JULY 2013 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc,* 270 Mich App 437, 440 (2006).

The duty a possessor of land owes to an individual depends on the individual's status on the property, which can either be a trespasser, licensee, or invitee. *James v Alberts*, 464 Mich 12, 19 (2001); *Pippin v Atallah*, 245 Mich App 136, 141 (2001). A trespasser is one who is on the property without the landowner's consent, while a licensee is "a person who is privileged to enter the land of another by virtue of the possessor's consent," *Pippin*, 245 Mich App at 142, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000), and is normally there for social purposes. Finally, an invitee is one who is on the premises for a reason directly related to the landowner's commercial interest. *Stitt*, 462 Mich at 597-599. Here, Smith is an invitee because he was on WAF's property to purchase goods in the store.

In general a premises possessor owes a duty to invitees 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 Inc*, 464 Mich 512, 516 (2001). The duty does not generally encompass removal of open and obvious dangers, because 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." *Hoffner v Lanctoe*, 492 Mich 450, 460-461 (2012), quoting in part, *Bertrand v Alan Ford Inc*, 449 Mich 606, 611 (1995). "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." *Id.*, at 461.

If a condition is found to be open and obvious, a duty can still arise if special aspects of the condition exist that create an unreasonable risk of severe harm. *Lugo*, 464 Mich at 517-518. The two most well known examples of special aspects are a 30 foot deep pit in the middle of a parking lot and a single exit to a business where the floor is covered with standing water, making the water "effectively unavoidable." *Id.*, at 518. If a special aspect of the condition exists, then the possessor of land must take reasonable steps to protect the invitee from the unreasonable risk of harm. *Lugo*, 464 Mich at 517; *Bertrand*, 449 Mich at 614.

Here, as noted, Smith is an invitee because he was on the property to purchase goods from WAF. As to WAF's duty, the question is whether the ice and snow in the parking lot just before the entrance to the store was an open and obvious condition about which WAF had no duty to warn. Ice and snow hazards are not always open and obvious, as invitors have a duty to exercise reasonable care within a reasonable time to diminish the hazard created by an accumulation of ice and snow. *Hoffner*, 492 Mich at 464. Nonetheless, individual circumstances and conditions can render snow and ice conditions open and obvious such that a person with ordinary intelligence would foresee the danger. *Id.*

The most accurate analysis of the facts would result in a conclusion that, when the circumstances are viewed objectively, the snow and ice conditions in the parking lot were open and obvious. There had been freezing rain the night before, it was snowing that morning, and it continued to snow when Smith arrived at the store. Additionally, Smith saw his friend Lauren

slip (but not fall) twice while walking into the store, and as a result Smith walked carefully through the parking lot into the store. Under these circumstances the slippery conditions were objectively open and obvious. See *Hoffner*, 492 Mich at 461 and *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929 (2005), rev'g 264 Mich App 99 (2004), for the reason stated by the dissent, 264 Mich App at 115-122 (noting that plaintiff saw other people holding onto side of car when exiting into the snowy parking lot).

Consequently, there was no duty for WAF to warn of the condition unless there was some special aspect to the condition. An argument can be made that the situation is similar to one of the *Lugo* examples, i.e., the condition was located at an area that was effectively unavoidable-a few feet from the store entrance. However, the better answer is that it was not effectively unavoidable, as Smith had the choice to leave before exiting the vehicle and entering the store (an option he took the night before when he did not leave his house). There was snow falling into the parking lot and at least one person was seen slipping while walking in the area. Instead of taking that option, Smith chose to traverse the parking lot and enter the store despite knowing that the conditions were slippery. *Hoffner*, 492 Mich at 472-473 ("A general interest in using ... a business's services simply does not equate with a compulsion to confront a hazard and does not arise to the level of a 'special aspect' characterized by an unreasonable risk of harm.") And, it was that decision that led to his having to exit the store through the same condition. Thus, it was not effectively unavoidable, and no special aspect to this condition existed. WAF had no duty to warn plaintiff of the slippery conditions.

However, if an applicant comes to the reasonable conclusion that a duty to warn did exist because of the location of the condition, then the final question under the call of the question is whether WAF breached the duty to warn. Although this is a close question under these facts, the best answer would be that it did. The facts show that the owner was aware of the slippery conditions, and although he took steps to contact a snow removal company, he took no further, more immediate steps to warn the customers of the condition. WAF also could have salted the lot, placed a warning sign, or otherwise warned customers of the slippery condition until such

time as the snow removal company arrived and eliminated the condition.