No. M2021-01511-SC-R11-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ROBERT L. TRENTHAM,

Plaintiff-Appellee,

vs.

MID-AMERICA APARTMENTS, LP, ET AL.

Defendants-Appellants.

On Appeal from the Circuit Court of Williamson County
(Hon. Michael Binkley) No. 20-0144

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts.

To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has participated as amicus curiae in cases around the United States where state courts of last resort addressed legal standards in tort law. *See, e.g.*, *Kuciemba v. Victory Woodworks*, 531 P.3d 924 (Cal. 2023); *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023); *Speedway LLC v. Jarrett*, 889 S.E.2d 21 (W.Va. 2023); *Haas v. Estate of Carter*, 525 P.3d 451 (Or. 2023).

Many members of the Chamber and the broader business community operate places of business visited by customers and vendors alike, and many others own and operate buildings and other real estate occupied by commercial or residential tenants and their visitors. The development of common-law standards for premises liability is thus of acute interest to the Chamber.

This Court has an opportunity to articulate a sound, clear, and fair standard here. This Court has widened the scope of constructive notice beyond the traditional rule, which requires that the condition alleged to

have caused injury existed long enough to charge the owner with discovering and remedying it. But it remains unclear which other prior conditions are sufficient to provide constructive notice. When the condition has not persisted until the injury at issue occurred, the Chamber respectfully submits that constructive notice of a dangerous condition should be limited to knowledge of conditions that are substantially similar in character, location, and danger.

No party or counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber, its members, or its counsel in this matter has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a critical component of premises liability law: the legal standard for imposing a duty on landowners or businesses for hazardous conditions that the defendant neither (1) created nor (2) actually knew about, and (3) that did not exist long enough before the plaintiff's injury to charge the defendant with notice that the specific condition needed to be addressed.

If inadequately rigorous, the legal standard for this large category of cases could give rise to harmful expansions of liability that directly injure businesses and indirectly injure consumers. This Court historically has defined legal rules that place reasonable limits on tort liability, often rejecting sweeping tests that flirt with strict liability or categorical applications of *res ipsa loquitur* that effectively infer notice (and thus duty) from the fact of an accident.

In one such rule, this Court has limited premises owners' tort duties to dangerous conditions for which the owner had actual or constructive notice. (References in this brief to the premises "owner" include business proprietors and "possessors" of property, who may likewise face premises liability.)

Before *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004), some courts had imposed a categorical duty for a seemingly limitless variety of hazards based solely on the defendant's "method of operation" of its business, regardless of whether there was any track record of injury of a particular kind in a particular place. In *Blair*, this Court rejected that approach and tethered constructive notice to situations where "a dangerous condition occurs regularly," *id.* at 766, which might or might not be the case for a retail business; some experience injuries, but some do not.

Yet some courts have undermined *Blair*'s limitations by holding that the mere foreseeability of a condition—without notice that it had ever occurred, let alone that it could cause harm—suffices to create a duty to prevent that condition and any harms that might arise from it. That is what happened in this case: the courts below derived constructive notice from the mere possibility that a condition could occur—without any showing that it had occurred, let alone that it could cause harm.

Clarifying what events put a premises owner on constructive notice of a dangerous condition will restore the equilibrium that *Blair* sought to achieve. When the condition causing injury has not persisted beforehand, the Court should hold that constructive notice arises only from previous conditions that are substantially similar in character,

location, and danger. The condition should be of the same kind. It should be in the same or a meaningfully indistinguishable location. And the danger of the condition should be demonstrated; notice of a *dangerous* condition properly requires notice not only of a condition, but of the danger that the condition will harm persons on the property.

The substantial-similarity standard is rooted in existing law, and it balances the need for notice to avoid undue burdens on premises owners, on one hand, and the Court's policy of avoiding rigid barriers to compensation in negligence cases, on the other. A substantially-similar-recurrence standard should clarify the evidentiary requirements while leading to more transparently and consistently reasoned decisions, benefiting parties, the courts, the bar, and the many businesses seeking to align their conduct with the requirements of Tennessee law.

