (Second) of Torts as the authority for analysis.[22] Writing for the majority in *Bertrand v. Alan Ford, Inc.* (pre-*Lugo*), Justice Cavanagh recognized that the comments to the

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12. Jacqueline L. Hourigan, *Negligence—Premises Liability—Where Hazardous Condition Is of an Open and Obvious Nature, Premises Owner Retains Duty to Warn of Unreasonable Risk. Bertrand v. Alan Ford, Inc., 537 N.W.2d 185 (Mich. 1995)*, 73 U. DET. MERCY L. REV. 613, 616 (1996).

13. *Id.*

14. *Id.* at 617.

15. *Id.*

16. *Id.*

17. *Id.* (quoting JOSEPH A. PAGE, THE LAW OF PREMISES LIABILITY 6.6, 34 (2d ed. 1976)).

18. Hourigan, *supra* note 12, at 617.

19. RESTATEMENT (SECOND) OF TORTS § 332 (AM. LAW INST. 1965).

20. *Id.*

21. Hourigan, *supra* note 12, at 617.

22. David A. Dworetsky, *Lugo v. Ameritech Corp. and Joyce v. Rubin: Michigan Courts Continue to Expand the Application of the Open and Obvious Danger Doctrine*, 81 U. DET. MERCY L. REV. 65 (2003).

Restatement indicated that Sections 343 and 343A must be read together.[23] When these sections are read in conjunction, the resulting rule is "that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger."[24] However, "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide."[25] Thus, the Michigan courts that accurately applied the Restatement held invitors to a higher standard than licensors because invitors, such as business owners, owe their invitees a duty of reasonable care to inspect and ensure that their land is free from any latent defects.[26] The invitor should also make any reasonable repairs or post warnings as necessary to protect invitees.[27] Since the *Lugo* decision, however, Michigan courts have deviated from this Restatement approach, and although continually stating they are adhering to it, have consequently imposed *less* of a duty of care on landowners.[28]

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23. Bertrand v. Alan Ford, Inc., 449 Mich. 606, 610, 537 N.W.2d 185, 187 (1995) ("The accompanying comments [to the Restatement] provide[] that §§ 343 and 343A are to be read together."). The Restatement (Second) of Torts Section 343 states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965). The Restatement (Second) of Torts Section 343A states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land *whose danger is known or obvious to them*, unless the possessor should anticipate the harm despite such knowledge or obviousness. (2) In determining whether the possessor should anticipate harm from a known or obvious danger, *the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance* indicating that the harm should be anticipated.

RESTATEMENT (SECOND) OF TORTS § 343A (AM. LAW INST. 1965) (emphasis added).

24. *Bertrand*, 499 Mich. at 611, 537 N.W.2d at 187.

25. *Id.*

26. Dworetsky, *supra* note 22, at 66.

27. *Id.*

28. *See* Sidorowicz v. Chicken Shack, Inc., 469 Mich. 912, 673 N.W.2d 106 (2003) (Taylor, J., concurring) ("[T]he determination of whether a particular open and obvious condition is nonetheless unreasonably dangerous is made using an objective, not

B. Lugo v. Ameritech: The Introduction and Expansion of the Open and Obvious Doctrine

In *Lugo v. Ameritech*, the Michigan Supreme Court adopted a new formulation of the open and obvious doctrine, thereby significantly lessening the duty of care on landowners[29] and shifting the burden of proving an unreasonably dangerous condition to injured plaintiffs.[30] The *Lugo* decision supplemented the traditional common law approach to premises liability and relieved landowners of liability so long as the danger in question was open and obvious, and did not contain any special aspects that would make it effectively unavoidable or unreasonably dangerous.[31]

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subjective, standard[,]" thus removing the possibility of consideration of a plaintiff's physical abilities in recovery); *see also* Robinson v. Estate of Tyler, No. 242332, 2003 WL 22114005, at *1 (Mich. Ct. App. Sep. 11, 2003) (A legally blind plaintiff fell down a step on the defendant's premises, and broke his leg and dislocated his knee. The plaintiff argued that the determination of whether the dangerous step was open and obvious should be a subjective analysis. The court disagreed, stating: "the Supreme Court rejected any consideration of the 'special aspects' of any particular plaintiff. Accordingly, the test to determine whether a danger is open and obvious is objective, not subjective."); Mann v. Shusteric Enters., 470 Mich. 320, 328–29, 683 N.W.2d 573, 577 (2004):

> To determine whether a condition is 'open and obvious,' or whether there are 'special aspects' that render even an 'open and obvious' condition 'unreasonably dangerous,' the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard . . . That is, in a premises liability action, the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff.

Id. (citations omitted); Hoffner v. Lanctoe, 492 Mich. 450, 461, 821 N.W.2d 88, 94–95 (2004) ("Whether a danger is open and obvious [is an objective standard, and] depends on whether it is reasonable to expect that an *average person with ordinary intelligence* would have discovered it upon casual inspection[,]" thus removing the possibility of consideration of a plaintiff's physical abilities in recovery) (emphasis added).

29. Lugo v. Ameritech, 464 Mich. 512, 517, 629 N.W.2d 384, 386 (2001).

30. *See Hoffner*, 492 Mich. at 463, 821 N.W.2d at 96 (If a plaintiff "demonstrates that a special aspect exists or that there is a genuine issue of material fact regarding whether a special aspect exists," the plaintiff has satisfied their burden, and recovery may therefore be permitted).

31. *Lugo*, 464 Mich. at 517–18, 629 N.W.2d at 386–87:

> [I]f 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 . . . [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant.

Id.

