STATE OF MICHIGAN
IN THE SUPREME COURT
(On application for leave from the Court of Appeals
Murphy, C.J., and Beckering and M.J. Kelly, J.J.)

CHARLOTTE HOFFNER,

Plaintiff-Appellee/
Cross-Appellant,

and

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN,

Third-party Plaintiff-Appellee,

v

RICHARD LANCTOE and LORI LANCTOE,

Defendants-Appellants/
Cross-Appellees,

and

PAMELA MACK, TIFFANI K. AHO, a/k/a
TIFFANI K. FONTECCHIO, and MOUSIE,
INC., d/b/a FITNESS XPRESS,

Defendants.

Supreme Court No. 142267

Court of Appeals No. 292275

Gogebic Circuit Case No. G-08-85-NO
Hon. Joseph D. Zeleznik

142267

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE CHARLOTTE HOFFNER

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ARGUMENT

I. The Lanctoes ask this Court to fundamentally rewrite its 2001 opinion in *Lugo v Ameritech Corp* and re-inject vast uncertainty into the "special aspects" doctrine.

The Court of Appeals' interpretation of the "special aspects" doctrine is a straightforward application of *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), in which this Court went to great pains to delimit the circumstances under which a plaintiff can avoid summary disposition where the dangerous condition, though "open and obvious," was effectively unavoidable. Defendants want this Court to throw out the "effectively unavoidable" component of the "special aspects" doctrine entirely, but this Court should reject that invitation.

As Justice Taylor's opinion for the Court in *Lugo* noted:

> ...the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, 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. [464 Mich at 517].

He then gave an example of an instance where the dangerous condition was "effectively unavoidable":

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.

The Lanctoes would restrict *Lugo*'s example to the literal terms stated by Justice Taylor: where the condition is "effectively unavoidable" because an invitee is *inside* a building, and it stands between her and the only way *out*. But a more faithful interpretation of Justice Taylor's exception instead focuses on the compulsion upon plaintiff to encounter and traverse the danger: in other words, where plaintiff is at Point A and must get to Point B, but the dangerous condition lies between, it is "effectively unavoidable." Not every customer walking into a business will

meet that requirement – but an invitee such as Ms. Hoffner, who has a prepaid membership she is attempting to use, and has only one way of using it – does.

Placing Justice Taylor's hypothetical *Lugo* shopper alternately inside and outside the store, and contrasting him with Ms. Hoffner, shows the eminent workability of this analytical framework. Where the shopper is inside the store and needs to get out, as *Lugo* confirms, the fact that there is only one door available and the water stands between the shopper and it, renders the condition "effectively unavoidable." The shopper needs to leave, there is only one exit, and to go through it he must also go through the dangerous condition. But put the shopper *outside* the store, wanting to get in – and assume that the store is open to the general public, and not a membership warehouse – and the circumstances change dramatically. In that instance, the shopper is *not* compelled to enter – he can come back later, or can drive down the street to another store that keeps its premises in better condition, effectively avoiding the dangerous condition altogether.

But for those like Ms. Hoffner, with a paid membership to a *specific* establishment housed only in a *specific building*, the analysis is the same, regardless of whether she is inside or outside the building and its lone door. Her status of being on the outside wanting to get inside places her within Justice Taylor's *Lugo* example, because she is *compelled* to go through the door, and thus traverse the dangerous condition. Ms. Hoffner had paid her membership to the club, and if she wanted to exercise that day, there was only one way to do it – by crossing the icy patch. There was no other health club to go to. Just as Justice Taylor's shopper in *Lugo* had to get from Point A to Point B and had only one way to do so, so too did Ms. Hoffner. In both instances there was a path, it ran directly through the dangerous condition, and circumstances compelled plaintiff to try to traverse it.

