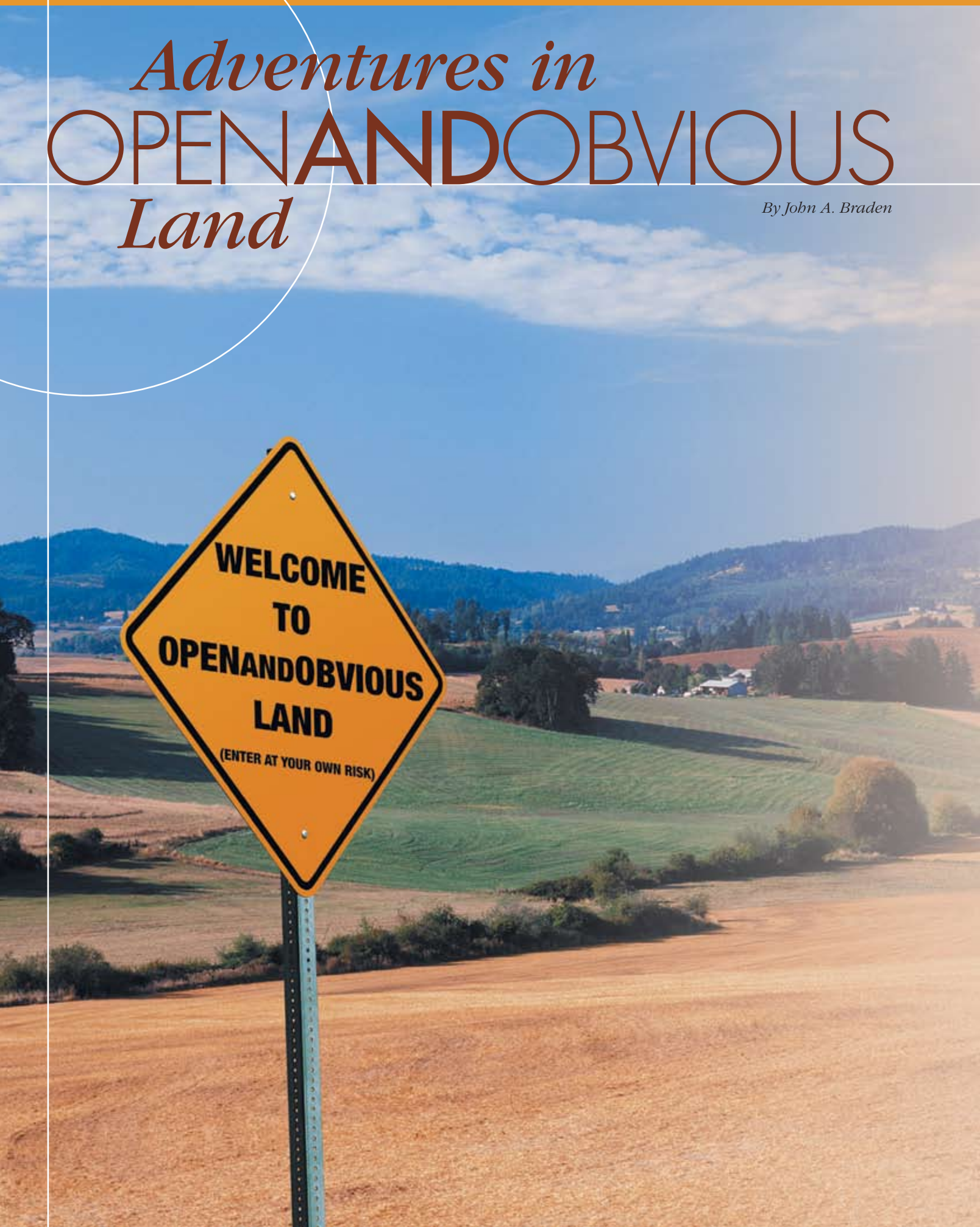
Adventures in OPENANDOBVIOUS *Land*

By John A. Braden



I awoke to a bright light in my eyes. Then a face with a sardonic grin hove into view. The face spoke: "Do you know where you are?"

I looked around at the gurneys and white coats. "A hospital? How did I get here?"

"We found you outside the entrance, lying on some black ice."

My memory started to clear. "I didn't see the ice," I said.