However, the Court did build very narrow exceptions into the newly promulgated rule.[32] The *Lugo* exceptions provide that if a particular *danger* contains special aspects, such that it makes the danger either effectively unavoidable or unreasonably dangerous, a landowner may then be held liable for injuries to the plaintiff.[33] The Michigan Supreme Court elaborated on such a notion using the following analogies:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.[34]

However, the court left open the possibility that if "reasonable warnings or other remedial measures" actually were taken, then the landowner still might possibly escape liability.[35] Thus, assuming the landowner did implement such measures, the court may have excused the landowner from liability for leaving the unguarded, thirty-foot pit in their parking lot. This is because the special aspects analysis, as declared by the Michigan Supreme Court, turns on whether the danger itself is effectively unavoidable or unreasonably dangerous, not on the possible special aspects of a particular plaintiff encountering the danger.[36]

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32. *Id.* at 517, 629 N.W.2d at 386.

33. *Id.*

34. *Id.* at 518–19, 629 N.W.2d at 387–88.

35. *Id.* at 518, 629 N.W.2d at 387.

36. *Id.* at 514, 517, 523, 524, 629 N.W.2d at 385, 387, 389, 390 ("The pothole was open and obvious, and plaintiff has not provided evidence of special aspects *of the condition* to justify imposing liability on defendant despite the open and obvious nature

Justice Cavanagh, while concurring in the *Lugo* holding, disagreed with the majority's analysis and adoption of the new open and obvious rule.[37] The majority stated it was following Section 343A of the Restatement,[38] but the Restatement specifically states that Section 343A is to be read in conjunction with Section 343 and not as a standalone provision.[39] Section 343A states:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land *whose danger is known or obvious* ***to them***, unless the possessor should anticipate the harm despite such knowledge or obviousness.
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> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, *the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility*, is a factor of importance indicating that the harm should be anticipated.[40]

The language of "to them" in Subsection (1) indicates that the analysis requires beginning with the individual invitee, and whether the danger in question was open and obvious to that particular person.[41] Thus, although the majority stated it was adhering to precedent in reaching the result,[42]

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of the danger." . . . "[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' *of the open and obvious condition*[.]" . . . "Accordingly, in light of plaintiff's failure to show special aspects *of the pothole at issue*, it did not pose an unreasonable risk to her." . . . "In the present case, there was no evidence of special aspects that made *the open and obvious pothole* unreasonably dangerous.") (emphasis added).

37. *Id.* at 526–44, 629 N.W.2d at 391–99 (Cavanagh, J., concurring).

38. *Id.* at 525, 629 N.W.2d at 390 ("In our view, this approach is consistent with § 343A of the Restatement").

39. *Id.* at 530, 629 N.W.2d at 393 (Cavanagh, J., concurring) ("More instructive is the text of comment (a) to § 343, which provides that 'This section should be read together with § 343A . . .'").

40. RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965) (emphasis added).

41. *Id.*

42. *Lugo*, 464 Mich. at 517–18, 629 N.W.2d at 387:

> *Consistent with Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing

Justice Cavanagh correctly asserted that the Restatement view, which he also suggested the majority effectively ignored, had "been key to Michigan's open and obvious danger law" for nearly as long as the idea of open and obvious had existed.[43] The *Lugo* decision modified the open and obvious doctrine, changed tort law in Michigan, and consequently abandoned the Restatement approach.

C. Post-Lugo's Implications on Michigan Jurisprudence

The decision in *Lugo* has made it more difficult for plaintiffs to recover in premises liability cases in Michigan. In *Lauff v. Wal-Mart Stores, Inc.*, the plaintiff was a 75-year-old legally blind woman who used the restroom in Wal-Mart after making a purchase.[44] While she had no trouble entering the restroom or using the facilities, upon leaving the stall, she slipped on water and wet toilet paper and fell on her hip.[45] After further investigation, it was discovered that the defendant had not cleaned its restroom in eight days, and also that the plaintiff had fractured her hip and ribs.[46] The defendant argued that the condition was open and obvious, and thus, according to *Lugo*, they should not be held liable for the plaintiff's failure to see or notice the danger.[47] The plaintiff countered that under *Bertrand*, the special aspects of her blindness required that the defendant expect she would be unable to protect herself from the dangerous bathroom condition.[48] The district court rejected the plaintiff's argument, reasoning that the Michigan Supreme Court in *Lugo* already expressly rejected such argument.[49] The court stated:

> By focusing the analysis on the unsafe condition before the plaintiff is injured, the *Lugo* court rejected any consideration of "special aspects" of the plaintiff. Applying this analytical approach to an ordinary pothole, the court reemphasized *the focus on the condition* and not the plaintiff and stated that "an

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liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

Id. (emphasis added).

43. *Id.* at 528, 629 N.W.2d at 392 (Cavanagh, J. concurring).

44. Lauff v. Wal-Mart Stores, Inc., No. 1:01-CV-777, 2002 WL 32129976, at *1 (W.D. Mich. Oct. 2, 2002).

45. *Id.* at *1.

46. *Id.* at *2.

47. *Id.* at *2–3.

48. *Id.* at *4.

