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STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

Hank O'Henry,

Plaintiff,

File No: 06-1234-NO

Hon. Thomas P. Boyd

v.

Friendly Bank, Inc.,
A Michigan Corporation
123 Main St.
Lansing, MI 48987

Defendant.

_____/

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BRIEF OPPOSING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

COUNTERSTATEMENT OF FACTS

This case is about a seventy-two-year-old man named Hank O'Henry who at one time was spry and healthy but whose physical health is now rapidly deteriorating since falling on a wet floor inside Friendly Bank. This case presents the trial court with the opportunity to decide whether Hank O'Henry's case can proceed to trial. Mr. O'Henry has been happily married for over fifty-three years. He has six children and seventeen grandchildren. (Deposition of Hank O'Henry at p 6: 3-6, 10-12, attached as **Exhibit A**). Mr. O'Henry worked for General Motors before retiring twelve years ago. (*Id*. at 6: 19-23, 7: 5-7). He loves the "great outdoors" and cherishes life's simple pleasures. Two of the things that Mr. O'Henry loved to do were to go for walks and to take long bike rides. (*Id*. at 6: 17-18).

But all of that changed on July 30, 2005. On July 30, 2005, Mr. O'Henry suffered a life-altering injury when he was walking into Friendly Bank to cash his social security check, as was his usual custom at the end-of-the-month. To be on the safe side, Mr. O'Henry was carrying an umbrella even though it had stopped raining earlier that morning and there were only a few puddles left on the ground. (*Id*. at 4: 9-10, 8: 15-18).

As Mr. O'Henry was half-way through the door, he used one foot to hold it open and both hands to close his umbrella. Unbeknownst to Mr. O'Henry, the tile that he was about to walk on was covered with puddles of water. Suddenly, he lost his balance, the back of his head slammed against a piece of molding, and he landed on the floor in a puddle of water. (*Id*. at 8: 1-2). When

Mr. O'Henry regained consciousness, he found himself lying in a pool of blood from a laceration to his head. (*Id*. at 9: 5-8).

Since his catastrophic fall at Friendly Bank, Mr. O'Henry's physical condition has deteriorated. Mr. O'Henry can no longer participate in the outdoor activities that he used to enjoy. For example, Mr. O'Henry can no longer garden or ride his bike. Even the slightest bit of exertion causes him to experience severe headaches and dizziness. His only prior injury is a herniated disk from tripping over his dog. (*Id*. at 33: 5-7).

Inside the foyer of Friendly Bank lies a black mat. (Deposition of Hillary Deville at p 16: 13-14, attached as **Exhibit B**). The purpose of this mat is to cut down on water and dirt that is tracked in from outside. (*Id*. at 10: 7-9). The mat is changed and replaced every two weeks. (*Id*. at 10: 15-17). It covers every square inch of tile with the exception of the first two-feet of tile and a one-foot border. (*Id*. at 17: 4-6). The tile is light gray with grouting. (*Id*. at 15: 23-24).

Friendly Bank has a procedure in place for mopping up water in the foyer. (*Id*. at 14: 17-25). Friendly Bank expects its tellers to "stick their head out" into the foyer to check for hazardous conditions when they are returning from lunch or from break. (*Id*. at 9: 10-18). At the first site of water, the tellers are required to mop up the floor and to put out caution signs. (Id. at 15: 3-7).

Mr. O'Henry brings this suit against Friendly Bank, Inc., under a theory of premises liability, claiming that Friendly Bank, Inc. is liable for his injuries. Friendly Bank has moved for

summary disposition claiming that they never owed Mr. O'Henry a duty to protect him from unreasonable risks of foreseeable harm. Mr. O'Henry opposes Friendly Bank's motion.

