

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Patrick M. Meter, Michael J. Kelly, and Kirsten Frank Kelly (dissenting)

SHERYL L. SPIGNER,
Plaintiff-Appellee,

Supreme Court No. 09M 9-30-14

Court of Appeals No. 315616

v

Lower Court No. 11-2037 NO

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

*Macomb
P. Macomb*

Defendants,

and

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

Third-Party Plaintiffs,

**THIRD PARTY
DEFENDANT-APPELLANT
W & D LANDSCAPING &
SNOW PLOWING, INC.'S
APPLICATION FOR
LEAVE TO APPEAL**

v

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant.

OK

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STATEMENT OF APPELLATE JURISDICTION

This is an application for leave to appeal from the September 30, 2014 decision of the Court of Appeals. In a 2-1 decision, the Court of Appeals affirmed the Macomb County Circuit Court's denial of the Motion for Summary Disposition brought by Third-Party Defendant-Appellant, W&D Landscaping and Snow Plowing, Inc. (hereinafter "W&D"). (Ex. A.) W&D requested summary disposition pursuant to MCR 2.116(C)(10) on the grounds that Plaintiff-Appellee Sheryl Spigner's ("Plaintiff") premises liability claim – which arose out of a slip and fall on snow and/or ice – was barred by the open and obvious doctrine.¹ After a tangled procedural history in the trial court, the trial judge ultimately determined that, although the condition was open and obvious, it was effectively unavoidable because Plaintiff could not retrieve her mail without traversing the otherwise unremarkable accumulation of snow and/or ice near her mailbox. The Court of Appeals majority accepted that this was a "special aspect" that defeated W&D's open and obvious defense.

This Court should review this case because the denial of W&D's Motion for Summary Disposition was – as the dissenting Court of Appeals judge explained (Ex. B) – contrary to multiple decisions of this Court dealing with the open and obvious doctrine. Simply put, there is no authority to support the proposition that a delay in retrieving mail equates to being "inescapably required to confront" a hazard. *Hoffner v Lanctoe*, 492 Mich 450, 456; 821 NW2d 88 (2012). Moreover, the Court of Appeals majority failed to adequately consider this Court's statement in

¹ Although W&D was not the owner or possessor of the property, and was not sued directly by Ms. Spigner, it is able to raise premises liability defenses (such as the open and obvious doctrine) because it is standing in the shoes of Defendants Yarmouth Commons Condominium and Kramer-Triad Management Group (hereinafter "Yarmouth/Kramer"), in accordance with an indemnity provision in the snow removal contract. (See Ex. C, pp 2, 5-6.) This is expressly permitted by MCR 2.204(A)(2), which states: "The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." Although W&D maintains that its indemnity obligation was not triggered by the facts of this case (see Ex. C, pp 2, 5-6), that issue is beyond the scope of this Application.

Hoffner that “an ‘effectively unavoidable’ condition *must be an inherently dangerous hazard* that a person is inescapably required to confront under the circumstances.” *Id.* (emphasis added).²

Whether the open and obvious doctrine is correctly understood and applied by Michigan’s intermediate appellate court is, W&D submits, an issue “of major significance to the state’s jurisprudence.” MCR 7.302(B)(3). Likewise, the decisions of the lower courts conflict with this Court’s precedent – particularly *Hoffner, supra* and *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001) – as well as precedent from the Court of Appeals such as *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012).³ Leave to appeal should therefore also be granted under MCR 7.302(B)(5).

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² Although the majority superficially considered this issue, their short analysis missed the mark by conflating the term “inherently dangerous” with the term “uniquely high severity of harm.” (Ex. A, p 8.) The concepts are related, but are not identical. A condition presents a special aspect, so as to overcome the open and obvious doctrine, if it is either (1) “unreasonably dangerous” because it “present[s] an extremely high risk of severe harm to an invitee,” *Hoffner, supra* at 462, or (2) “effectively unavoidable,” meaning it is an inherently dangerous hazard that a person is inescapably required to confront,” *Id.* at 456. The Court of Appeals majority correctly noted that the condition does not have to satisfy both (1) *and* (2) in order to be a special aspect. (Ex. A, p 8.) However, the Court of Appeals majority ignored the fact that, in order to fall within (2), the condition *does* have to be “an inherently dangerous hazard.”

³ “[T]he open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty. ... Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard.” *Buhalis, supra* at 693-693 (citations omitted).

DATE AND NATURE OF THE ORDER APPEALED FROM

On September 30, 2014, the Court of Appeals affirmed, in a 2-1 decision, the Macomb County Circuit Court's denial of W&D's Motion for Summary Disposition. (Ex. A.) W&D argued, under MCR 2.116(C)(10), that Plaintiff's premises liability claim was barred by the open and obvious doctrine, and that there were no material questions of fact in that regard. The panel affirmed the denial of summary disposition because, although the snowy/icy condition was open and obvious, the majority found that the condition was effectively unavoidable and therefore presented a "special aspect":

In the present case, the trial court determined that the open and obvious danger doctrine did not bar Spigner's claim because the danger posed by the snow and ice blocking Spigner's mailbox was effectively unavoidable. ...[A] premises possessor may be liable for injuries caused by wintry conditions, even though the wintry conditions are open and obvious, if the conditions have special aspects that make them unreasonably dangerous. *Hoffner*, 492 Mich. at 463-464. In considering whether a condition is effectively unavoidable, ... an effectively unavoidable condition is a condition that is "unavoidable or inescapable in effect or for all practical purposes." *Id.* at 468. That is, in order to prove that a hazard is effectively unavoidable, the plaintiff must show that he or she, "for all practical purposes, [was] required or compelled to confront [the] dangerous hazard." *Id.* at 469. If, however, the evidence shows that the plaintiff had "a choice whether to confront [the] hazard", the hazard was not truly unavoidable, "or even effectively so." *Id.*

The present case does not involve a mere subjective desire or need to use a particular service or frequent a business. Because mail often includes communications and items of significant import, persons have a unique need to retrieve their mail that cannot be equated with a simple desire to avail oneself of the services or products offered by a particular business. Rather, the need to retrieve one's mail is an "extenuating circumstance" that leaves one "with no choice but to" confront the risk posed by any hazard blocking access to the mail. Accordingly, under the facts of this case, we conclude that the trial court did not err when it determined that the hazard at issue was effectively unavoidable. (Ex. A, pp 7-8.)

As the dissenting Court of Appeals judge noted, the denial of W&D's Motion for Summary

Disposition was, under the facts of this case, contrary to precedent:

The majority concludes that Spigner, in seeking to retrieve her mail, was required to confront the condition, rendering the hazard effectively unavoidable. I disagree. Spigner does not make a compelling argument that she was "forced to confront the risk," or "trapped in the building," or "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Hoffner*, 492 Mich. at 473. Moreover, the mailbox was obviously accessible by a motor vehicle as can clearly be seen in the photographs of the mailbox. ... The photographs show both older tire tracks and fresh, crisp tire tracks accessing the mailbox. However, plaintiff chose not to drive up to the mailbox to retrieve her mail, nor did she even try to do so, but rather disregarded the option and chose to access the mailbox on foot....