49. *Id.*

> 'ordinarily prudent' person would typically be able to see the pothole and avoid it."[50]

Ultimately, the district court concluded that, under *Lugo*, the blind plaintiff was held to the standard of an "ordinarily prudent"—or seeing-eyed—person, and as such, was barred recovery.[51] Further, the court found that the plaintiff had failed to demonstrate that the defendant should have anticipated that she would not discover the condition in the bathroom or that she would fail to protect herself from it.[52]

Under similar circumstances as *Lauff*, the Michigan Supreme Court denied leave to appeal the court of appeals' decision in *Sidorowicz v. Chicken Shack, Inc.*, thus affirming the trial court's denial of recovery to a legally blind plaintiff who, similar to the plaintiff in *Lauff*, slipped and fell on a wet bathroom floor on the defendant's premises.[53] Justice Taylor, concurring, wrote separately to reject Justice Cavanagh's dissent.[54] Justice Taylor stated that Justice Cavanagh's position was "inconsistent with the law" in Michigan, and that the judgment of whether a particular condition is unreasonably dangerous depends on an objective standard as opposed to a subjective one.[55] Justice Taylor reaffirmed the *Lugo* majority, stating "whether 'a plaintiff . . . [has] a particular susceptibility to injury . . . [is] immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous.'"[56] Conversely, Justice Cavanagh vehemently criticized the majority for their refusal to explore how "this Court's explanation of the open and obvious doctrine in [*Lugo*] relates to those with disabilities."[57]

Following *Lauff* and *Sidorowicz*, the Michigan Supreme Court decided *Mann v. Shusteric*.[58] The plaintiff in *Mann* entered the

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50. *Id.* (quoting Lugo v. Ameritech, 464 Mich. 512, 520, 629 N.W.2d 384, 388 (2001) (emphasis added)).

51. *Id.* at *5.

52. *Id.*

53. Sidorowicz v. Chicken Shack, Inc., 469 Mich. 912, 673 N.W.2d 106 (2003); Sidorowicz v. Chicken Shack, Inc., No. 239627, 2003 WL 140127, at *1 (Jan. 17, 2003).

54. *Sidorowicz*, 469 Mich. at 912, 673 N.W.2d at 106.

55. *Id.*

56. *Id.*

57. *Id.* (Cavanagh, J., dissenting):

> My fellow justices who are voting to deny leave to appeal should be thankful that there is not an open and obvious doctrine that applies to legal analysis. If there were, they would be found to have clearly stumbled over what is so plain in this case—what is open and obvious to the sighted is not necessarily open and obvious to the blind.

Id.

58. Mann v. Shusteric Enters., 470 Mich. 320, 683 N.W.2d 573 (2004).

defendant's bar during a blizzard and consumed nine alcoholic drinks over the course of an estimated three hours.[59] Upon leaving the bar, the plaintiff slipped and fell on accumulated ice and snow in the defendant's parking lot, causing injuries to the plaintiff.[60] The court explained that *Lugo* made clear the notion that special aspects rendering a condition unreasonably dangerous are examined using an objective standard.[61] The court added that "the fact-finder must consider the 'condition of the *premises*,' not the condition of the *plaintiff*."[62] Using this idea, the court criticized the court of appeals for giving weight to the defendant's service of alcohol.[63] The court reasoned that the defendant's awareness of the plaintiff's intoxication did not impact the legal duties owed to plaintiff, but rather that the fact-finder must only consider whether a "reasonably prudent person" would also have fallen in the defendant's parking lot, and thus whether the defendant should have warned patrons of the dangerous condition.[64]

Dissenting in *Mann*, Justice Cavanagh once again criticized the majority's decision as being "simply the latest installment in the majority's systematic dismantling of the Restatement of Torts approach."[65] Although the decision in *Mann* was probably appropriate given the particular factual circumstances (i.e., the plaintiff's intoxication was most likely voluntary, as contrasted with the involuntary blindness suffered by the plaintiffs in *Lauff* and *Sidorowicz*), Justice Cavanagh criticized the majority's application of the Restatement to its decision.[66] He explained his position through a lengthy but helpful analogy, using *Sidorowicz* as a guide.[67] The analogy is paraphrased here. A restaurant owner decides to remodel his building, which requires a six-foot hole to be created in the floor.[68] The owner feels it would be good for the business to remain open throughout the remodel process, and as such, visibly places large signs warning of the hole both at the entrance to the restaurant, and throughout it.[69] He also places a large red flag in the center of the hole, and customers are able to avoid the hole using one of

59. *Id.* at 324, 683 N.W.2d at 575.
60. *Id.*
61. *Id.* at 328–29, 683 N.W.2d at 577.
62. *Id.* at 329, 683 N.W.2d at 577 (emphasis added).
63. *Id.* at 329, 693 N.W.2d at 577–78.
64. *Id.* at 329–30, 683 N.W.2d at 578.
65. *Id.* at 336, 683 N.W.2d at 581 (Cavanagh, J., dissenting).
66. *Id.*
67. *Id.* at 340–41, 683 N.W.2d at 583–84 (Cavanagh, J., dissenting).
68. *Id.*
69. *Id.*

two available aisle ways.[70] A customer enters the restaurant, and is very obviously blind, as she is wearing sunglasses, carrying a white cane, and wearing a sign around her neck stating that she blind.[71] The customer even states clearly to the restaurant owner that she is blind.[72] The hole is obviously a dangerous condition on the land, but it is also considered open and obvious, as a reasonably prudent person would notice the large hole.[73] Further, no special aspects exist, because the danger can be avoided by using one of two alternate aisles.[74] Under *Lugo*, and the majority in *Mann*, the analysis ends here, and "the restaurant owner can never be held liable for failing to warn the blind invitee or for failing to take other actions to protect this person, . . . even though the owner *knows* with near absolute certainty that the invitee will be unable to protect himself and will suffer physical injury."[75] Justice Cavanagh continues:

> [C]ommon sense suggest[s] that the owner may be held liable in this instance despite the "obviousness" of the dangerous condition. This point of law appears to have eluded the majority and I would necessarily have to hold myself liable if I did not warn its members of their obvious error.
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> In its assessment of the above hypothetical example, the majority [fears this would] "impose a substantially increased legal burden upon such persons." . . . I am troubled by this assertion because, unlike the majority, *I do not believe that a blind person entering a restaurant is an extraordinary or uncommon event.* Moreover, I question the wisdom of any rule of law that only applies under so-called "ordinary" or idyllic circumstances. *The Restatement approach seeks to protect those who cannot protect themselves, including the more than forty-three million Americans with disabilities.*
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> In sum, I am troubled by the majority's overreliance on Lugo's "special aspects" analysis. By focusing solely on this analysis, the majority repudiates the Restatement approach and, at the

70. *Id.* at 340–42, 683 N.W.2d at 583–84 (Cavanagh, J., dissenting).
71. *Id.*
72. *Id.*
73. *Id.* at 340–41, 683 N.W.2d at 583.
74. *Id.* at 340–41, 683 N.W.2d at 583–84.
75. *Id.* at 341, 683 N.W.2d at 584.

> very least, unwisely eliminates the "unless" clause from Michigan jurisprudence.[76]

The "unless" clause Justice Cavanagh referred to comes from *Riddle v. McLouth Steel Products Corporation*, decided in 1992, and the Restatement Section 343A.[77] In *Riddle*, the Michigan Supreme Court held that the open and obvious nature of a condition was not an absolute bar to liability.[78] Instead, the court held that if a danger was known to the invitee or was so obvious that the invitee would be reasonably expected to discover it, then the invitor does not owe a duty to protect or warn the invitee "*unless he should anticipate the harm* despite knowledge of it on behalf of the invitee."[79] Thus, under the Restatement, even if the condition is known or obvious to a particular invitee, the landowner may still be required to use reasonable care in protecting another invitee from that danger.[80]

In following *Lugo*, the Michigan Court of Appeals in *Van Ormen v. Meijer, Inc.* found that a legally blind plaintiff who slipped and fell on a wet doormat just inside the door of defendant's premises could not recover for her injuries.[81] The plaintiff, like Justice Cavanagh, advocated for overturning *Lugo* and adopting the Restatement Sections 343 and 343A.[82] The court, acknowledging it was bound to the Michigan Supreme Court's prior decisions, rejected plaintiff's contention and held for the defendant.[83] The court reiterated that generally, a plaintiff cannot succeed in an action such as this unless they show the existence of special aspects surrounding an open and obvious condition that render it unreasonably dangerous[84] (despite an inability to actually *see* the wet doormat).

Several years later, the Michigan Supreme Court held that ice and snow accumulation on Michigan sidewalks are open and obvious in *Hoffner v. Lanctoe*.[85] The plaintiff in *Hoffner* was a member at Fitness Xpress, which had only one entrance to the building that required

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76. *Id.* at 341–42, 683 N.W.2d at 584 (emphasis added).

77. Riddle v. McLouth Steel Prods. Corp., 440 Mich. 85, 96, 485 N.W.2d 676, 681 (1992).

78. *Id.* at 95–96, 485 N.W.2d at 681.

79. *Id.* at 96, 485 N.W.2d at 681 (emphasis added).

80. *Id.* at 97, 485 N.W.2d at 682.

81. Van Ormen v. Meijer, Inc., No. 295661, 2011 WL 1436255, at *1–2 (Mich. Ct. App. Apr. 14, 2011).

82. *Id.* at *1.

83. *Id.* at *2.

84. *Id.*

85. Hoffner v. Lanctoe, 492 Mich. 450, 456, 821 N.W.2d 88, 92 (2012).

walking on a sidewalk running alongside the building connecting to the parking lot.[86] The plaintiff acknowledged that she saw the ice at the business' entrance, but felt as though she could safely traverse it.[87] However, she fell on the ice and injured her back.[88] She sued both Fitness Xpress and the owners of the building, sidewalk, and parking lot.[89] The court pointed to the open and obvious doctrine in its analysis, stating: "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection."[90] In applying the open and obvious doctrine to the plaintiff in *Hoffner*, the court explained that a landowner has a duty to exercise reasonable care in minimizing the hazards of ice and snow, requiring them to take reasonable measures within a reasonable period of time post-accumulation, in order to reduce the likelihood of injury to an invitee.[91] However, the court conditioned its statement on the "well established" open and obvious condition of ice and snow, and thus asked "whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a *reasonably prudent person* would foresee the danger."[92] The court found "no dispute" that the ice where the plaintiff fell was open and obvious, but instead asked whether the condition was effectively unavoidable, and thus qualified under one of the two special aspect exceptions to the open and obvious doctrine.[93] Ultimately, the court concluded that the plaintiff failed to meet her burden of showing sufficient evidence that the ice, which she saw before stepping on, was effectively unavoidable, and thus held for the defendant, despite the availability of only one entrance to the building.[94]

As the above case law demonstrates, the Michigan Supreme Court's decision in *Lugo* has had a widespread impact on premises liability recovery in Michigan. The effects of such impact have proved devastating for many Michigan plaintiffs, especially the disabled. Since they are held to the same standard as that of a non-disabled person, they are often unable to recover for their injuries unless they meet the high burden of proving the existence of "special aspects" surrounding the danger in accordance with *Lugo*.