Appellate rulings in the decade since *Lugo*'s issuance have had no trouble drawing this distinction, and applying the "effectively unavoidable" component of the "special aspects" doctrine to find a jury question only where the facts establish such compulsion. Thus, in *Brousseau v Daykin Electric Corp*, unpublished per curiam opinion of the Court of Appeals, decided June 7, 2002 (Docket No. 225880), *lv denied*, 468 Mich 865; 657 NW2d 720 (2003), the open and obvious doctrine did not bar plaintiff-truck driver's premises-liability claim, even though he saw the snow mound before driving over it and being injured, because the mound was in front of the only loading dock where deliveries could be made. In their opinion, Judges Murray, Cavanagh, and Gage expressly relied on *Lugo*'s "one way out" example, even though plaintiff in *Brousseau* obviously was driving *in* – to make a delivery. The court first noted that the snow mound, like the icy patch here, presented "a classic example of an open and obvious danger":

> The evidence established that there was nothing hidden about the mound of snow and that plaintiff had seen the mound before he decided to proceed over the snow mound. Plaintiff testified that the mound was two to three feet high, that it was icy and hard packed, that it extended the length of the well leading to the loading dock, and it is undisputed that he knew that because of its height and consistency slowly backing over the mound would not cause the truck to overcome the mound. Hence, the mound was an open and obvious condition. *Novotney v Burger King Corp, (On Rem)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). [*Brousseau*, slip op at 4].[1]

The panel then found that on the particular circumstances, *Brousseau* was a "unique" case where plaintiff had established that the snow mound, though open and obvious, contained "special aspects" that would allow a reasonable juror to conclude it constituted an unreasonable danger, and that defendant thus had a duty to undertake reasonable precautions. *Id.* While it called the case "a close one," it noted that the evidence was substantially similar to the "effectively unavoidable" example in *Lugo*:

[1] Unpublished cases cited in this brief are attached at **Tab 1.**

> The mound of snow in the present case blocked the only entrance to defendant's commercial loading dock where truck drivers were to make deliveries to defendant. Unlike many other conditions that are open and obvious where a person could simply avoid the hazard by walking around it, there was no possibility of doing so in this case. Indeed, the jury could reasonably conclude, based on the evidence presented, that in order to make his deliveries plaintiff effectively had no choice but to drive over the mound. Plaintiff presented lay and expert testimony that truck drivers such as plaintiff have numerous deliveries to make during the course of the day and are, therefore, on strict timelines. And, as noted, plaintiff could not drive around the mound and had no reasonable alternative to make the delivery. Thus, the mound of snow was effectively unavoidable, forcing plaintiff to encounter the condition. [*Id* at 4 (citations omitted)].

The Lanctoes of course maintain that the condition here *was* avoidable: that Ms. Hoffner could have gone home and come back to exercise some other time. But *Brousseau* specifically considered, and correctly dismissed as misplaced, such an argument, where the specific circumstances and location *compel* plaintiff's encounter with the dangerous condition:

> We note that the hypothetical plaintiff in the *Lugo* example surely could have not exited the building and instead asked an employee to clean up the water. We believe *Lugo's* example was utilized to emphasize that there can be liability imposed upon premises owners when the *location* of the open and obvious condition and the circumstances of the plaintiff (ie, an inability to exit without traversing over the water) are such that the plaintiff effectively had no choice but to encounter the condition. *Lugo, supra,* at 519 n 2. [*Brousseau*, op at 5, n4].

Accord, Van Wynsberghe v American Axle Mfg & Holdings, unpublished per curiam opinion of the Court of Appeals, decided April 15, 2008 (Docket No. 277094) (sloped, coolant-covered floor around factory machinery on which repairman slipped was "effectively unavoidable" where plaintiff had to cross it to do his job; even if plaintiff didn't cross it, *someone* would have had to cross it to diagnose and repair the equipment).

Contrary to the Lanctoes' assertions, continuing fidelity to *Lugo*'s "effectively unavoidable" component of the "special aspects" doctrine will not write the "open and obvious" doctrine out of Michigan's jurisprudence, or open wide the courthouse doors to frivolous

premises-liability claims. To the contrary, in the decade since *Lugo*'s issuance, there has not been a flood of appellate opinions allowing premises-liability plaintiffs to reach a jury using the "effectively unavoidable" component. Rather, only extreme, "unique" cases, on isolated facts showing *compulsion* to traverse the dangerous condition – such as *Brousseau, Van Wynsberghe*, and this case – have been deemed to fit within Justice Taylor's example. They have been few and far between, and there hardly has been a flood of plaintiffs passing through its narrow gate.