"You could have seen it if you looked."

"I did look," I protested. "But it was invisible."

He snorted. "As if that makes a difference. A danger need not be 'visually apparent' to be open and obvious,"[1] he said, as if reciting a mantra. "Anyway, you saw the ice after you fell, didn't you?"

"Why, sure. Falling tends to draw your attention to such things."

"Well, if you could see it afterwards, then it must have been open and obvious before."[2]

I let the *non sequitur* pass. "You keep saying 'open *and* obvious'," I replied. "Assuming the black ice was 'open,' it sure wasn't 'obvious'."

"Your grasp of our language is rather shaky," said the man in the white coat. "'Open and obvious' means 'open *or* obvious,'[3] *or* 'neither open nor obvious, but foreseeable.'"[4]

Seeing that the orderly was fluent in doublespeak, I moved on. "Suppose the ice was open and obvious. How was I supposed to avoid it? It stretched all the way across the walk."

"You could have picked another day to come here,[5] waited for the ice to melt,[6] or not come here at all.[7] It's not as if people *need* medical care. Let them eat cake!"

Considering the debate won, the orderly resumed his questioning. "Do you know what state you're in?"

"Michigan?"

He snorted again. "Who are you? Rip Van Winkle? This hasn't been Michigan for 20 years. It's called OpenandObvious Land now."

I was really confused now. "I was coming to the hospital, hobbling along because of my arthritis…"

"Don't matter," he interrupted. "In *Michigan,* landowners had to take foreseeable infirmities into account.[8] But in *Openand-Obvious Land,* everyone is hale and hearty.[9] We can all play hopscotch to avoid dangerous spots.[10] Our lame can walk![11]

"Our vision, too, is phenomenal. We can see in the dark.[12] We can see ice[13] or other dangers[14] under snow. Our eyes can pierce the murky depths.[15] We can see around corners.[16] We can see through other objects.[17] We can simultaneously see in multiple directions.[18] We have eyes in the backs of our heads.[19] We can even see things that are apparent only from the viewpoint of others![20]

"And it's not just our vision," he continued. "We have perfect memory. Having once seen a danger coming in, we never forget it when leaving.[21] And our concentration is preternatural: we are never distracted, even when others are trying to distract us.[22] Why, we can even read minds!"[23]

"Can you really do all that stuff?" I asked in wonder.

He leaned down conspiratorily and whispered, "No. *But landowners have a right to assume we can.*"

"Sounds like the contributory negligence defense," I observed.

"You're close," he said. "Saying that there's no liability if the patient should have anticipated even invisible danger[24] is another way of saying there's no liability if the patient is contributorily negligent.[25] But we don't stop there: if the condition is open and obvious, there is no liability *even if the patient acted perfectly reasonably.*"

"So more like assumption of the risk?" I ventured.

"Now you're getting warm. After all, under the assumption of the risk defense, what type of risk is assumed?"

"Let me guess. The risk of open and obvious dangers?"[26]

"Bingo."

"But didn't the Supreme Court abolish assumption of the risk?"[27] I asked.

"Sssh," he whispered. "No one is supposed to remember that. We flushed that down the memory hole."

The orderly then gave me a cup of liquid and said, "Drink this." I did, and immediately felt nauseated. After vomiting into a bucket he thoughtfully provided, I gasped, "What was that?"

"Isn't it obvious? It was an emetic."

"Well, why didn't you warn me?" I asked.

"You know that drinking liquids always involves some minuscule risk of choking, don't you?"

"I guess, but what…"

"Well, if an activity entails an obvious risk of *any* sort, that makes *all* risks obvious, whether apparent or not.[28] Anyway, it's your fault for doing what I told you to do."[29]

Seeing that I wasn't going to get any help here, I told the orderly I was leaving.

"You aren't going out the same way you came in, are you?" he asked.

"What choice do I have?"

"Well, we have another entrance, you know."

"No, I didn't know."

"Wouldn't have mattered if you did."[30]

"Is that entrance icy, too?" I enquired.

"Maybe it is, maybe it isn't. It's your burden to say."[31]

"How can I know until I actually try to use that entrance?"

"Now, it's comments like that that mark you as a foreigner. A citizen of OpenandObvious Land is expected to *just know* whether the other entrance is safer."