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86. *Id.*
87. *Id.* at 457, 821 N.W.2d at 92.
88. *Id.*
89. *Id.*
90. *Id.* at 461, 821 N.W.2d at 94–95.
91. *Id.* at 464, 821 N.W.2d at 96.
92. *Id.* at 464, 821 N.W.2d at 96–97 (emphasis added).
93. *Id.* at 465, 821 N.W.2d at 97.
94. *Id.* at 473–74, 821 N.W.2d at 101–02.

III. ANALYSIS

The Michigan Supreme Court effectively barred most slip and fall cases due to its decision in *Lugo*. As a result, all snow, ice, uneven sidewalks, potholes, and the like are considered open and obvious to a reasonably prudent person.[95] As such, plaintiffs in Michigan generally cannot recover for injuries sustained by encountering these conditions.[96] At the same time, the court in *Lugo* premised the open and obvious doctrine on two exceptions: the dangerous condition shall not contain any special aspects making the condition 1) "effectively unavoidable," or 2) "unreasonably dangerous."[97] If either exception applies, a plaintiff may be allowed to recover.[98] However, these exceptions apply only to the danger itself, and not to any special aspects of a particular plaintiff.[99] To date, no exception has been suggested in any majority opinion as it relates to the injured person.

A. Lugo's Disproportionate Application to the Disabled

While the open and obvious doctrine seemingly applies to all plaintiffs equally, it applies quite unequally in practice. One who is blind cannot be said to actually "see" a hazard in the same way as their seeing-eyed counterpart. Nonetheless, the district court in *Lauff* rejected the plaintiff's argument that the special aspects exception should apply to her as a plaintiff, and not only to the danger in question.[100] Instead, the court

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95. *See infra* note 115.

96. *See infra* note 115. In each case, the Plaintiff was denied recovery for their injuries.

97. Lugo v. Ameritech, 464 Mich. 512, 517–19, 629 N.W.2d 384, 387–88 (2001).

98. *Id.* at 518–19, 629 N.W.2d at 387–88 ("In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to *remove that condition from the open and obvious danger doctrine*.") (emphasis added).

99. Sidorowicz v. Chicken Shack, Inc., 469 Mich. 912, 912, 673 N.W.2d 106, 106 (2003) (Taylor, J., concurring):

> With regard to premises liability, we recently reaffirmed that this standard applies there also when we said in [*Lugo*], that whether "a plaintiff . . . [has] a particular susceptibility to injury . . . [is] immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous." See also [*Lauff*], [which held that] an invitee's blindness is immaterial to whether an open and obvious danger is unreasonably dangerous[.]

Id.

100. Lauff v. Wal-Mart Stores, Inc., No. 1:01-CV-777, 2002 WL 32129976, at *4, 5 (W.D. Mich. Oct. 2, 2002):

> Here, Plaintiff argues that "special aspects" of the invitee, namely her blindness, requires Defendant to expect that she will not protect herself from

held that the unsafe condition of the wet floor was open and obvious to an average person, and thus was open and obvious to her, a legally blind patron, as well.[101] Similarly, in *Van Ormen*, both the trial court and the Michigan Court of Appeals held that the legally blind plaintiff could not recover for injuries sustained as a result of the open and obvious danger.[102] Despite the plaintiff's physical inability to see and thus recognize the danger, the trial court and court of appeals alike concluded that since no special aspects existed surrounding the *danger* that "would give rise to a uniquely high likelihood or severity of harm," the plaintiff could not recover.[103]

The open and obvious doctrine ensures that plaintiffs are unable to recover in a lawsuit against a landowner for injuries sustained from a dangerous condition on the landowner's premises in which the plaintiff knew about or that could have been avoided. However, the doctrine assumes that all plaintiffs bringing suit for injury sustained on another's property are able to see, speak, and hear at the same level as an average, or "ordinarily prudent," person. It does not account for those with disabilities, and does not hold business owners to a different standard in order to protect the disabled.[104] As the aforementioned cases demonstrate,[105] the doctrine assumes that all patrons who enter a business

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> the dangerous condition. Plaintiff's argument has been rejected by the Michigan Supreme Court . . . Plaintiff has failed to show that Defendant should have expected Plaintiff would not discover the unsafe condition or fail to protect herself from it.

Id. Therefore, summary judgment was granted in favor of the defendant.

101. *Id.* at *5 ("Unfortunately Plaintiff was unable to see this condition because of her blindness, but this condition would have been open and obvious to an ordinarily prudent person.").

102. Van Ormen v. Meijer, Inc., No. 295661, 2011 WL 1436255, at *1, 2. (Mich. Ct. App. Apr. 14, 2011):

> In granting summary disposition, the trial court concluded that the alleged danger posed by the mat was open and obvious. Further, the court concluded that there were no special aspects of the condition that would give rise to a uniquely high likelihood or severity of harm. Thus, the court concluded that plaintiff had failed to establish an exception to the open and obvious danger doctrine. . . . [The] plaintiff cannot prevail unless she can show that there were special aspects of the condition that made the open and obvious risk unreasonably dangerous. In this regard, we note that the focus is on the "condition" and not on the individual plaintiff's limitations.

Id.

103. *Id.*

104. Mann v. Shusteric Enters., 470 Mich. 320, 342, 683 N.W.2d 573, 584 (2004) (Cavanagh, J., dissenting) (The majority's deviation from the Restatement failed to protect the "more than forty-three million Americans with disabilities.").