Thus, the Court of Appeals has withheld the "effectively unavoidable" designation from a blind plaintiff who was training her seeing-eye dog at a Meijer's and slipped on water after entering the doorway through which her instructor told her to enter; the water was not "effectively unavoidable" because there were other store entrances plaintiff could have used. *Van Ormen v Meijer, Inc*, unpublished per curiam opinion of the Court of Appeals, decided April 14, 2011 (Docket No. 295661). It has refused to apply the example to a hospital visitor who fell on snow-covered ice while walking down a parking-structure ramp; the ramp was the most direct route into the hospital, but not the only route. *Blue v St John Hosp & Med Ctr*, unpublished per curiam opinion of the Court of Appeals, decided October 13, 2009 (Docket No. 284769). It has found it inapplicable even to a plaintiff in a somewhat analogous position to Ms. Hoffner – a parent taking his son to hockey practice, who slipped on an icy patch just outside the rink's only entranceway – because photographic evidence showed he could have entered without stepping on the patch. *Belhabib v J&B of Michigan*, unpublished per curiam opinion of the Court of Appeals, decided June 17, 2008 (Docket No. 278380). And most recently, it found the doctrine inapplicable to a plaintiff who chose to use a stepladder on a ceramic tile floor and slipped – he could have stood on something other than a stepladder, or made other arrangements to secure it better. *Jajo v Village Banquet Hall*, unpublished per curiam opinion of the Court of Appeals,

decided May 5, 2011 (Docket No. 296917). In each of these cases, what was missing was the *compulsion* to attempt to traverse the dangerous condition that was present in Justice Taylor's *Lugo* example, in *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), in *Brousseau*, in *Van Wynsberghe*, and here.

Lugo "has brought some reasonable measure of clarity to a law that previously had been in disarray." *Mann v Shusteric Enterprises*, 470 Mich 320, 332 n12; 683 NW2d 573 (2004) (Markman, J). It has "coordinate[d] and render[ed] consistent the case law of Michigan," delivering our jurisprudence from the days when parties could "choose among inconsistent opinions in the manner that a patron at a Chinese restaurant might choose among dinner items from Column A or Column B." *Id* (citation omitted). Undoubtedly it has closed the courthouse door to many plaintiffs, but for those few who can show that the location of the open and obvious condition, coupled with their own circumstances, are such that they had no choice but to encounter the condition – that the circumstances *compelled* them to try and cross it – *Lugo* properly has recognized a jury question. As the *Brousseau* court noted, this is a "narrow realm" of cases, op at 5.

The Court of Appeals opinion constitutes a faithful application of *Lugo* and of Justice Taylor's "effectively unavoidable" example. It is the Lanctoes, not that opinion, who seek to re-inject uncertainty and instability into Michigan's jurisprudence, by essentially eliminating *Lugo*'s "effectively unavoidable" component. But in the face of a decade's experience with *Lugo*, they present no compelling reason why such radical re-ordering of Michigan's premises-liability law is either necessary or desirable. If this Court feels that any fine-tuning of *Lugo* is needed, it can accomplish that with a ruling simply reaffirming the *compulsion* aspect of *Lugo*'s "effectively unavoidable" example, and otherwise leaving the result here intact.

CONCLUSION/RELIEF REQUESTED

The application for leave to appeal should be denied.

Respectfully submitted,

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Dated: June 2, 2011

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. BROUSSEAU,

Plaintiff-Appellant/Cross-Appellee,

v

DAYKIN ELECTRIC CORPORATION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 7, 2002

No. 225880
Wayne Circuit Court
LC No. 95-518513-NO

Before: Cavanagh, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order effectuating the jury verdict entered against defendant and reducing plaintiff's award of future economic damages to present value. Defendant cross-appeals as of right, challenging the trial court's decisions to deny its motions for judgment notwithstanding the verdict (JNOV), new trial, directed verdict, and remittitur, and the granting of plaintiff's motion for costs and attorney fees. We affirm in part and reverse in part.

I.

