

STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Michigan Court of Appeals
(Judges Kirsten Frank Kelly, Michael J. Kelly and Patrick Meter)

SHERYL L. SPIGNER,

Plaintiff-Appellee,

Docket No. 150327
COA No.: 315616
Case No.: 11-2037-NO

v

YARMOUTH COMMONS ASSOCIATION
and KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Defendants.

and

YARMOUTH COMMONS ASSOCIATION
and KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Defendants/Third Party Plaintiffs,

v

W & D LANDSCAPING & SNOW
PLOWING, INC.

Third Party Defendants-Appellants.

150327-
PLAINTIFF-APPELLEE SHERYL SPIGNER'S ANSWER TO THIRD-PARTY
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

As third-party defendant correctly states, this is a premises liability action in which the trial court ultimately concluded that summary disposition was improper because the hazard at issue was effectively unavoidable. Thereafter, the Court of Appeals affirmed the trial court's ruling (in part) in an unpublished opinion and likewise opined that the hazard was effectively unavoidable. Third-party defendant now seeks leave to appeal.

While third-party defendant generally described the procedural posture of this case accurately, Plaintiff disputes the remainder of third-party defendants' statement of jurisdiction. As will be set forth in detail below, neither the trial court nor the Court of Appeals erred in concluding that summary disposition was precluded in this case. Perhaps more importantly for the present phase of this matter, however, third-party defendant has not identified any legitimate need for this Court to further review this specific issue. The Court of Appeals in this case issued an unpublished and thus non-binding opinion. As this Court will see, this cause of action involves a mailbox at a condominium complex that was surrounded by snow and ice for a period of several days. After the Plaintiff's complaints went unaddressed, she was compelled to finally collect the mail that had been gathering. She then fell and was injured. In arguing that the hazard was not effectively unavoidable, no party nor Court has located any case that had analogous facts to this matter. Thus, the narrow holding of the Court of Appeals is specific to the present case only and, based on the vast history of premises liability cases in this state, is unlikely to involve a fact pattern that will ever be repeated again.

As this Court repeatedly emphasizes the Court of Appeals is the only error-correcting Court of this state. This Court's function, in contrast, is not to simply correct what it perceives to be legal errors, but is to address matters of jurisprudential significance. Here, no error has occurred.

Additionally, to the extent that defendant wishes to argue an error did occur, the Court of Appeals issued a non-binding opinion that is also highly fact-specific. No new rule of law was created, and no future litigants are likely to be impacted by this decision. As a result, third-party defendant is unable to show why this case is meritorious of review by the Supreme Court under MCR 7.302(B). The mere fact that third-party defendant disagrees with the outcome at the Court of Appeals is hardly a proper basis to seek leave to appeal in this Court.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Is Third-Party Defendant entitled to review of whether the Court of Appeals erred in affirming the trial court and in concluding that there was a genuine issue of material fact regarding whether the hazardous condition that third-party defendant negligently created was effectively unavoidable and that, as a result, Plaintiff's cause of action was not barred by the open and obvious doctrine?

Lower Court Answered: NO

Third-Party Defendant-Appellant Answered: YES

Plaintiffs-Appellees Answered: NO

COUNTER-STATEMENT OF FACTS

Factual Background

This cause of action arises out of a slip and fall accident that occurred in a common area at the Yarmouth Commons Condominium Complex. In June 2010, Plaintiff Sheryl L. Spigner began residing in a condominium at Yarmouth Commons with her mother. Sheryl was (and is) a Detroit police officer. She began working in that position in 1996.

The accident at issue occurred on February 4, 2011. Sheryl worked that day. After work, she went to the residence of her friend Terry Wadowski. She spent some time at Terry's house, and then Terry drove her back to her residence at Yarmouth Commons. (Spigner Dep, pp 21-24, Attached as Exhibit A.) When they arrived at Yarmouth Commons, Sheryl asked Terry to stop the vehicle so that she could get her mail. Sheryl's mailbox, like the other mailboxes in Yarmouth Commons, was adjacent to the road. The mailbox could not be reached by the occupant of a vehicle because snow had been plowed in front of it. Consequently, Sheryl had to get out of the vehicle and walk to the mailbox to get her mail. (Spigner Dep, pp 30-31; Wadowski Dep, pp 31-32, attached as Exhibit B.)¹

In days preceding the accident, Sheryl complained to Yarmouth Commons about the manner in which the snow was plowed (Spigner Dep, pp 168-169). As is evident in the attached photos, there was a significant portion of snow that had been plowed into the space between the road and the mailbox, forming a snow bank (Attached as Exhibit D). There is no dispute that there was no pathway to the mailbox available to Sheryl that was free of snow and ice (Spigner Dep, p

¹ In her dissenting opinion, Judge Kelly in part relied on her conclusion that Sheryl could have accessed the mailbox from her vehicle. As the undersigned attorney argued at oral argument, that conclusion is improper at the appellate level, particularly in a summary disposition proceeding, because it requires the Court to either ignore Wadowski's testimony or judge the credibility of that testimony. Neither action is permitted at this stage and it was improper for Judge Kelly to conclude otherwise.