105. *See infra* Part III.

have at least average vision, and actually see or should see a particular danger on the premises.[106]

B. Revising the Doctrine to Better Align With the Restatement (Second) of Torts

Justice Cavanagh has suggested that Michigan courts have not properly adhered to the Restatement sections they have intended to follow or believed they were following.[107] Restatement Section 343(b) states: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he . . . (b) should expect that *they will not discover or realize the danger*, or *will fail to protect themselves against it.*"[108] Further, the Restatement suggests that Sections 343 and 343A be read in conjunction.[109] Section 343A(1) states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious *to them*, unless the possessor should anticipate the harm despite such knowledge or obviousness."[110]

Since *Lugo*, Michigan courts have erroneously looked to the condition of the *danger* and not to the *individual plaintiff* in analyzing the Restatement approach to recovery for injuries sustained on a defendant's premises.[111] The court in *Lugo* believed that it was following

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106. *Mann*, 470 Mich. at 342, 683 N.W.2d at 584 (Cavanagh, J., dissenting) (" . . . I question the wisdom of any rule of law that only applies under so-called 'ordinary' or idyllic circumstances.").

107. *Id.* at 336–39, 683 N.W.2d at 581–83 (Cavanagh, J., dissenting):

> I agree with the majority that a premises possessor is generally not required to protect an invitee from open and obvious dangers. This is the approach advanced by 2 Restatement Torts, 2d, § 343A, an approach which "has been key to Michigan's open and obvious danger law" . . . As noted by the Restatement, however, there are exceptions to this general rule, and these exceptions cannot be conveniently summarized by a "special aspects" analysis. . . . § 343A's "unless" clause is a "crucial qualifier to the general rule" of the Restatement. . . . Thus, "if the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger."

Id. (citations omitted).

108. RESTATEMENT (SECOND) OF TORTS § 343(b) (AM. LAW INST. 1965) (emphasis added).

109. RESTATEMENT (SECOND) OF TORTS § 343 cmt. a (AM. LAW INST. 1965) ("This Section should be read together with § 343A . . .'").

110. RESTATEMENT (SECOND) OF TORTS § 343A(1) (AM. LAW INST. 1965) (emphasis added).

111. Lugo v. Ameritech, 464 Mich. 512, 525, 629 N.W.2d 384, 390–91 (2001):

> Simply put, there must be something out of the ordinary, in other words, special, *about a particular open and obvious danger* in order for a premises

the Restatement position, but instead, according to Justice Cavanagh, the majority wholly rewrote the open and obvious doctrine.[112] Since *Lugo*, Michigan courts have, in the name of stare decisis, looked only to the aspects of a particular danger and not the plaintiff for analysis, despite awareness of the Restatement language.[113] In doing so, these courts have significantly reduced the duty on landowners, especially commercial business owners, to ensure their premises are safe and accessible to disabled patrons.

Each of the aforementioned cases[114] involved commercial businesses.[115] However, businesses are already required to accommodate disabled persons under disability accommodation legislation, such as Mich. Comp. Laws § 37.1102.[116] Section 37.1102 states, in relevant part:

> possessor to be expected to anticipate harm from that condition. Indeed, it seems obvious to us that *if an open and obvious condition lacks some type of special aspect* regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous.

Id. (emphasis added).

112. *Id.* at 541, 629 N.W.2d at 398.

113. *See generally* Van Ormen v. Meijer, Inc., No. 295661, 2011 WL 1436255 (Mich. Ct. App. Apr. 14, 2011). The *Van Ormen* court first rejected Plaintiff's contention that the *Lugo* court misinterpreted the Restatement. It instead explained how the *Lugo* court interpreted the applicable Restatement sections, and then stated:

> *This Court is bound by decisions of our Supreme Court* until our Supreme Court overrules itself. Accordingly, *plaintiff cannot prevail* unless she can show that there were special aspects of the condition that made the open and obvious risk unreasonably dangerous. In this regard, we note that *the focus is on the "condition" and not on the individual plaintiff's limitations.*

Id. at *2 (emphasis added) (citations omitted).

114. *See generally* Part II.

115. *See Lugo*, 464 Mich. 512, 629 N.W.2d 384 (the Plaintiff stepped in a pothole and fell in the Defendant's parking lot. The Plaintiff was on the Defendant's premises in order to pay her telephone bill inside the Defendant's building); Lauff v. Wal-Mart Stores, No. 1:01-CV-777, 2002 WL 32129976 (W.D. Mich. Oct. 2, 2002) (the Plaintiff was a 75-year-old legally blind woman who slipped and fell in a puddle of water and wet toilet paper while using the restroom in Defendant Wal-Mart's building after making a purchase there); Sidorowicz v. Chicken Shack, Inc., 469 Mich. 912, 673 N.W.2d 106 (2003) (a legally blind Plaintiff slipped and fell on a wet bathroom floor on the Defendant's premises); Mann v. Shusteric Enters., 470 Mich. 320, 683 N.W.2d 573 (2004) (the Plaintiff entered the Defendant's bar during a blizzard and consumed nine alcoholic drinks over the course of an estimated three hours, and upon leaving the bar, slipped and fell on accumulated ice and snow in the Defendant's parking lot); *Van Ormen*, 2011 WL 1436255 (a legally blind plaintiff slipped and fell on a wet doormat just inside the door of Defendant Meijer's premises); Hoffner v. Lanctoe, 492 Mich. 450, 821 N.W.2d 88 (2004) (the Plaintiff, a member at Defendant Fitness Xpress, used the only entrance to the building, which required walking on a sidewalk running alongside the building that connected to the parking lot. The Plaintiff was injured when she slipped and fell on ice on that sidewalk).