The wintery conditions that Spigner encountered did not give rise to a special aspect exception because she chose to confront the hazard. Moreover, there is no evidence that the condition at issue here gave rise to a uniquely high severity of harm....

There is nothing in the record to suggest that Spigner confronted "anything other than what every Michigan citizen is compelled to confront countless times every winter." *Hoffner*, 492 Mich. at 480. (Ex. B, pp 3-4.)

Without this Court's review, W&D will be forced to proceed to trial in a premises liability case where the condition was open and obvious and avoidable – a result that, as the Court of Appeals dissent noted, is contrary to *Hoffner*, *Lugo*, and other established precedents discussed below. Allowing Plaintiff's case against W&D to proceed to trial, on the basis of the illusory and poorly defined fact questions identified by the lower courts, would undermine not only the open and obvious doctrine, but the very purpose of MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 124 n 5; 597 NW2d 817 (1999).

RELIEF SOUGHT

W&D respectfully requests that this Supreme Court grant its Application for Leave to Appeal, allowing it to pursue an appeal of the Court of Appeals' September 30, 2014 decision.

In the alternative, W&D respectfully requests that this Supreme Court peremptorily reverse the trial court and the Court of Appeals, and remand this action to the Macomb County Circuit Court for entry of a new Order granting W&D's Motion for Summary Disposition.

S E C R E T W A R D L E

STATEMENT OF THE QUESTION PRESENTED

- I. DID THE LOWER COURTS ERR IN DENYING W&D LANDSCAPING'S MOTION FOR SUMMARY DISPOSITION, AS TO PLAINTIFF'S PREMISES LIABILITY CLAIM, WHERE PLAINTIFF'S DEPOSITION TESTIMONY CONFIRMED THAT THE CONDITION SHE ENCOUNTERED ON FEBRUARY 4, 2011 PRESENTED AN OPEN AND OBVIOUS RISK OF SLIPPING AND FALLING ON SNOW AND/OR ICE, AND THAT THERE WERE NO SPECIAL ASPECTS?**

The trial court answered "No."

The Court of Appeals majority answered "No."

The dissenting Court of Appeals judge answered "Yes."

Plaintiff will presumably contend that the answer should be "No."

W & D Landscaping respectfully suggests that the answer should be "Yes."

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This case involves Plaintiff's February 4, 2011 slip and fall accident, which was allegedly caused by an ice patch near the mailbox of Plaintiff's mother's condominium unit. (See Ex. E, 2; Ex. F, p 3.) Plaintiff sued Yarmouth/Kramer, who in turn filed a Third-Party Complaint against their snow removal contractor, W&D. Plaintiff described the incident as follows:

Q. What caused you to slip, or what caused you to fall?

A. The ice.

Q. All right. When you were there, did you see any salt on the ground?

A. No.

Q. After you fell, did you look at the area where you fell?

A. Yeah. I was sitting on ice.

Q. At the time that you were looking around, did you see any salt down there?

A. No. (Ex. G, p 180.)

Q. Okay. Do you know, before your accident on February 4, 2011 – that day before your accident, when you were walking to the mailbox, could you tell if the roads had been plowed already that day?

A. Yeah.

Q. Yes, they had?

A. Yes, they were plowed. (Id., p 154.)

Q. Now, tell me what happened after you pushed off [the mailbox] with both hands.

A. I turned to go walk back towards the Jeep, walking southbound on Yarmouth, and there's a big ice – right here is where I slipped and fell.

Q. You started walking to the south, towards Harbor Lane?

A. Yes.

Q. How many steps did you take before the incident occurred?

A. A couple. ... [o]ne to two. (Id., pp 37-38.)

Q. That's what I want to know. At the time of your fall, when your -- I think you said your left foot slipped....

A. Right.

Q. ...were you looking at the ground where you slipped?

A. I don't know where my eyes were. I turned and fell; it happened that fast. (Id., p 155.)

Q. Would you agree with me that, based upon the photographs you just looked at, if you'd looked down, you would have seen the snow and ice?

A. Yes. (Id., p 140.)

Q. How long have you lived in Michigan?

A. All my life. (Id., p 148.)

On the basis of this record, W&D moved for summary disposition on or about August 2, 2012. W&D's motion argued that, in light of Plaintiff's deposition testimony and the photograph taken by her shortly after the incident, the condition was open and obvious per *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). (Ex. H, p 11.) In *Janson*, the

Supreme Court held that even “black ice” conditions are “open and obvious” when there are “indicia of a potentially hazardous condition,” including “specific weather conditions present at the time of the plaintiff’s fall.” The *Janson* Court explained that “wintry conditions” – such as below freezing temperatures, the presence of snow on the ground, and snowfall earlier in the day – “by their nature [should] ... alert[] an average user of ordinary intelligence to discover the danger upon casual inspection.” *Id.* W&D’s Brief argued that “[t]he *Janson* Court’s statements regarding ‘indicia of a potentially hazardous condition’ are particularly important here, where Plaintiff admitted she is a lifelong Michigan resident and admitted that the picture taken by her boyfriend shortly after her fall was what the area in question looked like.” (Ex. H, p 11.)

In response, Plaintiff argued that the Landlord-Tenant Act, MCL 554.139(1)(a), barred W&D from invoking the open and obvious doctrine. (Ex. F, pp 13-15.) This was despite W&D’s explanation, offered in its initial Brief, of why the Landlord-Tenant Act did not apply here: Yarmouth/Kramer is a condominium, Plaintiff is not a tenant, and none of the Defendants are landlords. (Ex. H, pp 7-8.) Alternatively, Plaintiff argued that the open and obvious defense did not apply because the condition was “effectively unavoidable.” (Ex. F, pp 11-12.)

The trial court heard W&D’s motion on August 27, 2012. At that hearing, counsel for W&D referred the Court to *Hoffner, supra*, which had just been issued approximately four weeks earlier. (See 8/27/12 trans, p 7.) The court took the motion under advisement, and issued an Opinion and Order denying same, in relevant part, on November 14, 2012. The trial court correctly rejected Plaintiff’s argument under the Landlord-Tenant Act, finding that “MCL 554.139 does not apply to condominiums.” (Ex. C, p 4.) The trial court also seemed to agree that the snowy and/or icy condition on February 4, 2011 was open and obvious, noting that “the parties each rely on a

photograph of the area where the incident took place. ... In the photo in question, there is clearly ice and snow present around the mailbox in question....” (Id., p 5.)