This Court has not "lost [its] appreciation for the moderating and sobering influences of the well-tested principles regarding the imposition of duty." *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365 (Tenn. 2008). Adopting the substantial-similarity standard for constructive notice in premises-liability cases will continue the Court's moderating tradition while increasing fairness and predictability.

ARGUMENT

A. A Substantial-Similarity Standard Efficiently and Predictably Orders the Law of Constructive Notice.

This Court's decision in *Blair* broadened the scope of constructive notice in premises liability beyond settings where the hazard causing injury had been in place long enough to provide the defendant with a reasonable opportunity to remediate the harm. On its face, *Blair*

retained prudent limits on the scope of constructive notice, limiting the extension to "a pattern of conduct, a recurring incident, or a general or continuing condition indicating the dangerous condition's existence." 130 S.W.3d at 765–66.

As shown in Mid-America's Application (at 38–40) and opening Brief (at 42–48), the limiting principles expressed in *Blair* have proved insusceptible to consistent application. The inconsistency has led to an erosion of those limits, as the decision below illustrates. And with inconsistency comes unpredictability, which undermines businesses' efforts to identify and conform their conduct to the governing standards of care in tort.

Limiting constructive notice to substantially similar prior events should restore consistency and predictability to Tennessee jurisprudence. And that rule of law is fair to defendants without posing undue problems of proof for plaintiffs.

1. Foreseeability of a physical condition is not a valid substitute for the actual recurrence or persistence of a recognizably dangerous condition.

a. The opinion below substituted a lenient foreseeability inquiry for Blair's emphasis on common occurrences.

The decision below shows how *Blair*'s limits on constructive notice can dissolve into a simple inquiry whether a condition was foreseeable. As the Application pointed out, other courts in Tennessee have similarly skipped over the inquiry into prior, recurrent events, instead focusing on whether the condition was generally foreseeable. *See*, *e.g.*, *Kee v. City of Jackson*, No. W2013-02754-COA-R3-CV, 2015 WL 1510802, at *5 (Tenn. Ct. App. Mar. 30, 2015) (duty imposed because "reasonabl[y]" foreseeable

that someone would fall on the bridge at issue, in part because defendant had practice of inspecting it); *Wood v. Wal-Mart Stores East, LP*, No. 3:11-1081, 2013 WL 3010698, at *3 (M.D. Tenn. June 18, 2013) ("reasonably foreseeable" that pedestrian could trip on uneven sidewalk); *Morgan v. Tanger Outlet Centers, Inc.*, No. 3:03-cv-423, 2006 WL 1006553, at *5 (E.D. Tenn. Apr. 13, 2006) ("reasonably foreseeable" that drain would back up and render ramp slippery); *Albers v. Walgreen Co.*, No. 04-2462, 2005 WL 2600215, at *3 (W.D. Tenn. Oct. 11, 2005) (triable issue of constructive notice of toy car on which plaintiff slipped based on position of toy bin on bottom shelf and practice of inspecting aisles only hourly); cf. *Wooden v. J.C. Penny Co.*, No. 3-07-00253, 2009 WL 812716, at *2–3 (M.D. Tenn. Mar. 27, 2009) (finding duty based on what amounts to *res ipsa loquitur*, inferring triable issue of negligence, including constructive notice, from fact of injury). In these decisions, constructive notice has been replaced by a mix of speculation and presumed conclusions that approaches a strict liability standard.

That approach turns *Blair* on its head, and unfairly expands the tort duties imposed on premises owners. This Court in *Blair* anchored its assessment of foreseeability in "the basic idea that a past history of a recurring event or condition makes that event or condition foreseeable." 130 S.W.3d at 766. That is, foreseeability of a dangerous condition flows from past experience with the condition.

In the present case, however, the Court of Appeals took "recurring" and "past history" out of the picture. Both courts below recognized that there was no evidence that anyone associated with the premises owner "had first-hand, personal knowledge of the condition of the bridge." Ct.

App. Op. 11. Nor, so far as the Court of Appeals opinion indicates, was there any evidence of similar injuries or dangers on the same bridge—not even on any other bridge on the property. Thus, there was no conceivable "past history of a recurring event or condition." *Blair*, 130 S.W.3d at 766.