ARGUMENT

I. Standard for Decision

a. Under MCR 2.116(C)(10)

> "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." MCR 2.116(C)(10), (G)(4).
>
> "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, or other documentary evidence. *Neubacher v Glober Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993)." [Smith v Globe Life Ins Co, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting Quinto v Cross & Peters Co, 451 Mich 358, 362-363; 547 NW2d 314 (1996)]."
>
> A motion under MCR 2.116(C)(10) "should be granted only when it is impossible for the claim to be supported at trial because of a deficiency that cannot be overcome." *Warren's Station, Inc v City of Bronson*, 241 Mich App

384, 388; 615 NW2d 769 (2000) (citing *Holland v Liedel*, 197 Mich App 60, 64; 494 NW2d 772 (1992)).

As will be shown, Friendly Bank owed Mr. O'Henry a duty to protect him from unreasonable risks of harm due to dangerous conditions on its premises. Summary disposition is not appropriate here, and Friendly Bank's motion should be denied.

II. Friendly Bank owed Mr. O'Henry a duty to maintain its premises in a reasonably safe condition, inspect the premises for hazardous and defective conditions, and warn Mr. O'Henry of all known or readily observable dangers.

Like all negligence claims, a premises liability claim requires a plaintiff to prove four elements, *Clark v Dalman*, 379 Mich 251, 260; 150 NW2d 755, 759 (1967): (1) That the defendant owed a legal duty to the plaintiff; (2) That the defendant breached the legal duty it owed to the plaintiff; (3) That the plaintiff suffered damages; and (4) That the defendant's breach of duty was a proximate cause of the damages suffered by the plaintiff.

Under the premises liability theory, the status of the injured party determines the premises owner's duty of care. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 92; 485 NW2d 676, 680 (1992) (citing Prosser & Keeton, Torts (5th ed), §§ 58-62, pp 393-434). A business invitee is one who enters a premises to conduct business that concerns the premises owner at the owner's express or implied invitation. *Id*. at 91 (citing Prosser & Keeton, Torts (5th ed), § 61, pp 419-424). Here, Mr. O'Henry went to Friendly Bank to deposit his social security check and banks are in the business of holding people's money. Therefore, Mr. O'Henry was a business invitee.

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. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185, 186 (1995). However, this duty does not generally encompass removal of open and obvious dangers. *Lugo v Ameritech Corp*, *Inc* 464 Mich 512, 516; 629 NW2d 384, 386 (2001). "The 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle*, 440 Mich 85, 95-96; 485 NW2d at 681 (1992).

Generally, an invitor does not owe a duty to protect or warn the invitee if (1) the dangers are known to the invitee or (2) the dangers are so obvious that the invitee might reasonably be expected to discover them. *Id*. at 96, 485 NW2d at 681. The only way that a possessor of land can be held liable to an invitee for harm caused by an obvious condition is if the possessor should have anticipated the harm. *Id*. at 96, 485 NW2d at 681. There must be something out of the ordinary, or, in the words of the Michigan Supreme Court, "special," about a particular open and obvious danger for a premises possessor to be expected to "anticipate" harm from that condition. *Lugo*, 464 Mich at 525, 629 NW2d at 391.

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. *Id*. at 525, 629 NW2d at 391. By "reasonable precautions," the *Lugo* court is referring to "reasonable warnings or other remedial measures." *Id*. at 518, 629 NW2d at 387.

To help guide the trial courts in resolving issues regarding the open and obvious doctrine, the Michigan Supreme Court created a two-part test in *Lugo*. The first part of the test is whether the condition of the premises is open and obvious. *Id*. at 523, 629 NW2d at 390. If so, the second part of the test is whether there are special aspects of the situation that nevertheless make it unreasonably dangerous. *Id*. at 523, 629 NW2d at 390.

III. The wet floor was not open and obvious because it was not the type of everyday occurrence that a reasonably prudent person would ordinarily observe when entering a bank.