Plaintiff argues that the trial court committed reversible error when it reduced the jury verdict to present value after it had already instructed the jury to do so, effectively reducing the verdict twice. We disagree. This issue involves a question of statutory interpretation, which this Court reviews de novo. *Cheron, Inc v Don Jones, Inc,* 244 Mich App 212, 215-216; 625 NW2d 93 (2000).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000). The first step in determining intent is to review the specific language of the statute itself. *In re MCI Telecommunications Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). If the plain and ordinary meaning of the language is clear and the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permitted. *Id.*

MCL 600.6306 states in pertinent part:

(1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

* * *

(c) All future economic damages . . . reduced to gross present cash value. [MCL 600.6306(1)(c) (footnotes omitted).]

"Before 1986, under the common law, the obligation to perform the reduction of future damages to present cash value in personal injury actions was the obligation of the jury." *Nation v WDE Electric Co,* 454 Mich 489, 492; 563 NW2d 233 (1997). However, MCL 600.6306 transferred the obligation to perform that calculation to the trial judge. *Id.* The clear and unambiguous language of the statute mandates that the trial court shall reduce any future economic damages to gross present value when entering an order of judgment in favor of a plaintiff. Thus, the trial court in this case properly reduced plaintiff's award of future economic damages to present value when it entered the order of judgment.

Furthermore, plaintiff's claim that there is a presumption that juries follow the instructions of the court, and therefore, the jury's award included a reduction to present value, has been overcome by the facts in the record. We agree with defendant that it is clear from the record and the verdict form that the jury's award of future economic damages did not include a reduction to present value. Rather, the jury returned an award for future economic damages that was requested by plaintiff, $55,000 the first year and $30,000 for every year after that for the rest of plaintiff's working life as determined by the jury. Thus, the jury simply adopted the figures as requested by plaintiff when returning a verdict without making any calculations for present cash value, which would have been evidenced by a different calculated amount reduced for each year under the formula. Accordingly, we find no error in the trial court's decision to reduce plaintiff's award for future economic damages to present value.

II.

On cross-appeal, defendant argues that the trial court erred in denying its motion for JNOV. We disagree. This Court reviews de novo a trial court's decision with regard to a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000). "A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury." *Pontiac School Dist v Miller Canfield Paddock & Stone,* 221 Mich App 602, 612; 563 NW2d 693 (1997). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli, supra* at 260-261.

Defendant bases several of its arguments for reversal on the decision in *Millikin v Walton Mobile Home Park, Inc,* 234 Mich App 490; 595 NW2d 152 (1999). Defendant primarily argues that the *Millikin* Court modified the open and obvious doctrine such that this Court's prior opinion in this case was based on an incorrect standard of law. However,

defendant's reliance on *Millikin* is misplaced, and therefore, *Millikin* provides no basis for reversal.[1]

Millikin involved a premises liability action in which the plaintiff was injured after tripping on a support wire that extended from the ground at the base of her home to a utility pole. *Millikin, supra*, 234 Mich App at 491. The *Millikin* Court affirmed the trial court's grant of summary disposition in favor of defendant, finding that the open and obvious "doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability," including negligent maintenance of the premises. *Id.* at 495-497. However, the *Millikin* Court also went on to address whether the support wire still presented an unreasonable risk of harm as discussed in *Bertrand v Alan Ford, Inc.* 449 Mich 606, 609; 537 NW2d 185 (1995). *Id.* at 498-499. The *Millikin* Court found that the plaintiff had failed to establish anything unusual about the wire or that the wire posed an unreasonable risk of harm despite its open and obvious nature. *Id.* at 499. Accordingly, the *Millikin* decision did not limit, extend, or change the holding or rules of law outlined in *Bertrand*, and therefore, as determined in the prior *Brousseau* opinion, such principles are applicable to the facts in the instant case.

Of greater import to this appeal is the recent decision issued in *Lugo v Ameritech Corp Inc,* 464 Mich 512; 629 NW2d 384 (2001), where our Supreme Court, relying in great part upon its *Bertrand* decision, reiterated the duties imposed upon landowners under the open and obvious doctrine. The Court, speaking through Justice Taylor, noted that "the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if specific 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." *Lugo, supra,* at 517. Under this standard, the Court concluded the critical question with regard to open and obvious conditions to be:

> [W]hether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [Id. at 517-518.]

