

**PLAINTIFF'S MOTION TO**  
**STRIKE AFFIRMATIVE DEFENSE**

NOW COMES Plaintiff herein and in support of said Motion states as follows:

1. This is a premises liability action.
2. This Motion is brought pursuant to MCR 2.116 (C)(9) and MCR 2.111 (F)(3).
3. That in its responsive pleadings the Defendant in this action has asserted that the hazard which caused Plaintiff's injury was open and obvious.
4. That pursuant to MCR 2.111 (F)(3)(a), any affirmative defenses contained in a responsive pleading must state the facts constituting said affirmative defense.
5. That the Defendant's assertion that the hazard which caused Plaintiff's accident was open and obvious is not supported by any allegations of fact specific to this case, and is therefore defective pursuant to MCR 2.111 (F)(3).
6. That in addition, MCR 2.111 (F)(3) requires that certain affirmative defenses be filed in the parties' first responsive pleadings including such affirmative defenses as contributory negligence (2.111 (F)(3)(a)), and/or a defense that by reason of other affirmative matters seeks to avoid the legal effect or defeat the claim of the opposing party, in whole or in part (2.111 (F)(3)(b)).
7. That with regard to the pleading of the "open and obvious" defense among Defendant's affirmative defenses, said affirmative defense must be struck pursuant to MCR 2.116 (B)(1) and MCR 2.116 (C)(9). Said Rule states that a party against whom a defense is asserted may move under this Rule for summary disposition of the defense. Further, subparagraph (9) indicates that summary disposition is appropriate when the opposing party has failed to state a valid defense to the claim asserted against him or her.
8. That with regard to the affirmative defense asserting that the hazard which caused Plaintiff's injury was open and obvious, assertion of said defense, as a complete bar to

Plaintiff's recovery, is contrary to the plain language of MCLA 600.2958 which states that “. . . In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a Plaintiff's contributory fault does not bar that Plaintiff's recovery of damages.”

9. That MCLA 600.6304, which sets forth the method of apportioning damages and allocating fault in a tort case, defines “fault” as follows:

**MCLA 600.6304(8)**

**“As used in the section, ‘fault’ includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.”**

10. That MCLA 600.2958 was enacted March 28, 1996.

11. That the holding in such “open and obvious” cases as *Riddle v. McLouth Steel Products Corp.*, 440 Mich 85 (1992) and *Novotney v. Burger King Corp.*, 198 Mich App 470 (1993), should be overruled by the plain language of MCLA 600.2958, enacted after those decisions.

12. That to the extent that cases subsequent to the enactment of MCLA 600.2958 perpetuate the “open and obvious” defense, those decisions have engrafted additional requirements on a Plaintiff's cause of action in direct conflict with the plain meaning of MCLA 600.2958. The Supreme Court in this state has consistently rejected the judicial usurpation of legislative power in such a manner. (See *Rowland v. Washtenaw County Road Commission*, 477 Mich 197 (2007)).

13. That to the extent that “open and obvious” decisions since 1996 hold that the defense applies to the “duty” element of a negligence claim those decisions invariably engage in an analysis of the Plaintiff's conduct and/or Plaintiff's fault. Further, that such an analysis is in fact a determination of the reasonableness of the Plaintiff's conduct against a standard of

what an average user of ordinary intelligence would determine upon casual inspection of the hazard involved.

14. That such an analysis is an analysis of conduct, and of fault, and such a determination by the Court is contrary to the definition of “fault” pursuant to MCLA 600.6304, the requirements of MCLA 600.2958, and contrary to the Supreme Court established jury instructions defining negligence, MCiv JI 1903, and 10.02.

15. That determinations of issues of fact are of a Judge invade the province or duty of the ultimate finders of fact.

16. That under such circumstances, the judicial engrafting of an open and obvious element to a common law premises liability case is contrary to the plain reading and plain language of MCLA 600.2958, which requires the Court to engage in an analysis of conduct contrary to the statute, and contrary to the rules promulgated by the Supreme Court in negligence actions, and is contrary to the Michigan Supreme Court’s current textualist philosophy.

17. That the Supreme Court and Courts of Appeals of this state have a long history of reversing prior precedent determined by said Courts to be “wrongly decided” (see extensive citations in the accompanying Brief).

18. That the “open and obvious” defense cannot be asserted by Defendant in this matter as a bar to Plaintiff’s claim as the defense is contrary to statutory requirements, and is a judicially created element engrafted onto a statute and at variance with said statute.

19. That the open and obvious affirmative defense should be struck pursuant to MCR 2.116(C)(9).

WHEREFORE, Plaintiff prays this Honorable Court strike Defendant's affirmative defense invoking the open and obvious defense and grant the Plaintiff such other and further relief as is just and equitable.

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