The Court of Appeals instead seized upon Mid-America's general maintenance protocol of periodically power-washing pedestrian bridges to find a "pattern of conduct" that made the condition of the bridge reasonably foreseeable.[1] Yet this Court's opinion in *Blair* made clear that the reference to "pattern of conduct" was not intended to render businesses categorically liable for their "way of doing business." 130 S.W.3d at 766. Instead, the Court shifted the focus away from what courts might infer from the owner's business practices to "whether the condition occurs so often that the premises owner is put on constructive notice of its existence," "regardless of what caused the condition, and regardless of whatever method of operation the owner employs." *Id.* The point, this Court explained, was "that, when a dangerous condition occurs

[1] The opinion of the Court of Appeals (at 11–12) referred to "admissions by [Mid-America's] witnesses that the bridge was required to be … washed on a regular basis in order to prevent microbial growth." Yet the testimony from Mid-America employees identified in the opinion (at 3–5) said nothing about "microbial growth," but referred only to periodic pressure-washing and other "preventative maintenance." Ct. App. Op. 4. The testimony linking washing to microbial growth came from the parties' experts. *E.g.*, Ct. App. Op. 5–6. But of course Mid-America cannot be charged with the knowledge of experts retained for this litigation after the accident occurred.

regularly, the premises owner is on constructive notice of the condition's existence." *Id.*

Thus, under *Blair*, notice of a dangerous condition arises from the *dangerous condition's* prior occurrence—not from the prior occurrence of the premises owner's maintenance activities, or generalized risks of having property where others walk. A broad foreseeability test like that imposed below, a test linked to ordinary business practices but untethered from any evidence of prior occurrences, would effectively remove constructive notice from the analysis. But notice—which results from the owner's "superior knowledge of the condition of the premises." *Blair*, 130 S.W.3d at 764 (cleaned up)—is what justifies the affirmative duty to keep premises safe in addition to the duty not to act negligently.

b. A flexible foreseeability test resembles an extreme application of the "mode of operation" test.

A broad foreseeability test of the kind some courts are applying in the wake of *Blair* largely replicates the extreme version of the "method of operation" test rejected in *Blair*. The rejected analysis presumed constructive notice of a recurrent danger through the mere method of operation. *See Blair*, 130 S.W.3d at 764. Under that approach, the way of doing business puts the landowner on constructive notice of any hazard that generically may recur in the course of operations without any proof that the hazard actually occurred, let alone in the same location.

The mode-of-operation test eliminates the burden of proving notice, conclusively presuming that, by running a business that presupposes visitors or tenants, the owner was on constructive notice of any condition associated with the business that might ultimately and foreseeably cause

harm. *See*, *e.g.*, *Kelly v. Stop and Shop, Inc.*, 918 A.2d 249, 261 (Conn. 2007) (imposing duty because "[s]elf-service businesses … are aware that some customers will be injured due to the conduct of other customers because such injuries are a likely, and therefore foreseeable, consequence of the self-service method of operation"). That standard unfairly removes the notice factor from any business that regularly has visitors or tenants. Even the origin of the standard—which arose (and was largely limited to) the operation of self-service grocery stores (*see id.* at 256)—seems quaint. Merely operating a modern grocery store should not categorically expand tort duties to encompass conditions and injuries that do not arise from known or constructively known risks. The expansion of this categorical imposition of liability to encompass any business open to the public, including any residential landlord, would threaten property owners with strict liability.

As one court recently observed, "common sense, confirmed by legal scholarship, teaches that adoption of the mode-of-operation rule effectively leads to strict liability." *Edwards v. Hy-Vee, Inc.*, 883 N.W.2d 40, 48 (Neb. 2016). *See also Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 436 (Ky. 2003) (quoting *Dumont v. Shaw's Supermarkets, Inc.*, 664 A.2d 846, 849 (Me. 1995)) (noting that the "'mode of operation' approach, which imposes strict liability on the retail proprietor once the plaintiff proves that he or she was injured as a result of slipping on a transitory foreign substance on the premises."). A broad foreseeability test similarly imposes strict liability on any premises owner for any hazard that might have been foreseen even if the hazard had not previously materialized or injured anyone.