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[1] In an earlier decision in this same case, *Brousseau v Daykin Electric Corp*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 1998 (Docket No. 195259) (hereinafter "the *Brousseau* opinion"), this Court determined that the open and obvious nature of the condition was not dispositive of plaintiff's theory of liability based on the negligent maintenance of the premises. This Court reversed the entry of summary disposition in favor of defendant not because the open and obvious doctrine did not apply to claims for negligent maintenance, but because an invitor may still remain liable, notwithstanding an open and obvious danger, if the risk of harm remains unreasonable. The *Brousseau* opinion cited *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609; 537 NW2d 185 (1995) for this principle. Consequently, this principle of law was not changed by the intervening decision in *Millikin, supra,* as defendant suggests.

The *Lugo* Court provided an example illustrating such a "special aspect" that may impose liability under the doctrine:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id.* at 518.][2]

Viewing the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to plaintiff, *Morinelli, supra,* we conclude that reasonable jurors could have honestly reached different conclusions regarding whether the mound of snow posed an unreasonable risk of harm despite its open and obvious nature, and therefore, the jury verdict must stand.

The mound of snow in this case presents a classic example of an open and obvious danger in a premises liability action. The evidence established that there was nothing hidden about the mound of snow and that plaintiff had seen the mound before he decided to proceed over the snow mound. Plaintiff testified that the mound was two to three feet high, that it was icy and hard packed, that it extended the length of the well leading to the loading dock, and it is undisputed that he knew that because of its height and consistency slowly backing over the mound would not cause the truck to overcome the mound. Hence, the mound was an open and obvious condition. *Novotney v Burger King Corp, (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, based on the circumstances surrounding this mound of snow, plaintiff presented sufficient evidence to establish that the mound of snow, although an open and obvious risk, contained "special aspects" such that a reasonable juror could conclude that it nonetheless constituted an unreasonable danger. As such, this was a unique case where reasonable jurors could conclude that defendant had a duty to undertake reasonable precautions to protect plaintiff from that risk.

We acknowledge that the present case is a close one, but we believe that the evidence presented is substantially similar to the example provided in *Lugo* as to an open and obvious condition that has a special aspect because it is "effectively unavoidable." The mound of snow in the present case blocked the only entrance to defendant's commercial loading dock where truck drivers were to make deliveries to defendant. Unlike many other conditions that are open and obvious where a person could simply avoid the hazard by walking around it, there was no possibility of doing so in this case.[3] Indeed, the jury could reasonably conclude, based on the evidence presented, that in order to make his deliveries plaintiff effectively had no choice but to drive over the mound. Plaintiff presented lay and expert testimony that truck drivers such as plaintiff have numerous deliveries to make during the course of the day and are, therefore, on

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[2] The standards articulated in *Bertrand* and *Lugo* were recently affirmed by the Supreme Court in *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd,* __ Mich __; __ NW2d __ (Docket No. 116059, issued April 24, 2002).

[3] See, e.g., *Corey v Davenport College of Business,* ___ Mich App ___; ___ NW2d ___ (Docket No. 206185, issued April 26, 2002).

strict timelines. And, as noted, plaintiff could not drive around the mound and had no reasonable alternative to make the delivery. Thus, the mound of snow was effectively unavoidable, forcing plaintiff to encounter the condition.[4] Viewing this evidence and all reasonable inferences in a light most favorable to plaintiff, as the trial court was required to do, plaintiff submitted sufficient admissible evidence to allow a jury to conclude that there were special aspects about the mound of snow at issue to establish that it posed an unreasonable risk to him. Accordingly, reasonable jurors could find that defendant breached a duty of reasonable care under these specific circumstances. The trial court did not err in denying defendant's motion for JNOV.

Defendant's reliance on *Joyce v Rubin,* 249 Mich App 231; 642 NW2d 360 (2002), is misplaced. In *Joyce*, this Court held that although the issue presented a "close case," the slippery spots on a sidewalk caused by snow were not the type of special aspects contemplated by *Lugo* because the spots were not unavoidable, as plaintiff testified that "she *walked around the regular pathway* to avoid the slippery condition." *Id,* at 242 (emphasis in original). In the instant case, however, plaintiff was presented with the situation discussed in *Lugo* – only one loading dock which could only be reached by going over the mound. Hence, although this too is a "close case," we find that the evidence presented placed this case in the narrow realm of cases that present a special aspect given the effective inability for plaintiff to have avoided the openly obvious condition. See, also, *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 694; ___ NW2d ___ (2002).