However, the trial court did not dismiss Plaintiff’s common law premises liability claim, because this open and obvious accumulation of snow or ice was, in the trial court’s view, “effectively unavoidable.” (Id.) The trial court explained:

Plaintiff also contends, however, that even if the open and obvious doctrine is applicable in this case, W&D’s motion should be denied as a genuine issue of material fact exists as to whether the dangerous condition was effectively unavoidable. Even if a dangerous condition is open and obvious, it is nevertheless actionable where the hazard is effectively unavoidable. *Lugo, supra*, at 518.

... While the parties dispute whether snow or ice caused the incident, under either scenario the Court is convinced that a genuine issue of material fact exists as to whether the dangerous condition was effectively unavoidable. In the context of ice, the Michigan Court of Appeals has limited the effectively unavoidable doctrine to instances where there is no ice-free path to walk. See *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-594; 708 NW2d 749 (2005). In this case, it appears that the area surrounding the mailbox in question was covered in ice and/or snow. ... Accordingly, a genuine issue of material fact exists as to whether the hazard in question was unavoidable. Consequently, W&D’s motion for summary disposition of Plaintiff’s claims must be denied. (Ex. C, pp 4-5.)

W&D timely moved for reconsideration, and its motion was *granted* in a January 30, 2013 Opinion and Order which *dismissed Plaintiff’s premises liability claim* pursuant to *Hoffner*. (Ex. D, p 3-4.) The opinion on reconsideration explained:

In her response to W&D’s motion for summary disposition, Plaintiff relies on several unpublished cases of the Michigan Court of Appeals and the decision in *Robertson v Blue Water Oil* ... in support of her contention that in the context of ice, the Michigan Court of Appeals has applied the “effectively unavoidable” doctrine to instances where there is no ice-free path to walk. However, *Robertson* was recently abrogated by ... *Hoffner*....

Here, as in *Hoffner*, Plaintiff was an invitee who allegedly had a contractual right to access the mailbox in question. Despite the open and obvious nature of the hazard in question, Plaintiff elected to confront the hazard, not unlike the plaintiff in *Hoffner*. Plaintiff has failed to allege any special aspect(s) which required her to retrieve her mail at the time in question rather than waiting for the hazard to be remedied or retrieving the mail in an alternative manner. Accordingly, Plaintiff was not inescapably compelled to collect her mail at that time, and in the manner in question.... (Ex. D, pp 4-5.)

On the surface, the January 30, 2013 Opinion and Order should have dismissed Plaintiff's lawsuit, as her claim under MCL 554.139 had been dismissed in the November 14, 2012 Opinion and Order, and no reconsideration of that decision had been sought. However, to W&D's surprise, the trial court found that its decision on reconsideration *did not* dismiss all of Plaintiff's claims.

Rather, the trial court found:

Plaintiff's Complaint also contains statutory claims based upon an alleged violation of Clinton Township's ordinance, which would by extension be a violation of MCL 559.241. These claims are not addressed in W&D's motions and are not barred by the open and obvious doctrine as they are statutory in nature.... (Ex. D, p 4.)

On February 20, 2013, Plaintiff sought reconsideration of the January 30, 2013 order on reconsideration; that motion was denied on March 6, 2013, the trial court again finding *Hoffner* to be controlling and noting that "Plaintiff has failed to allege any special aspect(s) concerning the hazard." (Ex. E, pp 2-3.)

Meanwhile, on February 22, 2013, W&D sought leave to file a second Motion for Summary Disposition, relative to Plaintiff's claim under MCL 559.241, with the proposed Motion for Summary Disposition attached. The lower court denied this motion on March 18, 2013 (reduced to an order on April 3, 2013) (Ex. M), focusing solely on why Plaintiff's failure to plead this claim should be excused, but ignoring W&D's argument that the statute did not support such a cause of action. (See 3/18/13 trans, p 10.)

On March 13, 2013, Plaintiff filed a “Motion for Relief from Order” pursuant to MCR 2.612(C). In essence, this was a *second* request for reconsideration of the January 30, 2013 Opinion and Order, which had granted summary disposition *on reconsideration*. Despite this motion’s dubious procedural basis, the trial court *granted* this motion on March 25, 2013 (Ex. J), thereby reinstating its November 14, 2012 decision to W&D’s Motion for Summary Disposition. The trial court placed particular emphasis on Plaintiff’s argument that the icy condition stood in the way of her getting her mail. (3/25/13 trans, p 15.) The trial court found that, because “people have the right to make a determination that I want to get my mail,” this rendered the condition effectively unavoidable. (Id.) In again reversing itself, the trial court also took note of the Plaintiff’s “rather significant injuries.” (Id., p 16.) W&D then sought leave to appeal from the Court of Appeals, which the Court of Appeals granted on August 13, 2013.

The Court of Appeals issued its opinion on September 30, 2014. All three judges agreed that Plaintiff had no viable cause of action under MCL 559.241. (Ex. A, p 6; Ex. B, p 1.)⁴ However, the majority held that Plaintiff’s premises liability claim was not barred by the open and obvious doctrine. The majority affirmed the denial of W&D’s Motion for Summary Disposition because, although the snowy/icy condition was open and obvious, the majority found that the condition was effectively unavoidable and therefore presented a “special aspect”:

In the present case, the trial court determined that the open and obvious danger doctrine did not bar Spigner's claim because the danger posed by the snow and ice blocking Spigner's mailbox was effectively unavoidable. ...[A] premises possessor may be liable for injuries caused by wintry conditions, even though the wintry conditions are open and obvious, if the conditions have special aspects that make them unreasonably dangerous. *Hoffner*, 492 Mich at 463-464. In considering whether a condition is effectively

⁴ All three judges also agreed that questions of fact precluded summary disposition against W&D on the Defendants/Cross-Plaintiffs’ indemnity claim (Ex. A, p 6; Ex. B, p 1); that holding is not germane to this Application.

unavoidable, ... an effectively unavoidable condition is a condition that is “unavoidable or inescapable in effect or for all practical purposes.” *Id.* at 468. That is, in order to prove that a hazard is effectively unavoidable, the plaintiff must show that he or she, “for all practical purposes, [was] required or compelled to confront [the] dangerous hazard.” *Id.* at 469. If, however, the evidence shows that the plaintiff had “a choice whether to confront [the] hazard”, the hazard was not truly unavoidable, “or even effectively so.” *Id.*

The present case does not involve a mere subjective desire or need to use a particular service or frequent a business. Because mail often includes communications and items of significant import, persons have a unique need to retrieve their mail that cannot be equated with a simple desire to avail oneself of the services or products offered by a particular business. Rather, the need to retrieve one's mail is an “extenuating circumstance[]” that leaves one “with no choice but to” confront the risk posed by any hazard blocking access to the mail. Accordingly, under the facts of this case, we conclude that the trial court did not err when it determined that the hazard at issue was effectively unavoidable. (Ex. A, pp 7-8.)