116. MICH. COMP. LAWS ANN. § 37.1102 (West 1998).

"The opportunity to . . . full and equal utilization of public accommodations . . . *without discrimination because of a disability* is guaranteed by this act and is a civil right."[117] Further: "[A] person shall *accommodate a person with a disability* for purposes of . . . public accommodation . . . unless the person demonstrates that the accommodation would impose an undue hardship."[118] Thus, business owners already have the burden to ensure that their premises are both suitable for and accessible to persons with disabilities. It is not unreasonable then for a business owner to be expected to assume that blind persons are among the regular patrons of their business.[119] This notion, coupled with the requirements of Mich. Comp. Laws § 37.1102, make it reasonable to require that landowners engaged in business on their land in Michigan remedy potential hazards to blind persons.

1. Suggested Rephrasing of the Open and Obvious Doctrine

As Justice Cavanagh has repeatedly advocated, the current open and obvious doctrine in Michigan does not conform to the Restatement approach,[120] although many majority opinions have stated the contrary.[121] Both the Restatement and Justice Cavanagh expect that business owners will take appropriate measures to protect their patrons in accordance with the type of business they conduct, as expressed by Comment (e) to Section 343:

> One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, *one entering a*

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117. *Id.* § 37.1102(1) (emphasis added).

118. *Id.* § 37.1102(2) (emphasis added).

119. *Mann*, 470 Mich. at 341–42, 683 N.W.2d at 584 (Cavanagh, J., dissenting) ("I do not believe that a blind person entering a restaurant is an extraordinary or uncommon event.").

120. *Id.* at 336, 683 N.W.2d at 581 (Cavanagh, J., dissenting) ("Today's decision is simply the latest installment in the majority's systematic dismantling of the Restatement of Torts approach. The majority effectively states that the Restatement approach is dead because *Lugo*, and only *Lugo*, is the law in Michigan").

121. *See* Lugo v. Ameritech, 464 Mich. 512, 525, 629 N.W.2d 384, 390 (2001) ("In our view, this approach is consistent with § 343A of the Restatement . . ."); Van Ormen v. Meijer, Inc., No. 295661, 2011 WL 1436255, at *1–2 (in denying recovery to the Plaintiff, the court used the *Lugo* majority's analysis of the Restatement as authority); Hoffner v. Lanctoe, 492 Mich. 450, 479, 821 N.W.2d 88, 104 (2004) ("[O]ur caselaw . . . has relied on the principles of the Second Restatement of Torts, which this opinion then incorporates and applies").

> *store, theatre, office building, or hotel, is entitled to expect that his host will make* ***far greater preparations*** *to secure the safety of his patrons than a householder will make for his social or even his business visitors.* So too, one who *goes on business* to the executive offices in a factory, *is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety.*[122]

As previously cited, Section 343A(1) states that a landowner is not liable to invitees for injury caused to the invitees as a result of a dangerous condition on the land if the danger is obvious "*to them.*"[123] The inclusion of "to them" in this Section indicates that the appropriate focus is on the *invitee*, not on the dangerous condition. Thus, a possessor of land may only escape liability for injuries caused to their invitees by any dangerous condition on the land if it is known or obvious *to the invitee.* By implication then, the landowner *is* liable to the invitee for any condition on the land whose danger is *not* known or obvious *to the invitee.*

Comment (f) to Section 343A states that when a landowner can and should anticipate that a dangerous condition would cause injury to an invitee, despite it being seemingly obvious, the landowner is *not* relieved of his duty of reasonable care to the invitee.[124] In such case, the landowner would then be required to either warn or protect the invitee from the dangerous condition if the landowner could reasonably anticipate that the invitee would sustain physical harm from the condition.[125] Comment (f) then outlines when a landowner might expect harm to the visitor from known or obvious dangers: where the invitee's attention may be distracted, where the invitee may forget what he has discovered, or where the invitee may fail to protect himself against the danger (i.e., a blind patron who is physically incapable of protecting themselves from particular dangers).[126] Various illustrations following comment (f) suggest that the Restatement anticipates that some invitees will be distracted in a way that prevents them from being able to see a danger, or from noticing the danger because their attention is

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122. RESTATEMENT (SECOND) OF TORTS § 343 cmt. e (AM. LAW INST. 1965) (emphasis added).

123. RESTATEMENT (SECOND) OF TORTS § 343A (AM. LAW INST. 1965) (emphasis added).

124. *Id.* at cmt. f.

125. *Id.*

126. *Id.*

elsewhere.[127] For example, illustration 4 states the following hypothetical:

> Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles *which obstruct her vision, and does not see the spout.* She trips over it, and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.[128]

As the Restatement drafters would view an invitee's self-created obstructed vision as generating liability, it logically follows that the drafters would indeed hold a business owner liable for injury sustained by a blind customer if the business owner should have reasonably anticipated such harm to the blind patron.

Although Michigan courts have made decisions believing they were following the Restatement (Second) of Torts, this has in fact not been the case.[129] Perhaps then, in a future decision, the Michigan Supreme Court might delineate a modified open and obvious rule, following both Justice Cavanagh and the Restatement (Second) of Torts in a way that protects disabled patrons and eliminates fear of injury from an unseen danger without the option of legal recourse. Such rule should first acknowledge that the intent of Section 343 was that it be read in conjunction with Section 343A.[130] Then, it would state that premises possessors who should reasonably anticipate that a particular danger or hazard on their premises would not be obvious to certain patrons must then remedy the danger by taking "particular precautions for the safety of such visitors,"[131] and use reasonable care in making it safe *for them.*[132]

2. *Comparing Michigan's Open and Obvious Doctrine to the State of Minnesota*

In attempt to bolster support for his assertions and interpretations of the Restatement, Justice Cavanagh cited to the Minnesota Supreme Court's approach to the open and obvious doctrine in his dissent in

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127. *Id.*
128. *Id.* at illus. 4 (emphasis added).
129. *See supra* note 121.
130. *See supra* note 109.
131. RESTATEMENT (SECOND) OF TORTS § 343A cmt. d (AM. LAW INST. 1965).
132. *Id.* at cmt. g.