170). Further, there is no dispute that W & D was responsible for clearing the snow in the complex, created the hazard and was aware the hazard existed. Walter Duda, the owner of W & D testified that W & D could have, and *should have*, shoveled the area by the mailbox by hand in order to prevent this particular hazard from existing (Deposition of Walter Duda, attached as Exhibit C, pp 44-45). Unfortunately, that never happened. Then, because Yarmouth Commons failed to eliminate the man-made hazard in a timely manner, despite Sheryl previously placing them on full notice of the poor snow plowing, that hazard still existed on February 4, 2011. Sheryl's mother had not recently gotten the mail as a result of the snowy conditions in front of the mailbox (Spigner Dep, pp 33-34). Indeed, as stated in Sheryl's affidavit provided to the trial court, the hazard prevented her from retrieving her mail for three days. (Spigner Affidavit, attached as Exhibit J.)

When attempting to get her mail on February 4, 2011, Sheryl approached the mailbox and got as close as she could without entering the snow bank. Because of the size of the snow bank, Sheryl was forced to lean forward to reach the mailbox. She successfully opened the mailbox and retrieved her mail. When she began walking away, she fell on the ice surrounding the area of the mailbox. (Spigner Dep, pp 31-38.)

When Sheryl hit the ground, she screamed out. Terry came to assist her. Sheryl felt significant pain in her leg. She and Terry went back to her residence. However, Sheryl's pain worsened and she went to the hospital. (Spigner Dep, pp 41-45.) As a result of her fall, Sheryl has suffered serious injuries that will impact her for the remainder of her life. She has recently had a surgical procedure to fuse her SI joint, which involved the placement of three titanium rods in her body. She is in a perpetual state of pain and has suffered physically, emotionally, financially and professionally.

Procedural History Regarding Premises Liability

Following the above-described accident, Sheryl brought suit against Yarmouth Commons Association and Kramer-Triad Management Group (Complaint, attached as Exhibit F). Subsequently, Yarmouth Commons Association and Kramer-Triad Management Group brought a third-party complaint against W & D Landscaping & Snow Plowing, Inc. (“W & D”). Yarmouth Commons Association and Kramer-Triad Management Group have stated on the record that third-party defendant was negligent in its failure to adequately clear the snow surrounding Plaintiff’s mailbox (August 27 Hearing, Attached as Exhibit I, p 12).

On August 3, 2012, third-party defendant filed its motion for summary disposition in relation to Plaintiff’s complaint against Yarmouth Commons and Kramer-Triad. Third-party defendant argued that the hazard that caused Sheryl’s fall was open and obvious and that no special aspects existed to serve as an exception. This Court correctly rejected that argument and found that there was a genuine issue of material fact relating to whether the hazard was effectively unavoidable because there was no alternative path to the mailbox.

Three days before third-party defendant filed its motion for summary disposition, this Court released its opinion in *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). As will be discussed in greater detail below, *Hoffner* involved an application of the “effectively unavoidable” special aspect. After this Court properly rejected third-party defendant’s special aspects argument, third-party defendant filed its motion for reconsideration in which it relied on the *Hoffner* opinion.

As this Court is aware, MCR 2.119(F)(2) precluded Plaintiff from filing a response to the motion for reconsideration. Consequently, Plaintiff was never afforded an opportunity to explain the inapplicability of *Hoffner* to the present case. The trial court ultimately granted the motion for reconsideration in a January 30, 2013, Opinion and Order. That Opinion and Order stated that because Plaintiff was not “inescapably required” to get her mail, the dangerous hazard that caused

her to fall was not effectively unavoidable. Consequently, this Court determined that Plaintiff's recovery was limited by her ability to demonstrate the existence of a statutory duty.