Judge Kirsten Frank Kelly dissented as follows:

The majority concludes that Spigner, in seeking to retrieve her mail, was required to confront the condition, rendering the hazard effectively unavoidable. I disagree. Spigner does not make a compelling argument that she was “forced to confront the risk,” or “trapped in the building,” or “compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.” *Hoffner*, 492 Mich. at 473. Moreover, the mailbox was obviously accessible by a motor vehicle as can clearly be seen in the photographs of the mailbox. ... The photographs show both older tire tracks and fresh, crisp tire tracks accessing the mailbox. However, plaintiff chose not to drive up to the mailbox to retrieve her mail, nor did she even try to do so, but rather disregarded the option and chose to access the mailbox on foot....

In *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2004), the plaintiff was injured when she slipped and fell on an icy sidewalk while attempting to remove personal items from a private home where she was previously employed as a caregiver. *Id.* at 233. The Court determined that the icy conditions were not unavoidable because the plaintiff could have removed her items another day, she was not “effectively trapped inside a building” such that she had to

encounter the open and obvious condition in order to get out, and she admitted that she had “walked around the regular pathway to avoid the slippery condition.” *Id.* at 242.

In *Corey v Davenport College of Business* (On Remand), 251 Mich App 1; 649 NW2d 392 (2002), the plaintiff was injured when he slipped and fell on icy steps as he was going into his college dormitory. *Id.* at 2. This Court concluded that the icy condition was not unavoidable because the plaintiff had admitted that he saw the snow and ice buildup on the steps and knew that there was an alternative entry nearby. *Id.* at 6.

And in *Kenny v Kaatz Funeral Home Inc.*, 472 Mich 929; 697 NW2d 526 (2005), the Supreme Court, “in lieu of granting leave to appeal,” reversed this Court’s decision for the reasons stated in the dissent. In that case, plaintiff fell while traversing the defendant’s snow-covered parking lot to gain access to the defendant’s place of business. The dissent concluded that “[s]now and ice in a Michigan parking lot on December 27 are common, not unique, occurrence [s]” and that a snow-covered parking lot was not the type of unique situation that fell within the special aspects exception. *Kenny*, 264 Mich App 99, 121; 689 NW2d 737 (2004) (Griffin, J., dissenting).

The wintery conditions that Spigner encountered did not give rise to a special aspect exception because she chose to confront the hazard. Moreover, there is no evidence that the condition at issue here gave rise to a uniquely high severity of harm. Our Supreme Court has cautioned:

In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a “special aspect” and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition a priori, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are

immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. Thus, ... this opinion does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented. [*Lugo*, 464 Mich. at 519 n. 2.]

There is nothing in the record to suggest that Spigner confronted “anything other than what every Michigan citizen is compelled to confront countless times every winter.” *Hoffner*, 492 Mich at 480. (Ex. B, pp 2-4.)

STANDARD OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. As noted above, one of the criteria for granting Supreme Court applications is where a decision of a lower court is clearly erroneous and, if not reviewed and reversed, will result in material injustice. MCR 7.302(B)(5). That is the case here, as the denial of W&D’s Motion for Summary Disposition was contrary to precedent and, with the Court of Appeals having affirmed, W&D has no recourse other than to proceed to trial. Another one of the criteria for granting Supreme Court applications is where “the issue involves legal principles of major significance to the state’s jurisprudence.” MCR 7.302(B)(3). That is the case here, as the decision below cannot be reconciled with established case law delineating the open and obvious doctrine. (See Ex. B, pp 2-4.)

The second standard of review relates to the actual decision of the court below that is the subject of the Application. The decision of the court below was to deny W&D's Motion for Summary Disposition, which had been brought under MCR 2.116(C)(10). Decisions to grant or deny motions for summary disposition are reviewed on appeal *de novo*. *Maiden, supra* at 118.

Where the standard of review is *de novo*, appellate courts should not consider themselves "bound to any degree by the opinions of the trial courts on questions of law." Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, NY: Lawyers Cooperative Publishing, 1985), § 7.27, p 138. This is because "[o]ne of the purposes in having appellate courts, i.e., to ensure uniformity in the application of the law, would be lost if the appellate courts had to give substantial deference to the trial court's views.... The almost universal rule is ... that the appellate court is free to come to its own conclusions on questions of law." *Id.* See also *Department of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 115-116; 490 NW2d 337 (1992), noting that "[t]he term '*de novo*' has been defined as 'anew; afresh; again; a second time; once more; in the same manner, or with the same effect.' ... The very concept of '*de novo*' means that all matters therein are to be considered 'anew; afresh; over again....'"

"*De novo* review is sometimes referred to as 'plenary review,' no doubt because it allows the court to give a full, or plenary, review to the findings below." Beazley, *A Practical Guide to Appellate Advocacy*, (New York: Aspen Law & Business, 2002), § 2.3.1(b), p 15. Courts applying this standard "look at the legal questions as if no one had as yet decided them, giving no deference to any findings made below." *Id.* "When this standard is applied, the reviewing court is permitted "to substitute its judgment for that of the trial court...." *Id.*

ARGUMENT

I. THE LOWER COURTS ERRED IN FINDING A GENUINE ISSUE OF MATERIAL FACT, AS TO PLAINTIFF'S PREMISES LIABILITY CLAIM, WHERE PLAINTIFF'S DEPOSITION TESTIMONY CONFIRMED THAT THE CONDITION SHE ENCOUNTERED ON FEBRUARY 4, 2011 PRESENTED OPEN AND OBVIOUS RISKS OF SLIPPING AND FALLING ON ICE, AND THAT THERE WERE NO SPECIAL ASPECTS.

Under Michigan premises liability law, in order to proceed on their claim, plaintiffs are required to prove four *prima facie* elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The duty a landowner owes to those entering his or her land depends upon the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). Michigan law has traditionally recognized three categories of visitors: trespassers, licensees and invitees. *Id.* For the purposes of this Application, W&D assumes that Plaintiff was an invitee on Defendant's premises and, in turn, Defendant owed Plaintiff a "duty to use reasonable care to protect [Plaintiff] from an unreasonable risk of harm caused by dangerous conditions on the premises, including snow and ice conditions." *Hoffner, supra* at 455.

A premises owner is liable for breach of this duty if the owner "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id.* at 460. However, if the danger is open and obvious, then a premises owner does not owe a duty to an invitee either to protect him from danger or warn him of danger. *Id.* at 460-461. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an objective standard, calling for an examination of the objective nature of the condition of the premises at issue." *Id.* at 461. "This rule is properly seen not as an exception to the standard for premises liability to invitees, but merely

as an application and natural implication of ... that standard.... Namely, if a danger is open and obvious, it cannot be said that ... the [land]owner ... should expect that invitees will not discover or realize the danger....” *Leys v Lowe's Home Ctrs, Inc*, 664 F Supp 2d 828, 837 (WD Mich 2009), applying Michigan law in diversity and citing *Stitt, supra* at 597. The determination of whether a condition is open and obvious is, preliminarily, a question of law for the Court to decide. *Hoffner, supra* at 461 n 12.