As a substitute for evidence-based tests of constructive notice, foreseeability leaves much to be desired. This Court has long recognized that "foreseeability alone does not create a duty to exercise reasonable care." *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 820 (Tenn. 2008); *see also* William Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 16 (1953) ("[D]uty does not always coincide with foreseeable risk."). "[B]ecause almost any outcome is possible and can be foreseen, the mere fact that a particular outcome might be conceivable is not sufficient to give rise to a duty." *Satterfield*, 266 S.W.3d at 367. Few conditions are entirely unforeseeable—and hindsight after an injury intensifies the temptation to hold a premises owner responsible for foreseeing both a condition and its potential danger.

When foreseeability operates as a self-sufficient element without concrete analytical guidance, courts can reach inconsistent and unpredictable results. That is why, "[f]or almost as long as the law has depended on foreseeability, critics have pilloried its application as meaningless and hopelessly indeterminate." John Fabian Witt & Morgan Savige, *Foreseeability Conventions*, 44 Cardozo L. Rev. 1075, 1078 (2023); *see id.* at 1089–1094. Foreseeability "provides so little decisional guidance that scholars often revile it for being vague, vacuous, and indeterminate: '[I]n one sense everything is foreseeable, in another sense nothing.'" David G. Owen, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1278 (2009) (quoting H.L.A. Hart & Tony Honoré, *Causation in the Law* 255, 256–57 (2d ed. 1985)).

That is why, like this Court, courts in other states recognize that "[i]t is incumbent upon the courts to place limits on foreseeability, lest all

remote possibilities be interpreted as foreseeable in the legal sense." *Scott v. Fla. Dep't of Transp.*, 752 So.2d 30, 33 (Fla. Dist. Ct. App. 2000) (quoting *Fla. Power & Light Co. v. Macias by Macias,* 507 So.2d 1113, 1115 (Fla. Dist. Ct. App. 1987)). "Many harms are quite literally 'foreseeable,' yet for pragmatic reasons, no recovery is allowed." *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 156 (Conn. 1994)).

c. This Court's constructive-notice jurisprudence limits which foreseeable harms lead to tort duties.

The constructive-notice element long recognized in the Tennessee law of premises liability rests on just such pragmatic considerations. As Justice Holmes recognized, tort law must properly "give a man a fair chance to avoid doing the harm before he is held responsible for it." Oliver Wendell Holmes, *The Common Law* 115 (1881). This Court limits the scope of reasonably foreseeable harms to those of which the premises owner has constructive notice and thus a chance to remedy. That means the owner was aware—or should have been aware—of the condition that harmed the plaintiff because that condition occurred before. Either the exact condition that harmed the plaintiff must have persisted long enough for the owner to do something about it, or else the "dangerous condition" must have occurred "regularly" or "so often that the premises owner is put on constructive notice of its existence." *Blair*, 130 S.W.3d at 766.

The key is actual exposure to the condition and its danger. Constructive notice arises only from actual conditions, not theoretical ones. There must be some track record of a condition occurring "regularly" or "often," *id.*; it cannot be sufficient that the owner knew a

condition theoretically *could* happen. That would impose no meaningful limits on the scope of the owner's duties.

The notice limitation on landowners' duties—notice of a "*dangerous* condition," *Blair*, 130 S.W.3d at 765 (emphasis added)—properly requires notice not only of a condition, but of the condition's danger to persons on the property. Here, the courts below deemed sufficient mere notice of the possibility that a condition *could* occur—without any showing that it had occurred, let alone that the condition threatened harm to persons on the property

Adopting such "a rule of mere foreseeability would sweep too broadly." *Air & Liquid Sys. Corp. v. DeVries*, 586 U.S. ___, 139 S. Ct. 986, 994 (2019). This Court should retain the tight nexus between constructive notice and actual occurrences rather than approving the speculation attending a broad foreseeability test that for practical purposes imposes a duty to prevent all but the most freakish accidents. *See* Montgomery Lee Effinger, *"A Piling of Inferences" Still Will Not Do for Constructive Notice*, 22 Westchester B.J. 47 (1995) (observing that the constructive notice doctrine balances "public policy concerns of reasonableness and fairness to premises owners" rather than "piling … speculative inferences").

2. Maintenance routines do not place premises owners on constructive notice of any dangerous condition that maintenance might discover and remediate.