His voice lowered. "Since you're not from around here, I'll let you in on a little secret. The other entrance is also icy. But if you slip there," he said triumphantly, "we'll simply point to the existence of *this* entrance to avoid liability. If you use a ramp instead of steps, we'll say you should have used the steps.[32] If you use the steps instead of the ramp, we'll turn around and say you should have used the ramp.[33] If you stay on a walk, we'll say you'd have been safer stepping off it.[34] If you step off the walk, we'll score you for that."[35]

"But isn't it foreseeable that, if you provide a walk or entrance, people will use it?"

"Maybe in Michigan.[36] But in OpenandObvious Land, providing a second entrance eliminates liability for both."[37]

"Then when is a landowner liable for ice and snow?" I asked.

"Don't you get it? He *isn't*. Our robed friends have held that 'open and obvious' encompasses hidden but foreseeable dangers.[38] In the wintertime, ice and snow are 'foreseeable' everywhere outside, whether you can see them or not.[39] So all ice and snow are open and obvious. Ergo, no liability for ice and snow."

"Sounds like a revival of the natural accumulations defense," I observed.

"Try the *all* accumulations defense. In OpenandObvious Land, a landowner is immune even for accumulations he artificially creates. In fact, the more brazen the landowner's negligence, the stronger the immunity. For example," he said, drawing a handgun from his pocket, "see this gun I'm pointing at you?"

"Yeah."

BANG!

"Ow! You shot me!" I exclaimed incredulously.

"Hey, the danger was open and obvious. It's your own fault if you didn't duck. I gave you more warning than the law requires, so quit your whining. Be thankful I didn't kick you when you were lying on the ice; kicking people when they're down is a favorite pastime here in OpenandObvious Land. Anyway, it's only a flesh wound. A dressing will have you right as rain."

"I thought the open-and-obvious defense applied only to premises and products," I said through pain-gritted teeth.

"Maybe back in the day," answered the man in white. "But now it protects negligent *activities*, too."[40]

Once he'd applied the dressing, I climbed off the gurney. "I'm getting out of here. No one responsible to anyone else. People doing wrong with impunity. This is as bad as the state of nature."

"Worse!" he demurred. "In the state of nature, you'd be able to resort to self-help. In OpenandObvious Land, we deny all legal remedy, but will throw you in jail if you try your own remedy."

Once outside, I recalled the black ice I'd slipped on earlier. With nothing else to be done for it, I dropped to the ground and crawled over the ice on my hands and knees. As I looked about, I saw that the other pedestrians were doing the same thing. All but one, who was walking upright, with a servant strewing something that looked like salt in his path. "Who is that?" I asked a fellow-crawler. In hushed and reverential tones she replied, "A landowner."

I resumed crawling. ■

Editor's note: The *Michigan Bar Journal* welcomes stories from other "lands."

John Braden is a briefwriter for plaintiffs' attorneys in western Michigan.