Here, the trial court correctly determined that the snow and/or ice Plaintiff allegedly encountered on February 4, 2011 was open and obvious. (Ex. C, p 5.) This is consistent with *Janson, supra* at 934-935, where this Court held that even unseen ice is “open and obvious when there are indicia of a potentially hazardous condition, including the specific weather conditions present at the time of the plaintiff’s fall.” The Court of Appeals majority expressed no disagreement with this finding. (Ex. B, p 7.) The question, then, is whether the condition presented a “special aspect.” Although a landowner does not generally have a duty to protect invitees from open and obvious dangers, he must take reasonable steps to protect invitees from harm where “special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Lugo, supra* at 517. When determining whether such special aspects exist, courts must “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Id.* at 523-524. Special aspects are found in two sets of circumstances. The condition must give rise to (1) a uniquely high likelihood of harm, or (2) cause a severe harm if the risk is not avoided. *Id.* at 519. “In either circumstance,” the danger must “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided.” *Hoffner, supra* at 463.

The first of these occurs when a person cannot effectively avoid the dangerous condition. *Lugo, supra* at 518. In explaining this situation, the Court in *Lugo* provided the example of a business

in which standing water covers the only exit and traps a customer inside. *Id.* The second circumstance occurs when the open and obvious condition imposes “an unreasonably high risk of severe harm”; the Court gave the example of an unguarded thirty-foot pit in the middle of a parking lot. *Id.*

Shortly after deciding *Lugo*, this Court was called upon to apply that holding in the context of snow and ice in *Perkoviq v Delco Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002). In *Perkoviq*, the plaintiff was injured after falling 20 feet when he slipped on frost and ice on the roof of a partially constructed house as he was preparing to paint it. The Court held that defendant was entitled to summary disposition, finding that “[t]his case presents a classic example of an open and obvious danger in the premises liability setting. There was nothing hidden about the frost or ice on the roof, and anyone encountering it would become aware of the slippery conditions.” *Id.* at 16-17. The Court further held that the “presence of ice, snow, or frost on a sloped rooftop” *did not* constitute a special aspect:

In short, plaintiff has presented no evidence that the condition of the roof was unreasonably dangerous for purposes of premises liability. The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition. Plaintiff has not articulated any action that could reasonably be expected of possessors of land in Michigan to protect against the obvious dangers that arise when snow, ice, or frost accumulate on sloped rooftops. To avoid summary disposition on this type of claim, a plaintiff must present evidence of “special aspects” of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost. *Id.* at 19-20.

As the Court observed more recently in *Hoffner, supra* at 472, “*Perkoviq* illustrates that an overbroad understanding of effective unavailability cannot undermine the historical parameters of the limited duty owed when the condition is open and obvious.”

Perkoviq established that, unlike the thirty-foot pit example in *Lugo*, an open and obvious accumulation of snow and ice, by itself, does not feature any “special aspects.” See *Hoffner, supra* at

472. This concept was considered by both the Court of Appeals and this Court in *Kenny I* and *Kenny II*.⁵ In *Kenny I*, a 78-year old lifelong Michigan resident slipped and fell in a parking lot in December. The Court of Appeals held that fact questions precluded summary disposition, which had been sought on the grounds that the hazard was open and obvious. Judge Griffin dissented, and his dissent was subsequently adopted by this Court. *Kenny II, supra*. Judge Griffin's dissent (and in turn, the Supreme Court's holding) may be fairly summarized as follows: a lifelong Michigan resident should understand that ice often forms under snow and that any snow-covered area poses a slip and fall hazard. Also, the danger of ice-covered snow in the parking lot was "common and avoidable," so *Lugo's* "special aspects" exception did not apply.

These authorities confirm that Plaintiff's "unavoidability" argument – even if factually supported – should not have avoided the open and obvious doctrine because, in order to be considered "effectively unavoidable," *a condition must first be deemed* "an inherently dangerous hazard...." *Hoffner, supra* at 455. Snow and ice during a Michigan winter will not be considered "an inherently dangerous^[6] hazard." See also *Adams v Bretton Woods Condo Assoc*, unpublished administrative order, rel'd 1/16/13 (No. 310066) (Ex. I): "Snow and ice in the wintertime in Michigan are not an unreasonably dangerous hazard...." This fact is underscored by this Court's analysis in *Hoffner*.

⁵ *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) ("*Kenny I*"), *rev'd for reasons stated by dissenting Court of Appeals judge* 472 Mich 929; 697 NW2d 526 (2005) ("*Kenny II*").

⁶ Although *Hoffner* did not define "inherently dangerous," the term has an established meaning in other tort contexts. Michigan courts have "defined the term 'inherently dangerous' as that type of danger which inheres in an instrumentality or condition itself at all times, thereby requiring special precautions to be taken with respect to it in order to prevent injury." *Perry v McLouth Steel Corp*, 154 Mich App 284, 300; 397 NW2d 284 (1986).

In *Hoffner*, the plaintiff purchased a membership at a fitness center. There was only one entrance to the fitness center. On a late January morning, plaintiff drove to the building, intending to exercise. Although the defendant had already cleared and salted the parking lot and sidewalk earlier that day, by the time plaintiff arrived, ice had re-formed at the entrance. Plaintiff admitted that she could “see the ice and the roof was dripping.” *Hoffner, supra* at 457. Notwithstanding her awareness of the conditions, plaintiff formed the opinion that the ice “didn’t look like it would be that bad” and decided to enter the building. *Id.* Plaintiff explained that “it was only just a few steps,” and “I thought that I could make it.” *Id.* She fell on the ice, injuring her back. The Supreme Court found that the ice was not “effectively unavoidable” because nothing compelled the plaintiff to work out at that particular time or location. Although she had paid for gym membership, this did not change the premises owner’s tort duty; plaintiff was just like any other business invitee and defendant owed her no duty with respect to open and obvious dangers. “The law of premises liability in Michigan provides that the duty owed to an invitee applies to any business invitee, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees.” *Id.* at 469. In short, the condition was neither unreasonably dangerous, nor was it unavoidable given the fact that she simply could have chosen to work out another time. *Id.* at 473. She “was not forced to confront the risk.” *Id.*

Hoffner squarely addressed when snow and ice will be considered “effectively unavoidable,” so as to be a special aspect and overcome an open and obvious defense. Specifically, the *Hoffner* Court clarified that an “effectively unavoidable” condition “must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances.” *Hoffner, supra* at 456. The *Hoffner* Court emphasized that “special aspects” in general, and “effective unavoidability” in particular, are “limited exception[s] designed to avoid application of

the open and obvious doctrine *only* when a person is subjected to an unreasonable risk of harm.” *Hoffner, supra* at 468 (emphasis added). The “risk of harm associated with” snow and ice generally does not meet this threshold. *Id.* at 473. There is nothing out of the ordinary about naturally occurring snow and ice in the wintertime. See *Id.*

Here, the lower court seemed to acknowledge that the condition was open and obvious, but found a fact question as to “effective unavailability.” (Ex. C, p 5.)⁷ However, in order to be considered “effectively unavoidable,” a condition must first be deemed “an inherently dangerous hazard....” *Hoffner, supra* at 455. Naturally occurring snow and ice will almost never be considered “an inherently dangerous hazard.” The lower court, when it re-considered the issue a second time on March 25, 2013, found that Plaintiff was required to confront the hazard in order to receive her mail. The lower court overlooked the first step in the *Hoffner* analysis – was there “an inherently dangerous hazard”? – which *Hoffner* answers unequivocally: “no.”