Following the trial court's January 30, 2013 Opinion and Order, Plaintiff filed her Motion for Reconsideration on February 20, 2013. The Motion for Reconsideration requested that the trial court reverse its January 30, 2013 Opinion and Order. Alternatively, the Motion for Reconsideration requested that the court hold that Opinion and Order in abeyance and permit Plaintiff the opportunity to address the Opinion in *Hoffner* at a hearing. On March 6, 2013, the trial court denied Plaintiff's Motion for Reconsideration without the benefit of the requested hearing.

Following the denial of Plaintiff's Motion for Reconsideration, Plaintiff filed her Motion for Relief from Order pursuant to MCR 2.612(C)(1)(a) (Attached as Exhibit F), which provides a trial court with the discretion to relieve a party "from a final judgment, order, or proceeding on the basis of mistake, which mistake may be by the trial court." *Fisher v Belcher*, 269 Mich App 247, 262 (2005). Plaintiff respectfully argued that the trial court erred in granting third-party defendant's Motion for Reconsideration and in subsequently denying Plaintiff's Motion for Reconsideration because the trial court failed to recognize the significant factual distinctions between the present case and *Hoffner*. Consequently, Plaintiff requested that the trial court reverse its January 30, 2013, Opinion and Order and reverse its March 6, 2013 denial of Plaintiff's Motion for Reconsideration. (Motion for Relief from Order, Attached as Exhibit F)

The trial court held a hearing on March 18, 2013 at which it heard arguments relative to third-party defendant's motion for summary disposition regarding Plaintiff's statutory claim. Toward the close of the hearing, the court acknowledged that Plaintiff had filed a Motion for Relief from Order. The court then indicated that when it denied Plaintiff's Motion for Reconsideration,

it “was not aware of the fact that, number one, the plaintiff complained to the condominium association and this has been going on for a minimum of 3 days...” and that it would hold oral argument on the Motion for Relief from Order the following week (March 18 hearing, Attached as Exhibit I, p 11). Counsel for third-party defendant then asked whether that meant that the order denying Plaintiff’s Motion for Reconsideration “should be stricken,” to which the trial court responded “[f]or the time being, yes.” (March 18 hearing, p 11.)

The hearing regarding Plaintiff’s Motion for Relief from Order occurred on March 25, 2013 (Attached as Exhibit G). The parties reiterated the positions from their briefs. While Plaintiff emphasized that her need to get her mail was distinguishable from the *Hoffner* plaintiff’s desire to exercise, third-party defendant primarily argued that Plaintiff could have used alternative means to get her mail. The trial court then issued its ruling from the bench. The trial court judge noted that the mailboxes near his residence are arranged in the same way as the mailbox in the present case and that he understands the difficulty in accessing the mailbox when it is surrounded by snow. The court then observed that this case is distinguishable from *Hoffner* because *Hoffner* involved a business invitee. Further, in contrast to *Hoffner*, the plaintiff in the present case was injured while trying to get her mail. The court observed the importance of mail and rhetorically asked “how long does she [have to] wait?” In light of its observations regarding the distinction between the present case and *Hoffner*, the court held that summary disposition in favor of third-party defendant was improper. (March 25 hearing, pp 14-16.)

The entire discussion at the trial court’s premises liability analysis revolved around whether the ice and snow were effectively unavoidable as a result of Sheryl’s need to confront that hazard. In contrast, third-party defendant’s argument at the Court of Appeals (beginning with its application for leave) devoted very little to that argument and instead focused on whether ice and

snow are sufficiently dangerous to *ever* be considered a special aspect. In both Plaintiff's briefing and at oral argument, Plaintiff explained that third-party defendant's argument asked the Court to accept that the entirety of the *Hoffner* opinion (and every other opinion of the Court of Appeals and Supreme Court that addressed a slip and fall on snow and ice) was dicta. If defendant's position was correct, after all, every snow and ice case previously decided by the appellate courts would have been summarily dismissed with no analysis. Of course, that is not the course that jurisprudence in this state has taken.

As defendant correctly describes, the Court of Appeals affirmed the trial court's conclusions regarding the applicability of the effectively unavoidable special aspect in a 2-1 decision. Judge Kelly dissented and, in part, concurred with defendant's position regarding whether snow and ice could be sufficiently dangerous to justify analysis under the special aspects doctrine. Defendant now seeks leave to appeal at this Court. For the reasons set forth below, Plaintiff respectfully requests that this Court deny this application, because neither the trial court nor the Court of Appeals erred, and because defendant has failed to show any legitimate need to have the decision of the Court of Appeals reviewed by this Court.