FOOTNOTES

1. *Bukowski v Kendall,* unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No 251420) (Judges Murray, Markey, and O'Connell). Unless otherwise noted, all cases cited are unpublished opinions of the Michigan Court of Appeals.
2. Judges Bandstra, Borrello, Cooper, Donofrio, Fitzgerald, Fort Hood, Gribbs, Hoekstra, Jansen, Markey, Meter, Murphy, Murray, Neff, Saad, Sawyer, Schuette, Smolenski, Whitbeck, and Zahra so observed in these decisions: *Judd v Eschman,* issued July 1, 2004 (Docket No 246603) (Judge Neff dissented); *Sablosky v Train Station Motel,* issued May 31, 2005 (Docket No 260124); *Desloover v Ryan's Steak House,* issued November 22, 2005 (Docket No 255660); *Drake v JWG Investments,* issued August 23, 2005 (Docket No 260786); *Manser v Felpausch Food Ctrs,* issued August 11, 2005 (Docket No 253595); *Oates v Berkley GMPS Co,* issued July 19, 2005 (Docket No 260842); *Herron v Tulick,* issued July 14, 2005 (Docket No 252854); *Paolini v K-mart Corp,* issued September 29, 2005 (Docket No 262461); *Fortuna v Lake Ted Inc,* issued January 19, 2006 (Docket No 264636).
3. *Harris v Sears Roebuck & Co,* issued November 17, 2005 (Docket No 253546) (Judges Murphy, Sawyer, and Meter) ("open" and "obvious" not separate requirements).
4. Judges Cavanagh, Davis, Donofrio, Fitzgerald, Jansen, K.F. Kelly, Meter, Markey, Murray, Owens, Sawyer, Schuette, Talbot, Whitbeck, Wilder, and Zahra so held in these decisions: *Mallory v Platinum Sports,* issued March 16, 2006 (Docket No 257671); *Danayan v Heritage Square Apartments,* issued March 16, 2006 (Docket No 265807); *Laurendine v CCA Assoc,* issued March 21, 2006 (Docket No 257775); *Lafuente v Cherry Hill Lanes North,* issued December 21, 2004 (Docket No 249551); *Higgins v Providence Hosp,* issued January 17, 2006 (Docket No 255384); *Brooks v Burger King Corp,* issued June 23, 2005 (Docket No 252576); *Millhisler v Manzoni,* issued September 8, 2005 (Docket No 253559); *Augustyn v Target Corp,* issued August 18, 2005 (Docket No 262238); see also cases cited in n 38.
5. *Joyce v Rubin,* 249 Mich App 231, 242; 642 NW2d 360 (2002) (Judges Saad, Bandstra, and Whitbeck) (fired resident nanny could have removed her property on a nonsnowy day [which would have been easier, since the property might have already been placed on the sidewalk by then]); *Baillie v Dietz Org,* issued November 25, 2003 (Docket No 242055) (Judges Sawyer, Griffin, and Smolenski) (tenant could have taken different route to dumpster, or waited for another day [or perhaps sent her servant to take out the trash]); *Haley v Davis Inc,* issued August 16, 2005 (Docket No 253003) (Judges Borrello, Bandstra, and K.F. Kelly) (homeless person could have come back later to inspect an apartment [after all, it's not as if a homeless person needs housing]); *Devine v Rubloff Dev Group,* issued April 4, 2006 (Docket No 259166) (Judges Smolenski, Donofrio, and Owens); *Koss v A & A Transportation Services,* issued September 21, 2006 (Docket No 269411) (Judges Cavanagh, Markey, and Meter) (taxi driver could have avoided a dark, icy parking area by parking in front, contrary to his employer's prohibition [it's not as if he needs to keep his job]); *Fuller v Shooks,* issued October 24, 2006 (Docket No 269886) (Judges Cavanagh, Bandstra, and Owens).
6. *James v Sandyoak Village,* issued July 18, 2006 (Docket No 267615) (Judges Neff, Bandstra, and Zahra) (one trapped in a laundry room could have waited for water at the exit to dry).
7. Judges Bandstra, Cavanagh, Cooper, Fitzgerald, Griffin, H. Hood, K.F. Kelly, Markey, Meter, Murray, Neff, O'Connell, Saad, Sawyer, Schuette, Smolenski, Whitbeck, and Wilder so held in these decisions: *McFarlin v Ross Properties,* issued December 2, 2003 (Docket No 242416); *Vavrick v Bill's Automotive,* issued April 17, 2003 (Docket No 238473); *Buckenmeyer v Office Max,* issued October 21, 2003 (Docket No 242953); *Feole v Ruggero's Restaurant,* issued April 27, 2004 (Docket No 245047); *Rosario v 16481 Ten Mile Rd,* issued November 16, 2004 (Docket No 249919); *Lacey v Peerless Mattress & Furniture Co,* issued January 22, 2004 (Docket No 242906); *LaCross v Rankin Industrial Park,* issued May 23, 2006 (Docket No 258953) (Judge Fort Hood concurred in result only); *Stanton v Fitness Mgt Corp,* issued August 17, 2006 (Docket No 267623); *Koss, supra; Shine v MGM Grand Detroit,* issued November 14, 2006 (Docket No 269381). Contra *Robertson v Blue Water Oil Co,* 268 Mich App 588; 708 NW2d 749 (2005) (Judges Davis and Cooper; Judge K.F. Kelly dissented).
8. *Ackerberg v Muskegon Osteopathic Hosp,* 366 Mich 596; 115 NW2d 290 (1962) (more safety precautions needed for users of hospitals).
9. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 329 n 10; 683 NW2d 573 (2004) (drunk patron); *Warber v Trinity Health Corp,* issued August 21, 2003 (Docket No 239665) (Judges Zahra, Talbot, and Owens) (ambulatorily impaired person on way to aquatherapy); *Adams v Nat'l Church Residences,* issued December 11, 2003 (Docket No 242107) (Judges Cavanagh, Jansen, and O'Connell) (no enhanced duty for senior-citizen residence); *Szakacs v Battle Creek Health Sys,* issued January 25, 2005 (Docket No 250558) (Judges Hoekstra, Cavanagh, and Borrello) (no liability for slip on ice on way to emergency room entrance); *Sherman v Henry Ford Hosp,* issued November 6, 2001 (Docket No 224786) (Judges Whitbeck, Neff, and Hoekstra); *LaCross, supra* (arthritic unable to use steps at other entrance).