The Court of Appeals majority ostensibly addressed this argument, but in fact merely engaged a straw man,⁸ when it noted:

We reject W & D Landscaping's contention that, under the decision in *Hoffner*, Spigner had to establish that the hazard was both effectively unavoidable and inherently dangerous. This Court recently held that an effectively unavoidable hazardous condition remains unreasonable even though open and obvious because it

⁷ The first time the lower court so held, it relied upon *Robertson, supra* at 593-594. (Ex. C, p 5.) However, this Court in *Hoffner* “reject[ed] the *Robertson* majority's analysis of the ‘effectively unavoidable’ doctrine.” *Hoffner, supra* at 468 n 31.

⁸ “The ‘fallacy of the straw man’ is an informal logical fallacy created when an easily refutable position is attributed to an opponent deliberately to overstate the opponent's position.” *McNabb v Department of Corrections*, 163 Wash 2d 393, 415 n 4; 180 P3d 1257 (2008) (citation omitted). “In formal logic, the technique of setting up an argument that does not exist and then refuting that misrepresented argument is called the “straw man” fallacy. ... The straw man technique is fallacious because it leads to irrelevancies and because it precludes the development and resolution of the true issues of contention.” *Canesi ex rel. Canesi v Wilson*, 158 NJ 490, 518; 730 A2d 805, 820 (1999) (O’Hern, J., concurring, citations omitted).

gives rise to a unique likelihood of harm; for that reason, the plaintiff does not also have to show that the hazard involves a uniquely high severity of harm. *Attala v Orcutt*, — Mich App —; — NW2d — (2014) (Docket No. 315630). (Ex. A, p 8.)

In short, the panel conflated the term “inherently dangerous” with the term “uniquely high severity of harm” in order to make W&D’s position fit the argument that had been rejected in *Attala*. The two phrases are related, but are not identical. As explained above, a condition presents a special aspect, so as to overcome the open and obvious doctrine, if it is either (1) “unreasonably dangerous” because it “present[s] an extremely high risk of severe harm to an invitee,” *Hoffner*, *supra* at 462, or (2) “effectively unavoidable,” meaning it is an inherently dangerous hazard that a person is inescapably required to confront,” *Id.* at 456. The Court of Appeals majority correctly noted that the condition does not have to satisfy both (1) *and* (2) in order to be a special aspect. (Ex. A, p 8.) However, the Court of Appeals majority ignored the fact that, in order to fall within (2), the condition *does* have to be “an inherently dangerous hazard.”

As W&D argued in the Court of Appeals, in a Statement of Supplemental Authority:

...Although the issues are similar, W&D does not believe that *Attala* is applicable here.

In *Attala*, the plaintiff slipped and fell in the parking lot outside of the defendant’s apartment complex. The parties agreed that the entire parking lot was covered with ice, that the condition was open and obvious and was in fact observed by the plaintiff, and that the plaintiff had to confront the ice in order to get to her car from her apartment (plaintiff claimed that she had to get to her car in order to make it to a college class on time). The sole question presented was “whether special aspects existed such that defendant owned a duty to the plaintiff despite the open and obvious nature of the hazard.” *Attala*, Slip Op at 2. Specifically, the defendant’s only argument was “that to fall outside the open and obvious doctrine, the condition ... must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury.” *Id.* at 3 (emphasis added).

The trial court rejected this argument, finding that the condition presented a special aspect, regardless of whether it also posed a substantial risk of death or serious injury, because it was unavoidable.

[The Court of Appeals] affirmed, but the holding turned largely upon the fact that the property owner apparently *conceded* that the condition could not be avoided. *Attala*, Slip Op at 4 n 1. There has been no such concession here, as the Defendants have denied that the condition was “unavoidable.” Also, the precise language used by the defense, in framing the issue for appeal in *Attala*, distinguishes it. Defendant in *Attala* argued that to be a special aspect, the condition “must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury.” While *Hoffner* does not actually say this, it comes *very* close. See *Hoffner, supra* at 456: “[A]n ‘effectively unavoidable’ condition must be an *inherently dangerous hazard* that a person is inescapably required to confront....” And see *Hoffner, supra* 469 (“[T]he standard for ‘effective unavoidability’ is that a person, for all practical purposes, must be required or compelled to confront a *dangerous hazard*.” (Emphasis added to both.) Here, W&D argues that the ice or snow around Ms. Spigner’s mother’s mailbox – even if unavoidable (which W&D contests) – was not “inherently dangerous.” Ms. Spigner never argued that there was anything out of the ordinary about the condition that would distinguish it from the slippery conditions that are ubiquitous during a Michigan winter. See Judge Riordan’s dissent in *Attala*, p 3, citing *Hoffner, supra* at 463. (Ex. O, emphasis added.)

The Court of Appeals majority ignored this critical distinction between W&D’s argument – to be a special aspect, the condition must be “effectively unavoidable” and an “inherently dangerous hazard,” as this Court said in *Hoffner* – and the argument raised by the defendant in *Attala* – to be a special aspect, the condition must be “effectively unavoidable” and “pose a substantial risk of death or serious injury,” something *Hoffner* does not say). In so doing, the panel ignored an important part of this Court’s reasoning in *Hoffner*. Again, *Hoffner, supra* at 469 tells us that “the standard for ‘effective unavoidability’ is that a person, for all practical purposes, must be required or compelled to confront a *dangerous hazard*.” (Emphasis added.) Elsewhere in the opinion, *Hoffner* tells us that “an ‘effectively unavoidable’ condition *must be an inherently dangerous hazard* that a person is inescapably required to confront under the circumstances.” *Id.* at 456 (emphasis added). The Court of Appeals majority, in holding that the condition presented

a special aspect, made no inquiry into whether the snow and/or ice surrounding the Plaintiff's mailbox was a *dangerous hazard*.⁹

Indeed, even before *Hoffner*, this Court had strongly indicated that snow and ice in the wintertime will almost never constitute special aspects. *McKim v Forward Lodging, Inc*, 266 Mich App 373; 702 NW2d 181 (2005), *rev'd* 474 Mich 947; 706 NW2d 202 (2005). The Supreme Court's holding in *McKim* confirms that even under extreme circumstances, the danger of slipping in the wintertime due to snow, ice, and/or water is open and obvious and *is not* a "special aspect."