PRESERVATION OF THE ISSUE

As this Court has explained, "[g]enerally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Polkton Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In civil cases, this Court need to consider an unpreserved issue. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). Here, the argument third-party defendant makes regarding premises liability was not raised before, addressed or decided by the trial court. Consequently, it should not have

been addressed by the Court of Appeals and should not be entertained by this Court. It cannot be said that the trial court erred in failing to adopt an argument it was never presented.

STANDARD OF REVIEW

Third-party defendant challenges the opinion of the Court of Appeals that affirmed the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10).² When a motion is brought under MCR 2.116(C)(10), "a trial Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (emphasis added). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Only where the Court is satisfied that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law is summary disposition proper. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Michigan Court of Appeals has stated that it "is liberal in finding a genuine issue of material fact," *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 130; 793 NW2d 593 (2010).

ARGUMENT

² While third-party defendant styled its motion as a motion pursuant to MCR 2.116(C)(10), Plaintiff notes that this Court may choose to treat that motion as being brought pursuant to MCR 2.116(C)(8) to the extent that the motion argued that Plaintiff failed to state a claim of a breach of a statutory duty.

I. The Hazardous Condition Third-Party Defendant Negligently Created was Effectively Unavoidable.

In response to third-party defendant's original motion for summary disposition, the trial court held that a reasonable juror could conclude that the hazard that caused Sheryl's serious injuries was effectively unavoidable. As this Court is aware, a defendant is liable for injuries caused by an effectively unavoidable hazard, regardless of whether that hazard was open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). Prior to third-party defendant's motion for summary disposition, this Court issued its opinion in *Hoffner*, which involved a plaintiff's assertion that a condition was effectively unavoidable. Despite third-party defendant's arguments to the contrary, which Plaintiff was not permitted to respond to by way of MCR 2.119(F)(2), *Hoffner* does not demonstrate that the hazard in this case was not effectively unavoidable.

At the outset of this analysis, Plaintiff notes that third-party defendant inaccurately asserts that the present case does not hinge upon whether the hazard in question was effectively unavoidable. Third-party defendant alleges that a landowner is not liable for injuries resulting from open and obvious snow and ice *even if the snow and ice is effectively unavoidable*. Third-party defendant's remarkable position is inconsistent with Michigan law. While third-party defendant asserts that its position regarding snow and ice is "reflected by the Supreme Court's analysis in *Hoffner*," third-party defendant's argument is defeated by the mere existence of the *Hoffner* opinion.

Further, third-party defendant's argument regarding special aspects is not properly before this Court and was not properly before the Court of Appeals. As stated in this brief's "Preservation of the Issue" section above, an issue is not properly preserved for this Court's review if it is not presented to and addressed by the trial court. Here, as this Court will see in its review of the lower court record, third-party defendant's *Hoffner* argument below focused on whether Sheryl was

inescapably compelled to confront the snow and ice in front of her mailbox. In its Application for Leave to Appeal, third-party defendant limited its premises liability argument to the new argument that snow and ice are not sufficiently dangerous to qualify for the special aspects analysis. Because that argument was not presented to the trial court, it should not have been considered by the Court of Appeals and cannot be considered now. Should this Court entertain this unpreserved argument, it should nonetheless be rejected on its merits for the reasons set forth below.

As will be discussed in further detail below, the opinion in *Hoffner* addressed whether a particular patch of open and obvious ice was effectively unavoidable. This Court concluded that it was not. However, under third-party defendant's description of premises liability law, the vast majority of the *Hoffner* opinion is nothing more than dicta. If it were true that snow and ice are not “inherently dangerous” and thus not subject to the effectively unavoidable analysis, the Supreme Court in *Hoffner* would have said exactly that and would not have discussed whether the condition was effectively unavoidable. The Court would have merely said that the special aspects exception to the open and obvious doctrine was inapplicable in snow and ice cases and would have ended its analysis.

Instead, the Court conducted a thorough analysis of effective unavoidability in the context of an icy path leading to a business entrance, and thus confirmed that such a hazard *can be* properly classified as effectively unavoidable depending on the facts of the case. The Court found that recovery in *Hoffner* was precluded “because plaintiff was injured as a result of an *avoidable and obvious danger* and has provided no evidence of a special aspect to the condition that would justify the imposition of liability.” *Id.* at 473 (emphasis in original). There can be no doubt that where snow and ice is open and obvious yet effectively *unavoidable*, the premises owner is liable for injuries resulting from that hazardous condition. Third-party defendant does not, and cannot,

identify any case to the contrary. Instead, defendant is trying to use the present case as a vehicle to transform Michigan premises liability law.

