Submitted by
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Support HB 5744

The Members of the Michigan Association for Justice support HB 5744 because by reviving Michigan's proven comparative negligence law the bill will make Michigan a safer place to live and work, and reduce medical costs and lost economic productivity due to preventable accidents.

By ridding the state of the extreme and counterproductive "open and obvious' doctrine in premises liability cases:

- **HB 5744 *will* reverse an activist court's attempt to legislate from the bench**
- **HB 5744 *will* make Michigan a safe place to live, work, and do business**
- **HB 5744 *will* restore Michigan's effective and well-balanced legal protection for both property owners and others.**
- **HB 5744 *will not* make it easier to make frivolous claims**
- **HB 5744 *will not* disrupt Michigan's layers of legal protection for property owners**

Slip and fall accidents are not funny.
Though slip and fall injuries are often portrayed as amusing, slips and falls can be dangerous and even deadly.

Dangerous and deadly.
For example, more than one in five workplace injuries are the result of falls according to OSHA's 2008 data (the most recent fully compiled). Falls are one of the leading causes of traumatic brain injury according to the Centers for Disease Control and Prevention.

In 2004, 14,900 people 65 and older died from injuries related to unintentional falls; about 1.8 million people 65 and older were treated in emergency departments for nonfatal injuries from falls, and more than 433,000 of these patients were hospitalized. On average, the hospitalization cost for a fall injury was $17,500. *Center for Disease Control Statistics (2006).*

In 2007, more than 21,700 Americans died as a result of falls and more than 7.9 million were injured by a fall. *National Safety Council, Injury Facts, 2009 Edition.*

Falls are the leading cause of injury-related deaths among older adults 73 and older and the second leading cause of death from ages 60-72. *National Safety Council, Injury Facts, 2009 Edition.*

Slip and falls accounted for 35 percent of the 52,000 deaths, 275,000 hospitalizations and almost 1.4 million treated people and released from a hospital emergency departments, according to the CDC's report analyzing data for the years 2002-2006.

Premises accidents are usually preventable.
People in Michigan are often seriously hurt --or even killed- by the negligent failure to make a walkway safe or provide adequate lighting or neglect to warn or remove a risk in a timely fashion.

Michigan's premises owners already enjoy the best possible protections against unfair claims
Michigan law has adopted a "modified comparative negligence" standard. Under such a standard a fact finder compares the fault of each party. For example: A property owner who failed to clean up a dangerous spill in a timely manner is only partly at fault if the person that slipped due to the spill was "texting" at the time of the fall. If the fact finder determined that the property owner was 40% at fault, and the person texting was 60% at fault. The injured person's damages would be reduced by 60%.

Even stronger protections for premises owners.
As further protection for premises owners, the "modified" of Michigan's comparative negligence bars an injured person from *any claim* for non-economic damages (what we'd call "pain and suffering") if he or she was more than 50% at fault for the injury. In the example above, the texting person who fell would receive no non-economic damages and only 40% of the economic damages.

Development of the misapplication of the 'Open and Obvious Doctrine' in Michigan premises law.

The open and obvious doctrine took root in 1992 when the Michigan Supreme Court issued its opinion in *Riddle v McLouth Steel Prods Corp.*, 440 Mich 85 (1992). In that case, it was held that "where the dangers are known to the invitee to are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* at 96. In other words, the plaintiff's claim is barred if the plaintiff knowingly encounters a danger or fails to discover a danger that was there to be seen. The source of the open and obvious defense, cited by the *Riddle* court at 440 Mich 97, footnote 11, was 2 Restatement Torts 2nd, §343.

In *Lugo v Ameritech*, 464 Mich 512 (2001) the Michigan Supreme Court expanded the open and obvious doctrine, and created a "special aspects" analysis. The Court held that some conditions may contain "special aspects" which render those conditions to be unreasonably dangerous despite their obviousness. In other words, some conditions are so dangerous that the open and obvious rule should not apply. The Court, in dicta, gave examples of what would constitute a special aspect of a danger rendering same unreasonably dangerous, including the potential for a uniquely high likelihood or severity of harm, (like a 30 foot unguarded pit) or whether the defect was effectively unavoidable.

Since *Lugo* was issued, Court of Appeals panels have struggled with application of the open and obvious doctrine. One panel held that a puddle of water in a bathroom stall was open and obvious to a blind man because the average prudent, reasonable person would have seen it and avoided it.[1] The Michigan Supreme Court summarily reversed the Court of Appeals and adopted the dissent wherein it was held that since Michigan is a state with a winter season, persons should expect that it could be slippery on a Michigan winter day.[2] Not only do these cases mark an extreme divergence from the language in *Riddle*, but they also ignore Michigan Jury Instructions and the comparative negligence statute which was enacted in 1995. What is also apparent is that judges are deciding the issue, rather than the jury.

Michigan Jury Instructions indicate that the determination of whether a hazard is open and obvious is based on not an objective analysis, but on an analysis of the particular Plaintiff's conduct under the circumstances that existed when he encountered the hazard. MCiv 19.03 provides that "A condition is open and obvious if the invitee knew of it or if a reasonably careful

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[1] *Sidorowicz v Chicken Shack Inc.*, Unpub. Court of Appeals Docket No. 239627 (January 17, 2003).

[2] *Kenny v. Kaatz Funeral Home*, 472 Mich 929 (2005);

person under the circumstances that you find existed in the case would have discovered it upon casual inspection."

Michigan law has always held that questions of reasonableness are for the jury to decide and where reasonable minds can differ, it is for the properly instructed jury to determine whether the risk was "open and obvious" or posed a risk of "unreasonable" harm. In *Bertrand v Alan Ford, Inc.,* 449 Mich. 606 (1995), the Michigan Supreme Court held that "if the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide . . . . . If the jury determines that the risk of harm was unreasonable, then the scope of the defendant's duty to exercise reasonable care extended to this particular risk". Id. at 617.

The open and obvious doctrine also conflicts with the comparative negligence statute. In 1995, after *Riddle*, the Michigan legislature rejected contributory and pure comparative negligence principles and instead adopted a hybrid comparative negligence stance via the enactment of MCL 600.2959. The statute provides that in all actions based on tort or other theories seeking damages for bodily injury, property damage or wrongful death, the court must reduce the plaintiff's damages by the percentage of his or her fault, but a plaintiff's whose percentage of fault is greater than the aggregate fault of the other person(s) cannot recover noneconomic damages.

Despite the clear language of the comparative negligence statute, the open and obvious doctrine, as applied by the courts, bars a plaintiff's claim regardless of the attributed percentage of fault. It appears that the courts, without actually stating so, are finding that if a condition is open and obvious, the plaintiff is automatically more than 50% at fault. This invades the province of the jury.

MCL 600.2959, which was enacted after the birth of the open and obvious doctrine, bars a person's claim for pain and suffering if that person is more than 50% at fault for his/her injuries. Whether the person should have seen and avoided a dangerous condition is an issue implicating that person's comparative negligence. As such, limiting application of the open and obvious doctrine to the comparative negligence issue, by amending MCL 600.2959, will restore stability in the law.