In *McKim*, defendant owned a hotel and conference center in West Branch, Michigan. At around 10:30 a.m. on the morning of January 6, 2001, a hotel guest was injured when she slipped and fell on ice in defendant's parking lot. Several individuals attempted to help the guest, one of whom also slipped and fell, breaking her ankle. Plaintiff was a paramedic who was responding to the second fall. While walking across the parking lot to her ambulance to retrieve medical equipment, plaintiff also slipped and fell on the ice, hitting her head on the pavement. *McKim*, 266 Mich App at 375. Defendant moved for summary disposition under the open and obvious doctrine, which the trial court granted, finding that "defendant did not have a duty to warn plaintiff of the icy conditions, as the danger was open and obvious." *Id.* at 376.

Plaintiff subsequently moved for relief from judgment based upon after-acquired evidence "that defendant was not only aware of the icy conditions in the north parking lot, but had actually created the dangerous condition on the previous day" by "spraying hot water to dislodge an ice dam on the roof." *Id.* at 376-377. There was evidence that mist from this activity "coated the

⁹ *Hoffner* also tells us that this determination cannot be made in hindsight. *Hoffner, supra* at 461-462. In other words, the fact that a serious injury occurred is not itself evidence of a special aspect. *Id.* This was also acknowledged by the dissenting Court of Appeals judge in the instant case. (See Ex. B, p 4.)

north parking lot and that the water poured over the roof created giant icicles on that side of the building.” *Id.*

The Court of Appeals reversed, finding that “even if the icy condition of the north parking lot was open and obvious, the fact that defendant created the situation and failed to take immediate remedial action is a special aspect rendering the condition unreasonably dangerous.” *Id.* at 387-388. One judge dissented: “Because I agree with the trial court that the icy conditions were open and obvious, I would affirm.” *McKim*, 266 Mich App at 389-390 (Saad, J., dissenting).

This decision was appealed to the Michigan Supreme Court, which agreed with Judge Saad’s dissent. *McKim*, 474 Mich. at 947. Despite evidence that defendant may have actually *created* the ice by artificially adding water, the Supreme Court found that “the hazard giving rise to plaintiff’s injuries [i.e., slipperiness] was open and obvious, *and there was no special aspect present.*” *Id.* (emphasis added).

The Supreme Court’s holdings in *McKim*¹⁰ and *Hoffner* confirm that snow and ice pose a foreseeable slipping hazard during Michigan winters, and will not represent a special aspect *even when* their presence is the result of an act or omission by the property owner, where the condition merely presents that same risk otherwise associated with snow and ice covered surfaces: slipperiness. As applied to this case, it is clear *as a matter of law* that the condition Plaintiff encountered on February 4, 2011 did not represent an unreasonably high risk of harm within the meaning of *Lugo*, and was not effectively unavoidable. Rather, this case falls within the well-established rule that an open and obvious accumulation of snow and ice, by itself, does not feature any “special aspects.” *Hoffner, supra* at 455-456.

¹⁰ Through its adoption of Judge Saad’s dissent, this Court’s Order in *McKim* is binding precedent for reasons explained in *DeFrain v State Farm*, 491 Mich 359, 369; 817 NW2d 504 (2012).

Indeed, several months before this Court decided *Hoffner*, the Court of Appeals made the following observations in *Buhalis, supra*, which are particularly germane to this case:

- “Neither a common condition nor an avoidable condition is uniquely dangerous.” *Buhalis, supra* at 695 n 4.
- “[T]he presence of ice ... [does] not present such a substantial risk of death or severe injury that it [is] unreasonably dangerous to maintain the condition. ... Accordingly, plaintiff has failed to establish that any special aspect existed that rendered the icy condition effectively unavoidable or unreasonably dangerous.” *Id.*
- “The degree of care required of a premises possessor is to take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [the plaintiff] only if there is some special aspect that makes such accumulation unreasonably dangerous. ... [T]here is no general duty of inviters to take reasonable measures to remove snow and ice for the benefit of invitees unless the accumulation meets the ... high standard of creating an unreasonable risk of danger. ... In other words, it is not [defendant’s] duty to guarantee that ice will never form on its premises, but to ensure that invitees are not unnecessarily exposed to an unreasonable danger.” *Id.* at 696-697.
- “[D]uring the winter, a premises possessor cannot be expected to remove snow and ice from every portion of its premises.” *Id.* at 697.

As to the trial court’s finding that “people have the right to make a determination that I want to get my mail” (3/25/13 trans, p 15)¹¹ – which the Court of Appeals majority found to be

¹¹ The manner in which this argument was raised in the trial court was also unusual. Plaintiff asserted her inability to get her mail for the first time in an affidavit dated March 21, 2013, three months after she had been deposed. She filed this affidavit for the first time with a *supplemental* brief in support of her Motion for Relief from Order. She did not make this argument in response to W&D’s Motion for Summary Disposition, nor did she make it in her Motion for Reconsideration, nor did she make it in her Motion for Relief from Order itself. This Court has instructed appellate courts to review (C)(10) rulings based on the record as it existed at the time of the motion hearing. See *Maiden, supra* at 120-121 and *Quinto v Cross & Peters Co*, 451 Mich 358, 367 n 5; 547 NW2d 314 (1996).

critical (Ex. A, p 8) – *Parker-Dupree v Raleigh*, unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013) (Ex. N) is instructive. In *Parker-Dupree*, the Court of Appeals rejected a “special aspects” argument, premised upon the alleged unavailability of the slippery condition, even though the plaintiff was “a mail carrier for the United States Postal Service” and “was delivering mail ... when she slipped and fell.”

The *Parker-Dupree* panel explained:

Special aspects exist only “when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*.” *Hoffner*, 492 Mich at 463 (emphasis in original).

As the Michigan Supreme Court has recently recognized:

The touchstone of the “special aspects” analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an “unreasonably dangerous” hazard must be just that—not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an “effectively unavoidable” condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. [*Id.* at 455-456 (emphasis in original).]

In the instant case, plaintiff argues that the trial court erred in granting defendant’s motion for summary disposition because the snow and ice on the sidewalk was effectively unavoidable. The evidence presented in the lower court contradicts such an assertion.