10. *Easterday v Crossings I,* issued August 16, 2005 (Docket No 253790) (Judges Zahra, Cavanagh, and Owens) (danger avoidable because spots here and there not covered by ice or snow); *Budnick v Flanagan,* issued March 28, 2006 (Docket No 257642) (Judges Owens, K.F. Kelly, and Fort Hood) (plaintiff could have stepped in footprints in snow).
11. *Harris, supra* (uneven elevator floor avoidable because wheelchair-bound individual could have stepped over it).
12. Judges Bandstra, Cooper, Davis, Fitzgerald, Gage, Jansen, Markey, Meter, Miel, Murray, O'Connell, Sawyer, Schuette, Talbot, White, Wilder, and Zahra held in these decisions that a danger obscured by darkness was open and obvious: *Parkhurst v Bartz,* issued August 21, 2001 (Docket No 223576); *Sablosky, supra; Pisapia v 551 Office Bldg,* issued June 7, 2005 (Docket No 250317); *Forcelli v Princeton Enterprises,* issued May 12, 2005 (Docket No 251305); *Judd, supra; Myers v McLaren Regional Med Ctr,* issued March 3, 2000 (Docket No 208264) (Judge Michael Kelly dissented); *West v Olympia Entertainment,* issued March 19, 2002 (Docket No 229044); *McConnal v West Side Concrete Co,* issued June 20, 2006 (Docket No 267390).
13. *Schultz v Henry Ford Hosp,* 474 Mich 948 (2005); *Morgan v Laroy,* 474 Mich 917 (2005). And Judges Bandstra, Borrello, Cavanagh, Cooper, Fitzgerald, Gage, Griffin, Hoekstra, H. Hood, Jansen, Meter, Murphy, Murray, Owens, Saad, Sawyer, Schuette, Smolenski, Talbot, Whitbeck, White, Wilder, and Zahra held that ice under snow was open and obvious in these decisions: *Munoz v BASF,* issued May 24, 2005 (Docket No 260046); *Bentfield v Brandon's Landing Boat Bar,* issued August 31, 2004 (Docket No 248795); *Gammage v Canchola,* issued September 14, 2004 (Docket No 246133); *Watson v Watson,* issued September 30, 2003 (Docket No 240662); *Baillie, supra; Rodriguez v T Molitor Inc,* issued September 30, 2004 (Docket No 248140); *Uptergrove v Nacu,* issued August 20, 2002 (Docket No 230329); *Lockhart v Wal-Mart Stores, Inc,* issued September 27, 2002 (Docket No 229750); *Ververis v Hartfield Lanes (On Remand),* 271 Mich App 61; 718 NW2d 382 (2006); *Wilson v Shea,* issued May 11, 2006 (Docket No 266044); *Wells v Children's Hosp,* issued May 9, 2006 (Docket No 259942); *Garges v Todd,* issued September 12, 2006 (Docket No 260084); see also cases cited in n 38.
14. *Merry v Sweet Onion,* issued June 15, 2006 (Docket No 267596) (Judges Davis, Sawyer, and Schuette).
15. *Mugianis v Walled Lake,* issued April 20, 2006 (Docket No 266339) (Judges Cooper, Cavanagh, and Fitzgerald).
16. *Michalak v Atlas Coney Island,* issued April 27, 2004 (Docket No 243224) (Judges Bandstra, Sawyer, and Fitzgerald).
17. *Teufel v Watkins,* 267 Mich App 425; 705 NW2d 164 (2005) (Judges Saad, Fitzgerald, and Smolenski) (ice behind a snowbank was open and obvious).
18. *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001) (must look down to see pothole while looking around to avoid traffic); *Rambo v Warren Dental Assoc,* issued June 6, 2006 (Docket No 264552) (Judges Sawyer, Wilder, and H. Hood) (must look down while simultaneously looking up to avoid bumping head); *Brubaker v St Matthew Lutheran Church,* issued December 27, 1994 (Docket No 160151) (Judges Taylor, Holbrook, and Dodge) (same analysis).