An invitor owes no duty to protect or warn the invitee if (1) the dangers are known to the invitee or (2) the dangers are so obvious that the invitee might reasonably be expected to discover them. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676, 681 (1992). The defendant argues that Mr. O'Henry tripped and fell on the floor because he was not watching where he was going. But the relevant inquiry is not whether Mr. O'Henry actually saw water on the floor, instead, it's whether a reasonable person would have seen it and recognized the risk. *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379, 381 (1993).

This Court must look to the objective nature of the condition of the premises and not the subjective degree of care used by the plaintiff. *Lugo v Ameritech Corp*, *Inc* 464 Mich 512, 523-524; 629 NW2d 384, 390 (2001). The test to determine whether a condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney*, 198 Mich App at 475, 499 NW2d at 381.

In *Lugo*, the Supreme Court of Michigan held that an ordinary pothole in a parking lot was an open and obvious danger because "an ordinarily prudent person would typically be able to see the pothole and avoid it." *Lugo*, 464 Mich at 520, 629 NW2d at 388. In *Lugo*, the plaintiff was walking through a parking lot toward the defendant's building to pay a telephone bill when she stepped in a pothole and fell. The plaintiff testified that she was not watching the ground and that she was concentrating on a truck in the parking lot. The defendant moved for summary disposition, arguing that it did not have a duty to protect the plaintiff because the pothole was an open and obvious danger.

The Court reasoned that the plaintiff did not see the pothole because "she wasn't looking down," not because of any debris obscuring the pothole. *Id*. at 521, 629 NW2d at 389. Unlike the pothole in *Lugo*, an "average person of ordinary intelligence" would not have discovered the water because it blended in with the grayish color and matte finish of the floor, effectively concealing the slippery condition. By Hillary Deville's own admission, a person looking at the wet floor would be led to believe that it was dry even when it was wet. (Deposition of Hillary Deville at p 16: 4-5, attached as **Exhibit B**). In fact, Ms. Deville seemed to infer that Friendly Bank ordered this floor specifically because it did such a good job of hiding the defect. For example, Ms. Deville said, "we… like it that way [when water is not visible on the floor]," otherwise it would "look really dirty." (*Id*. at 16: 7, 12). Mr. O'Henry found that out the hard way. Indeed, it wasn't until after he fell and his clothes were drenched that he finally realized the floor was wet. (Deposition of Hank O'Henry at p 18: 19-22, attached as **Exhibit A**).

The defendant, relying on *Schmitt v Duke Realty*, 2005 WL 1953074 (2005)—a case from the Ohio Court of Appeals—argues that Mr. O'Henry should have known how slippery the floor was since "hallways… inside a building during a rainstorm *are tracked all over by the wet feet of people coming as they enter the building from the wet sidewalks*, and are… more slippery than they usually are." *Id*. at 6 (emphasis added). But this argument overlooks the fact that the puddles of water were attributable as much to the poorly designed entrance mat as they were to people tracking water in from outside. For example, the mat's rubber-back prevented water from seeping through the mat and into the recess area, where it could otherwise be stored until the tellers got around to mopping up the floor.

Mr. O'Henry's case differs from *Riddle*. In *Riddle*, the plaintiff was walking across a floor that was covered with oil when he slipped and struck his head on a metal rail. The slippery condition of the floor was caused by treating steal coils with oil to prevent them from rusting. The oil eventually dripped off of the coils and onto the floor. Although there were walkways around the coil fields, there were no signs to warn anyone of the slippery condition. The Supreme Court of Michigan held that the plaintiff should have been aware of the oily floor and used caution when walking through the coil field because he had worked with steel coils for seventeen years and had hauled them to the defendant's plant on a regular basis. Mr. O'Henry's case is similar in only one respect to *Riddle*. Mr. O'Henry and Mr. Riddle both frequented a place for a long period of time: Mr. Riddle, the plant where he worked for over seventeen years and

Mr. O'Henry, the bank where he conducted his business for most of his life. (Hank O'Henry Dep. at 7: 10-12).