Mann.[133] In *Sutherland v. Barton*, the Minnesota Supreme Court looked to the status of the individual plaintiff as opposed to the particular danger in evaluating liability of the landowner.[134] Invoking the Restatement, the court stated: "This court has adopted [Section] 343A of the Restatement (Second) of Torts (1965) which states that landowners are not liable to their invitees for harm caused by dangers that are 'known or obvious' *to those invitees*."[135] In this particular case, the plaintiff, an employee of an electric company, was killed in a workplace accident at a paper plant.[136] Following the accident, the plaintiff's trustee filed a wrongful death action against the paper plant.[137] Aside from the question of whether the paper plant owed the plaintiff a duty to protect him from harm, the court also considered the open and obvious nature of the condition causing the plaintiff's death.[138] The court, after looking at the particular characteristics of the *plaintiff* and *not* the actual condition, concluded that the plaintiff had knowledge of the dangerous nature of the job and thus could not recover in the wrongful death action.[139]

However, the *Sutherland* court also embraced the "unless" exception advocated by Justice Cavanagh.[140] The Restatement's "unless" clause provides that if a danger is known or obvious to an invitee, the landowner does not owe a duty to the invitee either to protect or warn them *unless* the landowner should anticipate the harm.[141] Thus, even if a danger is ordinarily known or obvious, the landowner may still be

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133. Mann v. Shusteric Enters., 470 Mich. 320, 339, 683 N.W.2d 573, 583 (2004) (Cavanagh, J., dissenting):

> As the Minnesota Supreme Court has noted, § 343A's "unless" clause is a "crucial qualifier to the general rule" of the Restatement . . . Thus, "if the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger."

Id. (citations omitted).

134. Sutherland v. Barton, 570 N.W.2d 1 (Minn. 1997).

135. *Id.* at 7 (emphasis added).

136. *Id.* at 2.

137. *Id.*

138. *Id.* at 7.

139. *Id.* Among other variables, the court considered the following facts as relating to the individual Plaintiff:

> He was a licensed electrician with 30 years of experience. He had worked near live buss bars before and in fact had warned others of the danger inherent in such a task. On the day of the accident, his supervisor specifically pointed out the live buss bars to Sutherland. There is no dispute that the danger was known and obvious to Sutherland.

Id.

140. *Id.*

141. Riddle v. McLouth Steel Prods. Corp., 440 Mich. 85, 97, 485 N.W.2d 676, 682 (1992).

obligated to exercise reasonable care in protecting the invitee from the dangerous condition.[142] The Minnesota Supreme Court stated that, according to the Restatement, even if a particular hazard is open and obvious, a landowner "may still be liable to their invitees if they 'should anticipate the harm despite such knowledge or obviousness.'"[143] Such exception "is a crucial qualifier to the general rule"[144] that a landowner is not liable for injuries sustained by invitees while on their land, so long as the hazard in question was open and obvious.

Thus, along with Justice Cavanagh's reasoning in his various dissenting opinions on the open and obvious doctrine in Michigan, the Minnesota Supreme Court also provides helpful explanation and application of the Restatement position to the doctrine.[145] That is, if a blind invitee enters a landowner's premises, particularly a business owner's premises, the landowner has a heightened duty to ensure his premises are safe for such disabled patrons. Otherwise, the landowner may not claim protection under the open and obvious doctrine for that particular invitee, as the invitee could not recognize or appreciate the "gravity of the threatened harm."[146]

IV. CONCLUSION

The Michigan Supreme Court's current interpretation of the open and obvious doctrine is not in line with the Restatement (Second) of Torts approach. The Restatement, as advocated by former Justice Cavanagh, looks to the individual injured plaintiff in determining whether a danger is open and obvious for purposes of recovery. Accordingly, the Restatement position might allow recovery to blind or otherwise disabled persons injured on a landowner's premises that may

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142. *Id.*

143. *Sutherland*, 570 N.W.2d at 7 (citing RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965)).

144. *Id.*; *see also* Mann v. Shusteric Enters., 470 Mich. 320, 339, 683 N.W.2d 573, 583 (2004) (Cavanagh, J., dissenting).

145. *See Sutherland*, 570 N.W.2d at 5–7.

146. RESTATEMENT (SECOND) OF TORTS § 343A cmt. b (AM. LAW INST. 1965):

> The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also *appreciation* of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be *recognized that it is dangerous*, and the probability and gravity of the threatened harm *must be appreciated.* "Obvious" means that both the condition and the risk are *apparent to and would be recognized by* a reasonable man, *in the position of the visitor*, exercising ordinary perception, intelligence, and judgment.

Id. (emphasis added).

not ordinarily be recoverable, due to the blind plaintiff's individual status in encountering the danger.

Further, the drafters of the Restatement acknowledged specific instances in which a landowner may be held liable for a condition if they should have anticipated that it would cause harm to particular individuals. Business owners should anticipate that blind and otherwise disabled persons might enter their premises on occasion, and perhaps even frequently. Thus, imposing a duty on these business owners to exercise reasonable care in order to protect these invitees is not overly burdensome, and is in accordance with the language of the Restatement. As a result, Michigan should adopt the position of the Restatement (Second) of Torts in premises liability, as advocated by Justice Cavanagh, in relation to the open and obvious doctrine so as to better protect disabled plaintiffs in Michigan.