19. *Doezema v Bay Harbor Yacht Docks,* issued November 21, 2006 (Docket No 267681) (Judges Bandstra and Donofrio; Judge Fort Hood dissented).
20. *Emmons v Acres,* issued July 27, 2004 (Docket No 246996) (Judges Fort Hood, Donofrio, and Borrello).
21. *Regan v GPV, Inc,* issued November 5, 1996 (Docket No 183838) (Judges Markman, Smolenski, and Buth); *Rector v Art Van Furniture, Inc,* issued February 21, 1997 (Docket No 184772) (Judges Corrigan, Doctoroff, and Lamb). Contra *Bertrand v Alan Ford, Inc,* 449 Mich 606, 611–612; 537 NW2d 185 (1995).
22. *Curry v Ritchey,* issued May 12, 2005 (Docket No 253019) (Judges O'Connell, Markey, and Talbot) (landowner's calling to plaintiff no excuse); *Simcox v ABC Appliance,* issued July 5, 2005 (Docket No 261679) (Judges O'Connell, Schuette, and Borrello) (same analysis). Contra *Bertrand, supra* at 611–612.
23. *Millhisler, supra* (patron who saw nurse walking with a mop was supposed to know the nurse was walking *away* from a wet floor rather than *toward* it).
24. See nn 4 and 39.
25. *Ghaffari v Turner Constr Co,* 473 Mich 16, 25–26; 699 NW2d 687 (2005) (admitting that the open and obvious defense is a revival of contributory negligence); *Laurendine, supra* (no special aspect, since plaintiff could have avoided the danger by being careful [but saying there is no liability because the plaintiff was not careful sounds a lot like contributory negligence]).
26. *Soderstrom v Holland-Emery Lumber Co,* 114 Mich 83, 87; 72 NW 13 (1897).
27. *Felgner v Anderson,* 375 Mich 23; 133 NW2d 136 (1965).
28. *Greene v A P Products,* 475 Mich 502; 717 NW2d 855 (2006); *Burch v Bob Evans Farms,* issued November 16, 2006 (Docket No 269907) (Judges Whitbeck, Saad, and Schuette).
29. *Crawford v Detroit Entertainment,* issued August 22, 2006 (Docket No 266289) (Judges K.F. Kelly, Markey, and Meter) (landowner immune for directing a patron across an icy spot).
30. *Feole, supra* (danger was avoidable, even though plaintiff was unaware of alternate exit).
31. These cases put burden of disproving the defense on the plaintiff: *Hearns v Westlawn Cemetery,* issued February 16, 2001 (Docket No 220123) (Judges Collins, Doctoroff, and White); *Shine, supra.*
32. Judges Cavanagh, Gage, Jansen, O'Connell, Markey, Saad, and Talbot so held in these decisions: *Clark v Carley Co,* issued August 17, 2004 (Docket No 249073); *Maddix v Prime Prop Assoc,* issued June 23, 2005 (Docket No 251223); *Forcelli v Princeton Enterprises,* issued May 12, 2005 (Docket No 251305).
33. *Knoll v Gen Motors Corp,* issued March 16, 2004 (Docket No 245387).
34. *Morton v CbyM Ltd Partnership,* issued February 2, 2006 (Docket No 255150) (Judges Sawyer, Wilder, and H. Hood); *Desloover, supra; Marchetto v Kiss,* issued January 4, 2007 (Docket No 270772) (Judges Bandstra, Jansen, and Sawyer).
35. *McConnal, supra; Timmerman v Auto Zone, Inc,* issued December 20, 2002 (Docket No 234779).
36. *Brezee v Powers,* 80 Mich 172, 177; 45 NW 130 (1890) (one who provides side entrance to theater should foresee that patrons will try to use it); *Budman v Skore,* 363 Mich 458; 109 NW2d 791 (1961) (foreseeable that invitees will use back entrance if no parking places at front of store).