The decision below held that Mid-America's maintenance protocol gave it constructive notice of the condition of the bridge at issue. The reasoning went like this: Mid-America power-washes pedestrian bridges regularly (at least annually). Power-washing at the right time might

have removed the slippery microbial growth from the bridge on which the plaintiff fell. Mid-America's power-washing routine means that any dangerous conditions that power-washing could remediate were reasonably foreseeable to Mid-America. Thus Mid-America was on constructive notice that the bridge surface was dangerously slippery.

That reasoning is fatally flawed as a matter of both law and public policy. First, as a matter of law, constructive notice extends only to actual "dangerous condition[s]" that have occurred in the past—and have occurred sufficiently "often" or "regularly" to put the owner on notice that the same thing was likely to happen again. *Blair*, 130 S.W.3d at 766. A maintenance routine can prevent all types of potentially dangerous conditions. For example, the power-washing routine that the Court of Appeals found sufficient to confer notice of the clear, seemingly invisible microbial growth claimed as the cause of harm here could have removed spills of oil-based liquids and deposits of mud or plant debris. Indeed, power-washing might also wash away rot on the surface of a wooden walkway, exposing other kinds of potentially harmful conditions. The possibilities are practically limitless—which is exactly why the law of constructive notice in this context focuses on the actual manifestation of actual, dangerous conditions in the past.

Second, sound public policy should preclude any inference of constructive notice of a particular harmful condition from the fact of a maintenance routine that might have prevented or ameliorated the condition. The law should encourage premises owners to engage in regular maintenance both to prevent injury to tenants and visitors and to prolong the useful life of real property. Yet under the foreseeability

standard applied below, the more substantial the maintenance routine, the wider the scope of potential tort duties based on harms that never occurred before, let alone occurred regularly or often. Just as remedial measures taken after the fact are generally excluded as evidence of the standard of care, Tenn. R. Evid. 407, general prophylactic measures should not suffice to prove constructive notice of harmful conditions.

3. Limiting constructive notice to substantially similar prior dangerous conditions provides a clear and manageable legal standard that is consistent with prior law and reflects sound tort policy.

The decision below illustrates the need to revise and clarify *Blair*'s standard for constructive notice. In particular, the "pattern of conduct" language in *Blair*, 130 S.W.3d at 765, has provided a back door to permit categorical imposition of duties based on constructive notice deriving simply from a premises owner's way of doing business, including its adherence to a maintenance regime. And, in some courts, *Blair*'s emphasis on actual, recurring conditions as a prerequisite for constructive notice has eroded to mean no more than a reasonable foreseeability that a previously unknown condition might arise. *Blair* also left other questions unanswered. This Court widened the scope of constructive notice beyond the precise incidence of the precise condition that injured the plaintiff. But it remains unclear which prior conditions are sufficient to provide constructive notice.

As Mid-America suggests, a defendant has constructive notice of a dangerous property condition when the defendant is aware of previous dangerous conditions that are substantially similar in their characteristics and location. That is, the nature and setting of prior

conditions must be so substantially similar to the condition alleged to cause injury in a particular case that the defendant fairly could be expected to anticipate the specific recurrence of the danger. *See* Mid-America Br. 50–54 (explaining how this standard is rooted in Tennessee tort decisions). The substantial-similarity standard provides an appropriate limit on the scope of constructive notice without unduly limiting recovery when premises owners reasonably should have been aware of the risk at issue.

a. The substantial-similarity standard provides clarity.

Blair held that prior conditions could provide constructive notice through recurrence. By doing so, *Blair* provided an additional basis for constructive notice beyond the plurality rule that requires proof that the condition causing injury for a sufficient duration to be reasonably susceptible to remediation. *See* Mid-America Br. 56.

But under *Blair* the prior conditions demonstrably must have existed and recurred. *Blair* rejected an effort to presume recurrence based merely on a presumption arising from the defendant's "method of operation," instead requiring evidence that the dangerous conditions actually occurred and recurred. 130 S.W.3d at 764. The Court should make clear that only substantially similar conditions count in the analysis—not possible conditions, not theoretical conditions, but actual, substantially similar conditions.

