EXAMINERS' ANALYSIS OF QUESTION NO. 7

The rules governing a premises owner's liability to an invitee are involved. "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 dictates the duty owed. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). A customer is an invitee of the property owner. "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." 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.
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> 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 facts presented, plaintiff Smith could successfully maintain his negligence claim against Grocery Time. With respect to duty, Smith was on the premises to do business with Grocery Time, and thus was an invitee. Consequently, Grocery Time must have exercised reasonable care to protect Smith from an unreasonable risk of harm that could be caused by a condition on the land, here the sinkhole.

Grocery Time will argue, however, that the sinkhole's size and location made it open and obvious. In fact, although this is an objective test, the facts reveal that Smith did see the sinkhole and traversed its edge. There can be little doubt but that a six-foot wide, three-foot deep hole in the middle of a parking lot is open and obvious to an average person, especially in daylight hours. Hence, unless the sinkhole presented a

special aspect, Grocery Time would have had no duty to warn or protect Smith from the perils of the sinkhole.

The facts suggest that the sinkhole can be considered a special aspect. Indeed, the *Lugo* Court specifically identified "an unguarded thirty foot deep pit in the middle of a parking lot" as an example of an open and obvious danger that "present[s] such a substantial risk of death or severe injury to one who fell in the pit" that it would be an unreasonable risk to maintain on the premises, absent some form of warning or other safety measure. *Lugo*, 464 Mich at 518. Thus, the sinkhole, though not thirty feet deep, nevertheless presented an unreasonable risk of harm despite its open and obvious nature. And, although the facts reveal that Grocery Time employees were bringing warning cones to place by the sinkhole, there was nothing at the time of the injury that would have provided any warning or safety measure to protect an invitee like Smith. Grocery Time breached its duty to Smith.

As to the final two elements, Smith clearly suffered damages as he was injured by the fall, and though an argument could be made that he was comparatively negligent in venturing too close to the sinkhole, the facts suggest that Grocery Time's breach of its duty proximately caused some (or all) of Smith's injuries.