Although Mr. O'Henry was a regular customer at Friendly Bank, he cannot be charged with knowing that the bank floor was wet in the same way that Mr. Riddle was charged with knowing that the coil field was covered with oil. First, the dark color of the bank's floor and entrance mat concealed the puddles of water that had accumulated, whereas the oil on the floor of the coil field could be discovered upon casual inspection. Second, Friendly Bank's front windows were tinted in a way that obscured the view of the vestibule area floor from the outside. Third, even a reasonably prudent person's eyes would take a while to adjust to the fluorescent lighting inside Friendly Bank after coming in from outside. (Deposition of Joan Smith at p 12: 10, attached as **Exhibit C**). In the time that it took for Mr. O'Henry's eyes to adjust to the fluorescent lighting, he was already lying on the floor.

Fourth, puddles of water are not something that an invitee should be expected to discover inside a bank because the public does not expect to enter a bank—or any other commercial establishment—at its own risk. Unlike an industrial plant, a bank is open to the general public. Because Mr. Riddle worked in an industrial plant, he was a licensee, not a business invitee, and McLouth Steel did not owe him the same duty of care that Friendly Bank owed Mr. O'Henry. Indeed, it is not unreasonable to expect an industrial worker who has worked around steel coils for most of his life to use a higher degree of care when traversing the floor of an industrial plant than a bank customer would use when entering a bank.

Not only does the wet floor differ from the oily floor in *Riddle*, but it also differs from the icy sidewalk in *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002) that the Michigan Court of Appeals found to be open and obvious. In *Joyce*, the plaintiff slipped and fell on a snowy sidewalk leading to the defendant's front door as she was removing her personal belongings from the defendant's home. The plaintiff argued that the defendant breached his duty to maintain a safe premises by failing to remove the snow.

The Court of Appeals held that the condition of the sidewalk and the danger it presented was open and obvious. First, the plaintiff testified that she knew that it snowed earlier on the morning that she fell. Second, the plaintiff testified that she saw the snow on the sidewalk and walked carefully because she knew it was not safe. And third, the plaintiff slipped twice before she fell.

There are three reasons why Mr. O'Henry's case differs from *Joyce*. First, the plaintiff in *Joyce* fell outside and Mr. O'Henry fell inside. Second, the hazard in *Joyce*—snow—was open and obvious, while the hazard in this case—a puddle of water—was hidden. Third, unlike the plaintiff in *Joyce* who testified to seeing snow on the sidewalk, Mr. O'Henry testified that he did not see any water on the floor before entering Friendly Bank. (Hank O'Henry Dep. at 11: 5). Mr. O'Henry was at a disadvantage. He did not have the benefit of experiencing two "close calls" to put him on notice of the floor's slippery condition in the same way that the plaintiff in *Joyce* lost her footing twice and was undoubtedly aware that the sidewalk was dangerous and that she

should proceed with caution. Instead, Mr. O'Henry slipped as soon as he stepped foot inside the foyer.

Mr. O'Henry's case is similar to *Talbot v RT Detroit Franchise, LLC*, 2006 WL 1084402 (Mich App) (2006). In *Talbot*, the Michigan Court of Appeals rejected the defendant's motion for summary disposition and held that a two-inch strip of water in the hallway of a restaurant was not open and obvious. The plaintiff was walking towards the restroom inside a restaurant when she slipped and fell on a two-inch strip of water. *Id*. at 1. According to the plaintiff, the water "was not visible before her fall because it was clear, and there was no sign warning of a wet floor." *Id*. at 1. The plaintiff testified that the water was so clear that "she would not have been able to see it if she had been looking down." *Id*. at 2. The Court reasoned that an average person with ordinary intelligence would not have discovered the strip of water upon casual inspection.

This Court should deny Friendly Bank's motion for summary disposition just like the Court of Appeals denied the defendant's motion for summary disposition in *Talbot*. First, the "puddle of water" that Mr. O'Henry slipped on was just as clear as the "strip of water" that Mrs. Talbot slipped on when she was walking through the hallway of the restaurant. Second, neither Friendly Bank nor the restaurant posted a sign to warn customers of the wet floor. And third, just like walking through the hallway was a "normal" path by which customers accessed the restrooms, walking through the foyer was a "normal" path by which customers entered Friendly Bank.

