EXAMINER'S ANALYSIS OF QUESTION NO. 7

This question tests the rules governing a premises owner's liability to an invitee. "To establish a prima facie case of negligence," underlying a premises liability claim, "a plaintiff must prove that '(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages.'" *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660 (2012), quoting *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011).

The first step is to determine the duty owed by the landowner to the person coming upon his land. *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012). There are three common-law categories in which visitors to one's land fall: invitees, licensees, and trespassers. One's category determines the duty owed. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). A social guest of a tenant is an invitee of the property owner. *Stanley v Town Square Co-op*, 203 Mich App 143, 147-148 (1993) ("Part of the rent paid to the landlord is the consideration for giving to the tenants the right to invite others onto the property. Thus, the same duty that a landlord owes to its tenants also is owed to their guests, because both are the landlord's invitees"); *Bailey v Schaaf*, 494 Mich 595, 604 (2013) ("Michigan law has recognized that a special relationship exists between "[o]wners and occupiers of land [and] their invitees," including between a landlord and its tenants and their invitees.").

"In general, 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." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). However, a landowner's duty to remedy or warn does not generally encompass defects that are "open and obvious." With regard to a premises owner's duty, in *Hoffner*, 492 Mich at 460, the Supreme Court recognized that "an integral component of the duty owed to an invitee considers whether a defect is 'open and obvious.' The possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." Thus, the duty imposed on property owners does not extend to open and obvious conditions that are effectively avoidable and do not impose a uniquely high likelihood of harm or severity of harm. *Hoffner*, 492 Mich at 463. An effectively unavoidable hazard is one that the person, "for all practical purposes, must be *required or compelled* to confront."

Hoffner, 492 Mich at 469 (emphasis in original.) Whether a condition is open and obvious is judged by an objective standard by asking, "Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?" *Price v Kroger Co*, 284 Mich App 496, 501 (2009).

Citing to *Lugo*, 464 Mich at 517, the *Hoffner* Court also addressed an exception to this rule that arises when the condition is so hazardous or its placement makes even the openly obvious risk unreasonable:

> Yet, as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable. When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm.
>
> * * *
>
> It is worth noting *Lugo*'s emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." The touchstone of the duty imposed on a premises owner being reasonableness, this narrow "special aspects" exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature. [*Hoffner*, 492 Mich at 461-462 (footnotes omitted).]

Under the law set forth above, defendant had a duty to Steve, an invitee, to warn of the pothole. Given its size and location, it is easy to conclude that the pothole was open and obvious to a reasonable observer and that it was at least arguably effectively avoidable because Steve could have walked around the pothole. However, the size of the pothole and its location also allows there to be at least a question of fact on whether the pothole presented a special aspect. As the examples in *Lugo* suggest, a premises owner continues to have a duty to warn if a readily observable condition on the land presents such an extremely high risk of harm to the invitee. Here, it can be argued that the pothole was so large in

size that it presented an unusual and dangerous condition in the land. Potholes are not unique, but one that is two feet wide and a foot deep are somewhat more so, and its location on the driveway where the driveway and the front walk meet, adds to the uniqueness and dangerousness of the pothole. Though it is a somewhat close issue, the most reasonable conclusion is that defendant would have had a duty to warn Steve of the dangerous condition on the land.

The question states Steve sued in *tort*. As a result, the applicant does not need to mention MCL 554.139, which provides a statutory duty to keep common areas fit for the use intended by the parties. A breach of that duty is a breach of the terms of the lease and "any remedy under the statute would consist exclusively of a contract remedy." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425-426 (2008).

Finally, as to any relationship between Steve's pre-existing weak ankle condition and his broken leg, defendant's argument will not succeed. First, a tortfeasor takes the plaintiff as he comes, *Wilkinson v Lee*, 463 Mich 388, 391 (2000), so the fact Steve's ankle was weak or sore has no bearing on defendant's liability for Steve's broken leg. Second, the facts show that Steve's ankle did not fail him until he stepped into the pothole. Nothing suggests that the ankle caused him to step into the pothole. Defendant's argument on this point will not succeed.