Defendant also argues that the trial court erred in denying its motion for JNOV based on plaintiff's misconduct in submitting an affidavit containing false statements in opposition to defendant's motion for summary disposition. In reviewing a trial court's denial of a motion for JNOV, this Court's inquiry involves the question of whether there was sufficient evidence presented to create a triable issue of material fact for the jury. *Pontiac School Dist, supra.* However, because defendant presents no authority to support its claim that plaintiff's misconduct entitles it to a JNOV, this issue is deemed "abandoned on appeal as being insufficiently briefed." *Dresden v Detroit Macomb Hospital Corp,* 218 Mich App 292, 300; 553 NW2d 387 (1996). Furthermore, plaintiff's alleged misconduct was either not erroneous or harmless, and therefore, cannot provide a basis for ordering a JNOV or a new trial. See *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997). First, the *Brousseau* Court did not rely on plaintiff's affidavit in reversing the trial court's grant of summary disposition as the Court stated that the affidavit was "not material to a motion under MCR 2.116(C)(8)." Second, defendant was not denied a fair trial because plaintiff's testimony was effectively impeached with the statements made in the affidavit. Accordingly, the trial court did not err in denying defendant's motion for JNOV.

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[4] Defendant's argument that the mound was avoidable because plaintiff had the alternative of calling his employer or asking defendant to have its employees remove the mound is misplaced. We note that the hypothetical plaintiff in the *Lugo* example surely could have not exited the building and instead asked an employee to clean up the water. We believe *Lugo's* example was utilized to emphasize that there can be liability imposed upon premises owners when the *location* of the open and obvious condition and the circumstances of the plaintiff (ie, an inability to exit without traversing over the water) are such that the plaintiff effectively had no choice but to encounter the condition. *Lugo, supra,* at 519 n 2.

III.

Defendant next argues that the trial court erred in denying its motion for a new trial. We disagree. "A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *Meyer v City of Centerline*, 242 Mich App 560, 564; 619 NW2d 182 (2000). The trial court's function in deciding a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party and its conclusion that the verdict was not against the great weight of the evidence is given substantial deference by this Court. *Morinelli, supra* at 261. Furthermore, when a party claims that a jury's verdict was against the great weight of the evidence, this Court may overturn that verdict only when it was manifestly against the clear weight of the evidence, but the jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999).

Defendant first claims that a new trial should have been granted because the great weight of the evidence established that the dangerous nature of the mound of snow was apparent, that plaintiff had alternatives to encountering the mound, and that defendant could not have expected that plaintiff would proceed to encounter the danger posed by the snow when plaintiff had viable alternatives to doing so. However, as was previously discussed, plaintiff presented sufficient competent evidence to establish that despite its open and obvious nature the mound of snow still posed an unreasonable risk of harm under the circumstances given its special aspects and that defendant had reason to expect that plaintiff would encounter it. Accordingly, the jury's verdict was not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also claims that it was entitled to a new trial because the jury's finding that plaintiff was not comparatively negligent was against the great weight of the evidence. Both parties disputed the reasonableness of plaintiff's conduct. Although defendant presented evidence of the alternatives available to plaintiff to encountering the mound of snow, such as calling his dispatcher or requesting assistance from defendant, plaintiff's expert testified that plaintiff's conduct in trying to overcome the mound of snow to make a timely delivery was reasonable in the trucking industry, especially when plaintiff observed another similar truck drive over the mound without incident just prior to plaintiff's accident. Furthermore, although defendant disputed that plaintiff was wearing a seatbelt through expert testimony of its own, plaintiff testified that he was wearing his seatbelt. "This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony . . . ." *Ellsworth, supra.* Thus, the jury verdict finding plaintiff not negligent, was not against the clear weight of the evidence. Accordingly, this Court cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial.