IV. Even if the wet floor was open and obvious, special aspects of the wet floor and the wet mat made them unreasonably dangerous.

In summarizing its ruling in *Lugo*, the Supreme Court of Michigan held that "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… remove that condition from the open and obvious danger doctrine." *Id*. at 519, 629 NW2d at 387-388.

There are two situations where "special aspects" of an open and obvious condition create an unreasonable risk of harm. The first situation is if special aspects of the open and obvious condition make it unavoidable. The defendant argues that Mr. O'Henry could have easily walked away from the water by simply stepping on the mat. But even if Mr. O'Henry could have avoided the wet tile by stepping over it, the thirteen-foot-long wet mat was unavoidable. It covered virtually every square inch of remaining tile leaving only one-foot of exposed tile on each side.

Notwithstanding the oversized mat and the narrow border surrounding it, the defendant argues that Mr. O'Henry could have avoided the mat by "simply walking around it." In theory, the defendant is right. An invitee could have avoided the mat if he or she were to "tip toe" around its edge. But in practice, it would be unreasonable to expect an invitee to "tip toe" through the vestibule area of a bank like a ballerina. In fact, Ms. Deville testified that "you pretty much cannot avoid it [the mat]." (Hillary Deville Dep. at 17: 4).

The second situation does not require the condition to be unavoidable as long as "special aspects" of the condition impose a risk of severe injury. Special aspects of the tile—namely, its grayish color and matte finish—obscured the slippery condition so that a person looking at it would think that it was dry even when it was wet. To make matters worse, the bank's tinted windows possessed special aspects that made it impossible to peer through the glass to see whether there was any water on the floor before entering.

And special aspects of the entrance mat—including its rubber-back—prevented water from seeping through the mat and into the recess area where it could otherwise be stored until the tellers got around to mopping up the floor. Finally, Ms. Deville testified that the mat's dark color made it difficult to tell that it was wet just by looking at it. (Hillary Deville Dep. at 16: 13-16).

a. Special aspects of the wet floor and the wet mat made them effectively unavoidable.

The first issue in the special aspects analysis is whether the wet tile and the wet mat were unavoidable. If so, then Friendly Bank owed Mr. O'Henry a duty to protect him from unreasonable risks of harm. This means that Friendly Bank's tellers would have had a duty to mop up the floor or to put out a caution sign to warn invitees about the floor's slippery condition.

In *Lugo*, the Supreme Court of Michigan provided an example of an open and obvious condition that was "effectively unavoidable": a commercial building with only one exit where

the floor is covered with standing water. Even though the wet floor is open and obvious, the fact that it is unavoidable makes it an unreasonably dangerous risk.

The wet bank floor is similar to the hypothetical in *Lugo*. First, just like the building in the hypothetical had only one exit, Hillary Deville testified that Friendly Bank had only one entrance. (Hillary Deville Dep. at 31: 9-11). Ms. Deville testified that there was approximately two-feet of clearance between the front door and the edge of the mat. In the same way that a customer wishing to leave the commercial building had to walk through the water to reach the exit, a customer wishing to enter Friendly Bank on July 30, 2005 had to walk across a *slippery* tile and over a thirteen-foot-long *wet* mat to reach the lobby. The danger associated with the wet mat is that it becomes "squishy" when it is saturated with water, just like a sponge after washing the dishes. (Hank O'Henry Dep. at 19: 1-9). Even if Mr. O'Henry could have avoided the wet tile by stepping over it, there was no way of avoiding the wet mat.