Further evidencing the error in third-party defendant's analysis, the *Hoffner* opinion briefly described three opinions issued by the Court of Appeals that each dealt with the effectively unavoidable special aspect. In the following cases, Court of Appeals applied the effectively unavoidable analysis to a hazard involving snow and/or ice:

- 1.) *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002)
- 2.) *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2001)
- 3.) *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005).

In discussing each of those opinions, *Hoffner* did not state that it was improper to apply the effectively unavoidable framework simply because the cases involved snow and ice and that snow and ice are not inherently dangerous. Rather, the Court in *Hoffner* addressed whether the effectively unavoidable analysis was proper in those cases based on the specific circumstances of that case. *Hoffner*, 492 Mich at 465-468.

Plaintiff recognizes that third-party defendant directs this Court to *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012), which third-party defendant asserts also demonstrates that the effectively unavoidable analysis does not apply in snow and ice cases. To the contrary, the *Buhalis* Court did not refrain from conducting an effectively unavoidable analysis because the case involved snow and ice. Rather, the Court plainly stated that “the patio was clearly avoidable because Ms. Buhalis was not required to use it and, again, the main walkway to the front entrance was clear.” *Id.* at 695 n 4. *Buhalis*, like *Hoffner*, only reinforces that this Court and the Court of Appeals continue to recognize the applicability of the effectively unavoidable special

aspect in the context of snow and ice cases. Absent any authority that explicitly states otherwise, third-party defendant's position is baseless.

It should be noted the argument third-party defendant makes on appeal explicitly contradicts its own positions in its briefing below. For example, on page 13 of its response to Plaintiff's Motion for Relief that was filed in the trial court, third-party defendant stated "Special aspects are either unreasonably dangerous because they are effectively unavoidable, and thus, create a likelihood of harm or they create a 'substantial risk of death or severe injury.' *Lugo*, 464 Mich at 518." That argument correctly recognized that if the snow and ice was effectively unavoidable in this case, it amounted to a special aspect because it created a high likelihood of harm. Third-party defendant cannot now do an about face and transform its special aspects analysis. Indeed, contrary to third-party defendant's assertion, the very nature of Sheryl's injuries and the disruption to her life demonstrate the dangerous nature of the hazard at issue.

As explained above, *Hoffner* (and *Buhalis*) demonstrates that effectively unavoidable snow and ice may for the basis of a premises liability action. The only real question before the trial court was whether the hazardous condition in the present case was factually analogous to the condition in *Hoffner* and thus not effectively unavoidable. The trial court properly recognized the distinction between *Hoffner* and the present case, as did the Court of Appeals.

The plaintiff in *Hoffner* was a paid member of a fitness center in Ironwood, Michigan. One January morning, she went to the fitness center to exercise. As she was approaching the only entrance to the facility, she saw that the sidewalk was icy. She determined that the conditions did not look "that bad" and thought that she could make it to the entrance because it was only a few steps away. Unfortunately, she fell and injured her back. *Hoffner*, 492 Mich at 456-457.

The plaintiff in *Hoffner* brought a premises liability action and the defendants asserted that the icy condition was open and obvious. The circuit court denied the defendants' motion for summary disposition. The court held that a reasonable jury could find that, because the plaintiff had a contractual right to go to the fitness center, the icy path was effectively unavoidable because it was the only path the plaintiff could use to enter the facility. *Hoffner*, 492 Mich at 457. On appeal, the Michigan Court of Appeals affirmed the Circuit Court's ruling in part. The Court of Appeals similarly reasoned that the icy path was the only available route by which the plaintiff could take advantage of her contractual rights. *Id.* at 458.

In rejecting the argument that the icy path at the fitness center was effectively unavoidable in *Hoffner*, this Court's opinion affirmed the principle that a defendant is liable for damages caused by an open and obvious hazard that is effectively unavoidable. The Court explained that in certain instances, a condition "presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature." *Hoffner*, 492 Mich at 462. The Court further reaffirmed its *rejection* of the notion that dangerous conditions created by ice and snow are per se obvious and never give rise to liability. *Id.* at 463-464. the Supreme Court expounded upon the meaning of "effectively unavoidable."