Thus, a "pattern of conduct" (*id.* at 765) provides constructive notice only if that conduct resulted in recurrent dangerous conditions that were substantially similar to the condition claimed to cause injury in a particular case. Constructive notice arises from a "recurring incident" of

a substantially similar dangerous condition. *Id.* And "a general or continuing condition" can "indicat[e]" the case-specific "dangerous condition's existence" only if the "general or continuing" condition was substantially similar to the specific condition claimed to cause injury. *Id.*

Conditions that are meaningfully different, let alone merely theoretical, cannot reasonably place a premises owner on constructive notice of a particular dangerous condition. Expressly requiring substantial similarity simply makes explicit an implicit component of the standard articulated in *Blair*.

b. The substantial-similarity test is workable and enhances consistency and predictability.

The substantial-similarity standard is clear and workable. Tennessee courts, like other courts around the country, have deep experience applying substantial-similarity standards in a wide variety of settings. As Mid-America points out, substantial similarity provides a well-worn criterion for the admissibility of evidence in the premises-liability setting. And the same criterion applies for other torts, including product liability. *See*, *e.g.*, *Rodriguez v. Bridgestone/Firestone N. Am. Tire, LLC*, No. M2013–01970–COA–R3–CV, 2017 WL 4513569, at *10–11 (Tenn. Ct. App. Oct. 10, 2017).

But the range of substantial-similarity standards is far wider. This Court and other Tennessee courts have used substantial similarity to determine:

- Whether a lawsuit is an "abusive civil action," Tenn. Code Ann. § 29-41-105(1);

- Whether differential treatment of two entities violates the Commerce Clause, *DIRECTV, Inc. v. Roberts*, 477 S.W.3d 293, 305 (Tenn. Ct. App. 2015) (quoting *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997));
- The admissibility of unrelated conduct in a will contest, *In re Estate of Smallman*, 398 S.W.3d 134, 150–51 (Tenn. 2013), or fraud case, *Keith v. Murfreesboro Livestock Market, Inc.*, 780 S.W.2d 751, 757 (Tenn. Ct. App. 1989); and
- The admissibility of prior convictions for impeachment, *State v. Waller*, 118 S.W.3d 368, 373 (Tenn. 2003).

Whether mitigating evidence in a capital trial was cumulative, *Henley v. State*, 960 S.W.2d 572, 581 (Tenn. 1997). In short, the Tennessee courts are adept at applying substantial-similarity principles and adapting them to different contexts. And courts are more likely to issue consistent rulings when applying familiar standards. Engrafting the substantial-similarity standard onto the *Blair* analysis accordingly should result in more consistent and predictable premises-liability jurisprudence.

c. The substantial-similarity test is consistent with current law and sound public policy.

A substantial-similarity standard does not merely transmute an established evidentiary standard into a logical, substantive rule of law. Rather, a focus on substantial similarity provides a clear and predictable organizing principle that is consistent with *Blair* and other precedents.

The substantial-similarity standard for the admissibility of prior-accident evidence rests on the judgment that prior accidents are relevant

to negligence. That evidence is relevant because it tends to prove notice and thus an opportunity to take preventive or ameliorative action.

As a substantive standard, substantial similarity provides a coherent explanation of the evidence that establishes constructive notice of a dangerous or defective condition. Because "[l]iability in premises liability cases stems from superior knowledge of the condition of the premises," *Blair*, 130 S.W.3d at 764 (quoting *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980)), the constructive notice element must reasonably reflect the owner's "superior knowledge." The relevant knowledge is knowledge of the "dangerous or defective condition" that injured the plaintiff. *Id.* Constructive notice can rest on a condition other than the one that harmed plaintiff only if actual knowledge of the other condition is sufficient to put a reasonable premises owner on notice of the hazard that harmed the plaintiff. And that can occur only if the owner is on notice of a condition so substantially similar that knowing the risk of one is tantamount to knowing the risk of the other. Knowledge of the mere condition is not enough unless accompanied by knowledge of the condition's risks—its "dangerous or defective" characteristics. *Id.* And this generally will arise only if the known, substantially similar condition has produced an accident or injury.