Second, while Mr. O'Henry may not have been "trapped" inside the bank so that he was forced to encounter the wet floor in order to get out, the fact that Friendly Bank had only one entrance and no outdoor ATM suggests that Mr. O'Henry had no choice but to enter Friendly Bank and to encounter the wet floor if he wanted to cash his check. Friendly Bank argues that the wet floor was avoidable because Mr. O'Henry had the option of asking the tellers to mop up the floor before entering. But the same can be said of the hypothetical plaintiff in *Lugo*. Indeed, the hypothetical plaintiff could have decided not to leave the building before asking an

employee to clean up the water, yet the majority still thought that the plaintiff had no choice but to encounter the standing water.

The wet floor is similar to a snow pile in front of the only loading dock on a defendant's property. In *Brousseau v Daykin Electric Corp*, 2002 WL 1275500 (Mich App) (2002), the Michigan Court of Appeals held that a mound of snow blocking the only entrance to a commercial loading dock—where truck drivers made deliveries—was "effectively unavoidable," despite being open and obvious. The Court reasoned that the plaintiff had no choice but to drive over the mound of snow since there was only one loading dock and no way around it. Just like the mound of snow blocked the only entrance to the defendant's loading dock, the puddles of water obstructed the only entrance to Friendly Bank. And just like the truck drivers had no choice but to drive over the snow mound to make their deliveries, Friendly Bank's invitees had no choice but to walk across the wet floor to do their banking.

Friendly Bank argues that Mr. O'Henry could have returned on another day to cash his check. But this is only a temporary solution—it does not fix the problem. All that it accomplishes is to put off the accident for another day. For example, even if Mr. O'Henry decided to return a day later after assessing the risk, there was no guarantee that the weather would have been any different on July 31 than it was on July 30. Indeed, Mr. O'Henry could just as easily have fallen in a puddle of water inside Friendly Bank on July 31 as he did on July 30.

More importantly, Mr. O'Henry's purpose in visiting Friendly Bank should not be overlooked. He wanted to cash his social security check and because Mr. O'Henry was a

seventy-two-year-old retiree, his social security check was his primary source of income. Telling Mr. O'Henry that he couldn't cash his social security check on July 30 was no different than telling him that he couldn't purchase groceries or pay his electric bill.

The facts of this case differ from *Joyce*. In *Joyce*, the Michigan Court of Appeals held that the plaintiff could have used an available alternative route to avoid the snowy sidewalk. The Court reasoned that the plaintiff could have walked around the regular pathway to avoid the slippery condition. Unlike a second available entrance—as in *Joyce*—Friendly Bank had only one entrance and that was through the vestibule area.

Finally, while Mr. O'Henry might have been distracted with closing his umbrella when he entered Friendly Bank, the degree of care he used is only appropriate in measuring the extent of his comparative negligence and not whether there was an available, alternative entrance to Friendly Bank. *Lugo*, 464 Mich at 522, 629 NW2d at 389.

b. Even if the wet floor was avoidable, special aspects made it so unreasonably dangerous that it created a risk of severe injury.

Even an avoidable open and obvious condition may be unreasonably dangerous if "special aspects" create a risk of death or severe injury. The issue is whether special aspects of the floor should prevail in imposing liability upon Friendly Bank or the openness and obviousness of the floor should prevail in barring liability. In other words, can Friendly Bank's floor, mat, and windows be distinguished from an ordinary bank's floor, mat, and windows in terms of the dangers that they present?

In *Lugo*, the Supreme Court of Michigan held that an ordinary pothole in a parking lot did not possess special aspects that involved a high likelihood of injury. The Court reasoned that a person who tripped on a pothole and fell to the ground would not suffer as severe an injury as a person who fell into a thirty-foot deep pit.