The Court explained that the "discussion of unavoidability in *Lugo* was tempered by the use of the word 'effectively,' thus providing that a hazard must be unavoidable or inescapable in effect or for all practical purposes. Accordingly, the standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard." *Hoffner*, 492 Mich at 468-469. In explaining that standard, the Supreme Court emphasized that the plaintiff was seeking to create a new exception to the open and obvious rule that would apply where a *business* interest was asserted. The Court stated

By providing that a simple business interest is sufficient to constitute an unquestionable necessity to enter a business, thereby making any intermediate hazard “unavoidable,” plaintiff’s proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship. Such a rule would transform the very limited exception for dangerous, effectively unavoidable conditions into a broad exception covering nearly all conditions existing on premises where business is conducted. [*Id.* at 470.]

Thus, it is clear that this Court’s holding in *Hoffner* was limited to the notion that a mere business interest did not create a necessity that required a party to confront an open and obvious hazard. Simply put, the Court was not addressing a hazard that existed in a common area of a condominium complex.

In stark contrast to the plaintiff in *Hoffner*, Plaintiff *is not* asserting that she had a business interest that somehow rendered an otherwise open and obvious hazard into a hazard that was effectively unavoidable. Sheryl’s testimony demonstrates that her mother had been unable to retrieve their mail because she could not navigate the snowy condition around the mailbox. Sheryl had previously complained about snow plowing at Yarmouth Commons and defendants failed to eliminate the hazard that they had created through their affirmative acts. Sheryl had no way of knowing how much longer her mailbox would be obstructed. Further, she had no way of knowing what was in her mailbox. Finally, unlike the plaintiff in *Buhalis*, she had no alternative route available to her. For the court to hold that this condition was *not* effectively unavoidable would be to hold that Sheryl was required to indefinitely forego checking her mail and to assume all the resulting risks.

Sheryl had previously complained about snow plowing practices and had no reason to believe the hazard would be remedied. With no sign that defendants were going to eliminate the snow and ice, Sheryl was inescapably compelled to confront that hazard. She was placed in the no-win position of confronting the hazard or potentially failing to discover time-sensitive or otherwise

important correspondence. *Hoffner* in no way stands for the proposition that a person must risk such serious consequences simply because a defendant has created a hazard and has failed to remedy that hazard in a timely fashion. *Hoffner* did not eliminate the “effectively unavoidable” special aspect, nor did it conclude that cases arising out of a fall on ice and snow instantly fail as a matter of law. There is a clear legal distinction between Sheryl’s *need* to get her mail and the plaintiff in *Hoffner* merely *desiring* to exercise at a fitness club.

As explained above, third-party defendant does not have a single argument relating to premises liability that is properly in front of this Court. The argument it made below, that the snow and ice was unavoidable, was not made in its application for leave to appeal and cannot be made now. The argument that was made in the application for leave to appeal, that snow and ice does not qualify for the special aspects analysis, was not made before the trial court and cannot be made now. Therefore, this Court should not consider any of the portion of third-party defendant’s brief relating to premises liability. Regardless of whether the arguments not properly before this Court are considered, the trial court should be affirmed for the reasons set forth above.

CONCLUSION

In this application for leave to appeal, third-party defendant asks this Court to reverse the Court of Appeals not because the Court of Appeals incorrectly applied the law, but because the Court did not make a wholesale change to premises liability jurisprudence. Jurisprudence of this State overwhelmingly demonstrates that a landowner may be liable for injuries that result from open and obvious, but effectively unavoidable, snow and ice. Defendant has never offered any case to the contrary. Likewise, while it was focused on the issue of inherent danger, third-party defendant has never even attempted to make a compelling argument regarding whether this hazard

was effectively unavoidable. Neither the trial court nor the Court of Appeals erred in holding that summary disposition was improper.

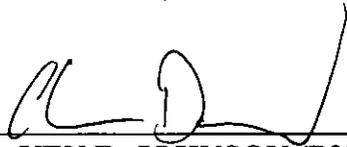
Defendant's application for leave to appeal presents no grounds upon which it can actually be granted. Because neither the trial court nor the Court of Appeals erred, this application does not seek to address a misapplication of law. More importantly, because the opinion of the Court of Appeals was unpublished and very narrowly tailored to the unique facts of this case, it is not an opinion that will have an impact on the jurisprudence of this State. Third-party defendant is simply trying to utilize this Court to transform the law of the state because it is dissatisfied with the results in this particular case. The application is thus devoid of merit.

RELIEF REQUESTED

Plaintiff respectfully requests that this Honorable Court deny third-party defendant's application for leave to appeal.

Respectfully submitted,

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