Plaintiff knew that there was snow on the ground and that it could be covering ice. She also navigated the pathway safely when she delivered the mail, avoiding any slippery areas that would cause a person to fall. Moreover, if plaintiff felt that the pathway she used was too dangerous, she could have notified her supervisor or simply stepped off the pathway. Even more significant is that plaintiff admitted that she could have taken an alternate route, using the walkway leading to the driveway. Thus, plaintiff has not established a genuine issue of material fact that the snowy condition on the walkway was effectively unavoidable. Accordingly, the trial court

did not err in finding that that there were no special aspects present and in granting summary disposition to defendant.

Certainly, society's interest in having the mail delivered is at least equal to, if not greater than, society's interest in a particular citizen checking their mail on a given day.¹² The fact that the plaintiff was delivering the mail in *Parker-Dupree* did not render the condition "effectively unavoidable," and the fact that the Plaintiff here was getting her mail should likewise should not have been dispositive.¹³ Indeed, as the dissenting Court of Appeals judge wrote about this issue, "Spigner [did] not make a compelling argument that she was forced to confront the risk, or trapped in the building, or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." (Ex. B, p 3, quotations omitted.) "[T]he mailbox was obviously accessible by a motor vehicle as can clearly be seen in the photographs of the mailbox." (Id.) "The photographs show both older tire tracks and fresh, crisp tire tracks accessing the mailbox. However, plaintiff chose not to drive up to the mailbox to retrieve her mail, nor did she even try to do so, but rather disregarded the option and chose to access the mailbox on foot." (Id., p 3 n 1.)

Even more problematic is that W&D's motion (as to the premises liability claim) was ultimately denied pursuant to a motion brought by Plaintiff under MCR 2.612(C)(1)(a), after Plaintiff's Motion for Reconsideration of the January 30, 2013 Order (which itself had been issued *on reconsideration*) had already been denied. In other words, the March 25, 2013 Order was the result of Plaintiff's *second* request that the lower court revisit the January 30, 2013 Order. To obtain relief under MCR 2.612(C)(1)(a), Plaintiff was required to show "[m]istake, inadvertence,

¹² See also *Pifer v Dow Chemical Co*, unpublished opinion per curiam of the Court of Appeals, rel'd 6/6/13 (No. 311361) (Ex. P): "*Hoffner* suggests that plaintiff's personal obligation does not make the hazard effectively unavoidable."

¹³ This is especially true where, as the *Parker-Dupree* opinion reflects, courts do not even reach "effectively unavoidability" unless and until the condition is shown to be inherently dangerous – which snow and ice almost never are per *Hoffner*.

surprise, or excusable neglect.” Plaintiff apparently relied upon an alleged “mistake” by the trial court, in granting summary disposition on reconsideration. However, relief is proper under this court rule only “when the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice.” *Gillispie v Bd of Tenant Affairs of Detroit Housing Comm*, 145 Mich App 424, 428; 377 NW2d 864 (1985). There was nothing extraordinary about these circumstances; the trial court reversed itself (the first time) on the basis of a timely filed MCR 2.119(F) motion, pursuant a controlling Supreme Court decision that it had previously overlooked (although W&D’s counsel did cite *Hoffner* at the August 27, 2012 hearing, see 8/27/12 trans, p 7). Although Plaintiff’s motion seemed to suggest that the failure to conduct a hearing on reconsideration was a “mistake,” nothing in the plain language of MCR 2.119(F) required the lower court to hold a hearing before granting reconsideration. In short, Plaintiff simply misused MCR 2.612(C)(1)(a), using it to effectively file a *second* motion for reconsideration *after* her first request for reconsideration of the January 30, 2013 Opinion and Order had been denied on March 6, 2013. (Ex. E.) The Court of Appeals majority did not address this misuse of the court rule in any meaningful way. (See Ex. A, pp 7-8.)

CONCLUSION AND RELIEF REQUESTED

In this premises liability suit, the open and obvious nature of the condition Plaintiff encountered on February 4, 2011 was confirmed by Plaintiff’s deposition testimony and her photographs, and appears to have been acknowledged by the lower court. The fact that this condition, as described by Plaintiff, did not present any “special aspects” as a matter of law was recognized by the dissenting Court of Appeals judge, whose reasoning is consistent with this Court’s unequivocal *Hoffner* decision. As explained in *Hoffner*:

The touchstone of the “special aspects” analysis is that the condition must be characterized by its unreasonable risk of harm. Thus, an “unreasonably dangerous” hazard must be just that – not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an **“effectively unavoidable” condition must be an *inherently dangerous hazard* that a person is inescapably required to confront under the circumstances....** *Hoffner, supra* at 476-477 (emphasis added).

Although the lower courts found the condition to be effectively unavoidable, both the Circuit Court and the Court of Appeals majority failed to first consider whether there was an “unreasonably dangerous hazard.” *Hoffner* confirms that a condition is not “effectively unavoidable” unless it is first established to be “inherently dangerous,” and that naturally occurring snow and ice will almost never be considered “inherently dangerous.”

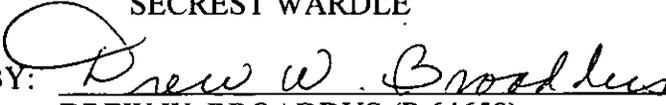
Even if the condition encountered by Plaintiff on February 4, 2011 could be deemed “inherently dangerous” under *Hoffner*, there was no evidence that she was “inescapably required to confront” it, as the dissenting Court of Appeals judge correctly noted. (Ex. B.) Such evidence needed to be in the record at the time of the summary disposition motion hearing in order to avoid the open and obvious defense.¹⁴ Here, Plaintiff did not assert her inability to get her mail, as a purported factor supporting unavoidability, until after the motion for summary disposition *and two motions for reconsideration* had already been decided. For these reasons, Defendant-Appellant Third-Party Defendant-Appellant, W&D Landscaping and Snow Plowing, Inc. respectfully requests that this Honorable Supreme Court enter an Order:

¹⁴ Per *Maiden, supra* at 120, Plaintiff was required to offer “substantively admissible evidence” *at the time of the (C)(10) motion hearing*. Also, *Quinto, supra* at 367 n 5 states that (C)(10) “plainly requires the adverse party to set forth specific facts *at the time of the motion....*” (Emphasis added.) “In ruling on a motion for summary disposition, a court considers the evidence *then available to it.*” *Id.* (emphasis added). Indeed, the (C)(10) hearing has been described as “the ‘put up or shut up’ stage of the proceeding....” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

(A) Granting this Application for Leave to Appeal, thereby permitting W&D to immediately appeal from the September 30, 2014 decision of the Court of Appeals, or in the alternative;

(B) Peremptorily reversing,¹⁵ vacating and holding for naught the September 30, 2014 decision of the Court of Appeals and remanding this action to the Macomb County Circuit Court for entry of a new Order granting W&D's Motion for Summary Disposition, thereby dismissing W&D from this action once and for all.

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¹⁵ As this Court did in *Janson, supra* at 934 and more recently in *Cole v Henry Ford Health System*, __ Mich __ (2014) (No. 149580) (rel'd 10/22/14).