37. *Corey v Davenport College of Business (On Remand),* 251 Mich App 1; 649 NW2d 392 (2002) (Judges Markey and Saad; Judge Neff concurred in result only). In addition, Judges Bandstra, Borrello, Cavanagh, Cooper, Donofrio, Fitzgerald, Gage, Gribbs, Hoekstra, Fort Hood, Jansen, K.F. Kelly, Meter, Murphy, Murray, Owens, Schuette, Smolenski, Whitbeck, Wilder, and Zahra held in these decisions that an alternate entrance destroys premises liability: *Nemecek v Knights of Columbus,* issued June 27, 1997 (Docket No 191378); *Laurain v Sparrow Hosp,* issued October 22, 2002 (Docket No 233429); *Mitchell v Black Law Office,* issued October 26, 2004 (Docket No 248442); *Haddad v Amber Mgt Corp,* issued April 21, 2005 (Docket No 250705); *Gammage, supra; Filarey-Chandler v Colonial Court Apartments,* issued June 8, 2004 (Docket No 246753); *Huber v Jo-Ann Stores,* issued July 20, 2004 (Docket No 248437); *Emmons, supra; Hollenbeck v Golden Greek Lounge,* issued March 15, 2005 (Docket No 251548); *Tarrance v Cole,* issued August 18, 2005 (Docket No 253853); *Maddix, supra; Oates, supra; Garrison v Dinnerware Plus Holdings,* issued January 16, 2007 (Docket No 271112).
38. See nn 4 and 39.
39. *Kenny v Kaatz Funeral Home,* 472 Mich 929 (2005) (adopting Judge Griffin's dissent at 264 Mich App 99, 115–122; 689 NW2d 737 [2004]); *Teufel, supra* at 428. In addition, Judges Bandstra, Borrello, Cavanagh, Cooper, Donofrio, Fitzgerald, Gage, Griffin, Hoekstra, H. Hood, Fort Hood, Jansen, K.F. Kelly, Markey, Meter, Murphy, Murray, O'Connell, Owens, Sawyer, Schuette, Talbot, Whitbeck, White, Wilder, and Zahra, in these decisions and those cited in n 13, held that ice and snow anywhere destroys liability for even invisible ice: *Parsons v HMTC Inc,* issued February 21, 2006 (Docket No 265863); *Kelly v Clay, Inc,* issued February 7, 2006 (Docket No 255314); *Munoz, supra; Watson, supra; Smith v Wingate Mgt Corp,* issued August 2, 2005 (Docket No 255151); *Dawood v Stuart Frankel Co,* issued November 15, 2005 (Docket No 255054); *Gammage, supra; Chapman v Nat'l City Bank,* issued March 1, 2005 (Docket No 252586); *Baillie, supra; Waddell v Washington,* issued November 1, 2005 (Docket No 255029); *Bentfield, supra; Slater v Brandle,* issued June 23, 2005 (Docket No 260867); *Crawford, supra; Knauf v KJB Enterprises,* issued December 5, 2006 (Docket No 269449); *Butler v Balal,* issued November 21, 2006 (Docket No 266113); *Drobot v Way,* issued November 21, 2006 (Docket No 270132).
40. *Pacernick Estate v Farmer Jack,* 469 Mich 922 (2003). In addition, Judges Borrello, Davis, Doctoroff, Donofrio, Fitzgerald, Holbrook, H. Hood, Meter, Owens, Sawyer, Schuette, Sullivan, Talbot, and Wilder have so held in these decisions: *Mozham v St Andrews Society,* issued February 6, 2001 (Docket No 215463); *Pelzner v Meijer, Inc,* issued June 4, 2002 (Docket No 230448); *Jacob v Continental Lanes,* issued March 4, 2004 (Docket No 244506); *Lezell v Hiller, Inc,* issued January 24, 2006 (Docket No 256415); *Rambo, supra.* Contra *Hiner v Majica,* 271 Mich App 604; 722 NW2d 914 (2006); *Nicaj v East-Lind Heat Treat, Inc,* issued December 21, 2006 (Docket No 270428) (Judges Borrello, K.F. Kelly, and Wilder).