Defendant further claims that the trial court's failure to instruct the jury in accordance with *Millikin* requires a new trial. A requested jury instruction must be given if it is applicable and accurately states the law. However, this determination rests within the sound discretion of the trial court. *Stevens v Veenstra,* 226 Mich App 441, 443; 573 NW2d 341 (1997); *Pontiac School Dist, supra* at 622.

In this case, defendant's requested instruction was incomplete and, therefore, constituted an inaccurate statement of the law. As previously discussed, *Millikin's* holding that the open and

obvious doctrine was applicable to claims of negligent maintenance did not change the holding in *Bertrand, supra*, that a possessor of land is not relieved of liability for a dangerous condition on the premises, despite its obviousness or despite knowledge of it by the invitee, if the risk of harm remains unreasonable. Rather, the trial court properly instructed the jury in accordance with *Millikin,* because the *Millikin* decision recognized that an invitor remains liable for an open and obvious danger if it posed an unreasonable risk of harm. *Millikin, supra* at 499. Thus, the trial court did not err in refusing to give defendant's special jury instruction.

Last, defendant claims that it was entitled to a new trial because the trial court erred in allowing plaintiff's damage expert, Dr. Robert Ancell, to testify regarding plaintiff's fringe benefits when plaintiff failed to plead or request special damages beyond wages. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). However, defendant failed to preserve the challenge to the admission of this testimony regarding the benefits package because defendant failed to timely object to the evidence on this ground at trial[5] and no error affecting substantial rights has been shown. *Meagher v Wayne State University,* 222 Mich App 700, 724; 565 NW2d 401 (1997); MRE 103(a)(1) and (d). Therefore, defendant is not entitled to appellate review of this issue.

In addition, defendant's one sentence argument that the trial court erred in admitting Ancell's testimony without requiring defendant to produce the underlying Teamsters contract and without establishing that Ancell was qualified to testify with respect to benefits packages is also unpreserved as defendant failed to object on these grounds at trial.[6] Moreover, this one sentence argument has not been properly presented or briefed for appeal as defendant may not merely assert error and leave it to this Court to make its argument and search for authority to support its position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, this Court need not address these issues.

IV.

Next, defendant argues that the trial court erred in denying its motion for a directed verdict. We disagree. In order to properly preserve an issue regarding a motion for directed verdict, a party must make a motion for directed verdict, stating specific grounds in support of the motion. *Garabedian v William Beaumont Hospital,* 208 Mich App 473, 475; 528 NW2d 809 (1995); MCR 2.515. On appeal, this Court will not review grounds for sustaining a directed verdict that were not articulated to the trial court. *Id.*

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[5] We also note that defendant's specific objection to the admission of evidence regarding "pension loss" was insufficient to preserve this issue for appeal because fringe benefits include more than just pension benefits. See MCL 408.471(1)(e); Black's Law Dictionary 667-668 (6th ed. 1990).

[6] However, defendant did object on the grounds that plaintiff did not establish any foundation for how Ancell would know the salaries of truck drivers and how they would go up. Thereafter, plaintiff laid a foundation and Ancell's testimony regarding benefits packages was admitted without further objection by defendant.

"This Court reviews de novo the grant or denial of a directed verdict. In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; __ NW2d __ (2001). If no factual questions exist on which reasonable jurors could differ then a directed verdict is properly granted. *Id.* at 679-680. However, a directed verdict is not appropriate if reasonable jurors could reach different conclusions and this Court should not substitute its judgment for that of the jury. *Id.* at 680.

Defendant first contends that the trial court erred in denying its motion for directed verdict because plaintiff failed to present any evidence to establish that defendant had reason to expect that plaintiff would proceed to encounter the mound of snow. Again, viewing the testimony and all reasonable inferences in the light most favorable to plaintiff, plaintiff presented sufficient evidence to raise a question of material fact as to whether defendant had reason to expect that plaintiff would encounter the danger posed by the mound of snow. It was not necessary for plaintiff to present explicit admissions by defendant in order to establish what defendant had reason to expect, as logical and reasonable inferences could be drawn by the jury from the evidence presented regarding the location and appearance of the mound of snow as well as the evidence that another truck negotiated the mound of snow while defendant's employee watched. Therefore, defendant's motion for a directed verdict was properly denied.