This Court applied a version of a substantial-similarity standard for constructive notice when it addressed the scope of premises owners' limited duty to protect against crimes by third parties. In *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996), the Court's notice analysis focused on "the location, nature, and extent of previous criminal activities and their similarity, proximity, or other relationship to the

crime giving rise to the cause of action." *Id.* at 902. And the Court screened out "criminal activities" that lacked "similarity, proximity, or [an]other relationship" expressly in order to avoid imposing an "undue burden" on premises owners. *Id.*

This Court again focused on "the presence or absence of prior similar incidents" when explaining why establishing that a risk was foreseeable is not enough to support imposition of a tort duty. *Giggers v. Memphis Housing Auth.*, 277 S.W.3d 359, 365 (Tenn. 2009). The Court emphasized that "principles of fairness" (*id.*)—particularly, fair notice—undergird the "'analysis of the relevant public policy considerations'" necessary "to determine whether a duty enforceable in tort must be imposed." *Id.* at 366 (quoting *Satterfield*, 266 S.W.3d at 364–65).

The same public policy concerns support adoption of a substantial-similarity standard to refine and add predictability to the standard in *Blair*—a standard that explicitly derived from *McClung*. *See Blair*, 130 S.W.3d at 766–67. This Court was a pioneer in charting a middle ground between (1) restricting constructive notice to the same instance of the same condition, or (2) effectively eliminating constructive notice by presuming notice for any hazard plausibly associated with a particular business.

Limiting constructive notice to substantially similar prior occurrences would forestall a potentially limitless "foreseeability" standard that would make property owners effectively the insurers of their tenants and visitors. Yet "[b]usiness proprietors are not insurers of their patrons' safety." *Id.* at 764. And imposing tort duties that undermine that policy would raise prices to consumers for retail

purchases, rental property, and any other good or service where the cost of unchecked premises liability could be significant.

Finally, rulings on tort duties have the "power to effectively communicate important information on the scope of law throughout the legal world." Owen, *supra*, 44 Wake Forest L. Rev. at 1304. Thus, when properly channeled through a substantial-similarity requirement, constructive-notice rulings may provide meaningful guidance to businesses about the scope of the precautions that they may be expected to undertake.

This Court's focus in *Blair* on constructive notice through recurrence preserved a fair-notice requirement that has begun to erode. Articulating a clear substantial-similarity requirement ensures that constructive notice remains fair notice. And a clear substantial-similarity standard for constructive notice would lead to clearer rulings on the issue, rulings that are more likely to have persuasive and predictive force

B. Consistent Articulation of Premises Owners' Duties Is Necessary to Ensure Adequate Gatekeeping by the Courts.

A clear substantial-similarity standard for constructive notice in premises-liability cases would produce another benefit. A clear standard is more likely to allow resolution of meritless cases by the court without a full trial, conserving judicial resources and reducing legal expenses for businesses in Tennessee.

Constructive notice of a dangerous condition is an element necessary to define a premises owner's duty to those on the property. *See*, *e.g.*, *Blair*, 130 S.W.3d at 766. And "[t]he existence or nonexistence of a

duty owed to the plaintiff by the defendant is entirely a question of law for the court." *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *see also Giggers*, 277 S.W.3d at 365.

Thus, like the elements for other tort claims, the constructive-notice element "perform[s] an important gatekeeping function for the purposes of ensuring the reliability of claims and of preventing liability from extending unreasonably." *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 39 (Tenn. 2005); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 363 (Tenn. 2002). *See* Owen, *supra*, 44 Wake Forest L. Rev. at 1301 (noting that duty rulings provide an "important screening function for excluding types of cases that are inappropriate for negligence adjudication").

A substantial-similarity standard provides the type of "objective gatekeeping rule[]" that allows courts to perform this function effectively and fairly. *Eskin v. Bartee*, 262 S.W.3d 727, 736 (Tenn. 2008). By tying constructive notice to hazards that have manifested in the past and are substantially similar in their physical characteristics, their location, and their risks, this Court can bring greater order and predictability to this area of tort law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: October 2, 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, I certify that this brief complies with the requirements of Section 3.02 of that Rule. According to the word count in Microsoft Word, there are 5,177words in this brief (excluding permitted sections).

Dated: October 2, 2023

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CERTIFICATE OF SERVICE

I certify that, on October 2, 2023, I electronically served the above brief on the following counsel via TrueFiling and email:

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