Unlike the pothole in *Lugo*, special aspects of Friendly Bank's floor made it unreasonably dangerous. First, the floor's grayish color and matte finish obscured its slippery condition so that a person looking at the floor would think that it was dry even when it was wet. Second, the bank's tinted windows made it impossible to peer through the glass to see whether there was any water on the floor before entering. Third, the mat's rubber-back prevented water from seeping through the mat and into the recess area, where it otherwise could be stored until the tellers got around to mopping it up. (Deposition of Joan Smith at p 17: 21-25, attached as **Exhibit C**). This rendered the recess area useless as an alternative means of capturing water once the mat was soaked and could not hold any more water. Instead, any water that was tracked in from outside would spill out onto the tile, thus exacerbating the floor's slippery condition. Ms. Deville even testified that the mat's dark color—like the tile—made it difficult to tell that it was wet merely by looking at it. (Hillary Deville Dep. at 16: 13-16).

Fourth, Mr. O'Henry testified that there were few, if any, puddles outside on the morning of July 30, 2005, suggesting that he did not anticipate the floor being wet. (Hank O'Henry Dep. at 4: 9-10, 16: 4-7). Fifth, while it is inappropriate to conclude retrospectively that the wet floor posed a high risk of harm merely because Mr. O'Henry suffered serious and debilitating injuries,

the fact that Mr. O'Henry did suffer a laceration to his head, a loss of short and long-term memory, dizziness, and recurring pain should not be overlooked. (Hank O'Henry Dep. at 21: 10-14, 22-24, 25: 4).

The defendant, relying on *Henderson v PKT, Inc*, 2005 WL 2445136 (Mich App) (2005), argues that the wet floor did not give rise to a "uniquely high likelihood of harm" since other invitees passed around or through the same water without falling. In *Henderson*, the plaintiff was injured when she slipped and fell on a trail of water while leaving a concert at an outdoor theatre. The Court of Appeals held that the trail of water did not give rise to a "uniquely high likelihood of harm" since it was "relatively insubstantial" and "thousands of patrons passed around or through that same trail of water without injury." *Id*. at 2.

While other invitees may have safely passed through the water before Mr. O'Henry arrived (Mr. O'Henry did not arrive until 10:30 AM and Friendly Bank opened at 9:00 AM), the fact remains that the number of customers who preceded Mr. O'Henry into Friendly Bank was negligible compared to the thousands of patrons who passed through the trail of water at the concert. Therefore, Friendly Bank cannot show that severe harm was unlikely merely by arguing that a dozen or so invitees made it across the bank floor without suffering any injuries.

The likelihood of severe harm can be measured more accurately by the reaction of other invitees to Mr. O'Henry's fall than by the number of customers who made it safely across the wet floor before the accident. The fact that some customers refused to enter the bank after the accident until the floor was dry shows how unreasonable the risk of harm actually was. These

customers feared a similar fate—falling and hitting their head on the molding. The combination of a high likelihood of harm and an unavoidable risk warrants removing this case from the open and obvious doctrine.

V. Friendly Bank's tellers breached their duty of care by failing to mop up the water or post warning signs in the atrium despite knowing that it had rained.

A plaintiff must show that the defendant breached its duty to him or her. The reasonableness of the defendant's conduct is generally a question for the jury. *Smith v. Allendale Mut Ins Co*, 410 Mich 685, 714; 303 NW2d 702, 710 (1981). As Ms. Deville testified, the tellers had a duty to "put out caution signs… [and] mop up the mat and the floor area" when "bad storms… cause[d] excessive puddles to build up and remain." (Hillary Deville Dep. at 14: 17-19, 15: 4-5). If Friendly Bank's tellers had a duty to "mop up" the floor and to "put out caution signs" when "excessive puddles" accumulated, then the tellers breached their duty to maintain the foyer in a safe condition. For example, Ms. Deville testified that she saw "puddles standing on the mat" after Mr. O'Henry fell. (*Id*. at 25: 14-16).

Ms. Deville testified that she did not see any warning signs when she arrived, almost two hours after the bank opened. (*Id*. at 8: 12-15, 30: 5-7). This means that two hours passed by without the tellers inspecting the atrium. While the tellers didn't see the need to mop up the floor or to put out caution signs before Mr. O'Henry fell, it is remarkable at how quickly they responded to Ms. Deville's orders to "come out and clean it up" after Mr. O'Henry fell. (Hank O'Henry Dep. at 18: 2-3). If the effectiveness of caution signs was ever in doubt, then Ms.