Defendant also argues that plaintiff failed to comply with the standards established by the *Millikin* decision because the evidence conclusively established that the mound of snow was open and obvious. Because defendant failed to articulate this ground in support of its motion for a directed verdict before the trial court, it is not preserved for this Court's review. *Garabedian, supra.* Nonetheless, as we concluded earlier, defendant's reliance on *Millikin, supra*, is without merit as the holding in *Millikin* does not change the standard applicable in this case.

V.

Defendant also argues that the trial court erred in denying its motion for remittitur when the jury's verdict was excessive and unsupported by the evidence. We disagree. A trial court's decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531, 533; 443 NW2d 354 (1989). Remittitur should only be exercised when the verdict is excessive. *Id.* at 531. Thus, the inquiry is whether the jury award is supported by the evidence. *Id.* at 531-532. This determination "should be limited to objective considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* at 532. Further, an appellate court must accord due deference to the trial court's decision regarding remittitur because "[t]he trial court, having witnessed all the testimony and evidence as well as having had the unique opportunity to evaluate the jury's reactions to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict." *Id.* at 531.

Defendant argues that the trial court erred in denying its motion for remittitur because the jury verdict finding plaintiff not comparatively negligent was unsupported by the evidence. However, as previously noted, the issue regarding plaintiff's negligence was highly contested at trial and plaintiff presented evidence to create an issue of material fact for the jury regarding the

reasonableness of plaintiff's conduct and the standard of care owed by defendant. This Court gives due deference to the trial court's ability to judge the credibility of the witnesses and this Court may not substitute its judgment for that of the trial judge unless an abuse of discretion is shown. *Id.* at 533. Thus, because the jury award was supported by the evidence, the trial court did not abuse its discretion in denying defendant's motion for remittitur.

VI.

Last, defendant argues that the trial court erred in awarding plaintiff excessive attorney fees and costs. This Court reviews a trial court's decision to award attorney fees and costs for an abuse of discretion. *Egan v City of Detroit*, 150 Mich App 14, 28; 387 NW2d 861 (1986).

Defendant first claims that the trial court erred in awarding plaintiff attorney fees from the date of mediation. We agree. By rejecting the mediation evaluation, defendant became liable to pay as a sanction plaintiff's "actual costs" when this suit concluded with a jury verdict in favor of plaintiff. MCR 2.403(O). MCR 2.403(O)(6) provides that "actual costs are those costs taxable in any civil action, and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services *necessitated by the rejection of the case evaluation.*" MCR 2.403(O)(6)(a) and (b) (emphasis added). However, "attorney fees incurred prior to the deadline for accepting or rejecting a mediation evaluation are not taxable as costs pursuant to MCR 2.403(O). . . . Prior to that time, a party cannot know whether the opposing party's decision will require preparation for a trial." *Taylor v Anesthesia Associates of Muskegon, PC*, 179 Mich App 384, 386-387; 445 NW2d 525 (1989). In this case, the parties rejected the mediation evaluation by allowing the twenty-eight day period for acceptance or rejection to pass. Thus, defendant was only liable for attorney fees from the day after the expiration of the twenty-eight day period for acceptance or rejection of the mediation evaluation. See *id.* Accordingly, the trial court abused its discretion in awarding plaintiff attorney fees from the date of mediation.[7]

In regard to defendant's argument concerning the trial court's award of excess costs, defendant fails to specify which costs it claims to be excessive and unauthorized by statute. Defendant only states that the trial court "allowed costs for taking depositions, which were not submitted into evidence in trial or used for purposes of impeachment." It is well established that a party cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel or elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham, supra.* This argument is therefore deemed abandoned on appeal. *Id.*

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[7] We understand the trial court's rationale for awarding these costs because of the short time the parties had to prepare for trial. However, in deciding this issue we are constrained by the plain language of the court rule. Additionally, although plaintiff argues that disallowing these costs under MCR 2.403(O)(6) would create an absurd result, we note that whether an absurd result occurs is not a relevant consideration when interpreting a plain and unambiguous court rule. *People v McIntire,* 461 Mich 147, 155-156, n 2; 599 NW2d 102 (1999).

Affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Christopher M. Murray