Deville's testimony that it was a "good idea" to use caution signs because they "help people to know that they might fall"—clearly establishes that Ms. Deville thought that a caution sign would prevent others from falling. (Hillary Deville Dep. at 17: 13-17).

Ms. Deville made it clear that the tellers' conduct was reprehensible. For example, Ms. Deville testified that she would have "gotten on [her] employees for not cleaning up the water that was on the floor" had there not been "pandemonium going on" when she arrived. (*Id*. at 25: 9-14). More importantly, Ms. Deville testified that she would have "expected" her tellers to "take a look" inside the vestibule to see if the floor was wet since it had been "raining out" earlier. (*Id*. at 25: 17-20).

Friendly Bank argues that the tellers had no way of knowing that there was water on the floor because they couldn't see the atrium floor from where they were seated behind their booths. But the issue is not whether the tellers saw water on the floor and failed to clean it up. Instead, the issue is whether it would have been reasonable for the tellers to warn customers that the floor *might* be wet considering the fact that they knew it had rained out earlier that morning.

There is no question that taking extra precautions to warn customers that the floor *might* be wet would have been the reasonably prudent thing to do. For example, Ms. Deville knew that a large number of senior citizens would need to access Friendly Bank on July 30, 2005 to deposit their social security checks. The fact that Ms. Deville expected heavy traffic

inside Friendly Bank on July 30 is a compelling reason why she should have warned her tellers to be especially careful to monitor the floor.

Instead of making safety her number one priority, Ms. Deville allowed the status quo to prevail. Under the status quo, the tellers were told "to put their head[s] out in the foyer area" when they weren't busy waiting on customers or when they were returning from a break. (Hillary Deville Dep. at 14: 25). If requiring the tellers to monitor the foyer regularly—beyond just making cursory checks on their way back from a break—was such a threat to productivity, then Ms. Deville should have assigned one teller with the responsibility of maintaining the foyer.

It was on busy days—more than on any other day—that additional staff was needed to maintain the vestibule area. But Ms. Teller testified that "on busy days… we [the tellers] couldn't check the floor area for an hour or two at a time." (Affidavit of Tammy Teller, line 4, attached as **Exhibit D**).

Regardless of Ms. Deville's intention, her iron grip policy of keeping the tellers chained to their desks discouraged them from monitoring the atrium floor. Indeed, failure to "complete a certain number of transactions per hour" was punishable by demerits. (Affidavit of Tammy Teller, line 6). As a result, on busy days, such as July 30, 2005—when Friendly Bank was inundated with dozens of customers waiting in line to deposit their social security checks—the tellers didn't have time to maintain the foyer even though it was more likely that the foyer would need attention at this time of the month than at any other time. The fact that Ms. Deville

would only send her tellers out to check the vestibule area if they were "not super busy," shows how Ms. Deville put business over safety. (Hillary Deville Dep. at 29: 3-5)

CONCLUSION

Hank O'Henry's claim against Friendly Bank is not deficient. Mr. O'Henry has shown that the puddles of water on Friendly Bank's floor blended in with the grayish color and matte finish of the tile, effectively concealing the slippery condition. But even if this Court finds that the wet floor was open and obvious, Friendly Bank still owed Mr. O'Henry a duty to protect him from unreasonable risks of harm because "special aspects" of the wet floor made it unreasonably dangerous. Mr. O'Henry has satisfied his burden of introducing specific facts to show that a genuine issue of material fact exists.

REQUEST FOR RELIEF

For the reasons stated, Hank O'Henry respectfully asks this Court to deny the Defendant's Motion for Summary Disposition.

Respectfully submitted,

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Dated: July 15, 2006