

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. 150327

Court of Appeals No. 315616

v

Lower Court No. 11-2037 NO

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

Defendants,  
and

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

Third-Party Plaintiffs,

v

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant.

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

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**TABLE OF CONTENTS**

Index of Authorities	ii
Argument	1
Conclusion and Relief Requested	9
Proof of Service	

SECRET WARDLE

## INDEX OF AUTHORITIES

### CASES

<i>Attala v Orcutt</i> , ___ Mich App ___ ; ___ NW2d ___ (2014) (Docket No. 315630)	4,5
<i>Canesi ex rel Canesi v Wilson</i> , 158 NJ 490; 730 A2d 805 (1999)	4
<i>Gillispie v Bd of Tenant Affairs of Detroit Housing Comm</i> , 145 Mich App 424; 377 NW2d 864 (1985)	9
<i>Hoffner v Lanctoe</i> , 492 Mich 450; 821 NW2d 88 (2012)	1-10
<i>Lugo v Ameritech Corp, Inc</i> , 464 Mich 512; 629 NW2d 384 (2001)	2,6
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999)	6,10
<i>McNabb v Department of Corrections</i> , 163 Wash 2d 393; 180 P3d 1257 (2008)	4
<i>Parker-Dupree v Raleigh</i> , unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013)	6-8
<i>Pena v Ingham Co Rd Comm</i> , 255 Mich App 299; 660 NW2d 351 (2003)	10
<i>Pifer v Dow Chemical Co</i> , unpublished opinion per curiam of the Court of Appeals, rel'd 6/6/13 (No. 311361)	8
<i>Quinto v Cross &amp; Peters Co</i> , 451 Mich 358; 547 NW2d 314 (1996)	6,10
<i>Wayne County v Britton Trust</i> , 454 Mich 608; 563 NW2d 674 (1997)	2

**COURT RULES**

MCR 2.116(C)(10)	6,10
MCR 2.119(F)	9
MCR 2.612(C)(1)(a)	8,9
MCR 7.302(B)	1
MCR 7.302(B)(3)	1
MCR 7.302(B)(5)	1

## ARGUMENT

Plaintiff-Appellee Sheryl Spigner (“Plaintiff”) asserts that Third-Party Defendant-Appellant, W&D Landscaping and Snow Plowing, Inc. (“W&D”) has failed to identify an issue worthy of this Court’s attention within the meaning of MCR 7.302(B). However, this Court has reminded lower courts not to lose sight of “the narrow nature of the ‘special aspects’ exception to the open and obvious doctrine.” *Hoffner v Lanctoe*, 492 Mich 450, 462; 821 NW2d 88 (2012). Further, this Court has warned against turning “effectively unavoidable conditions into a broad exception covering nearly all conditions,” as this “would completely redefine the duty owed to invitees, allowing the exception to swallow the rule.” *Id.* at 470. This Court has also warned against “an overbroad understanding of effective unavoidability,” which “cannot undermine the historical parameters of the limited duty owed when the condition is open and obvious.” *Id.* at 472. Also, this Court has clarified that the “special aspects” exception to the open and obvious doctrine, for hazards that are effectively unavoidable, is a “very limited exception.” *Id.* at 470. Here, the Court of Appeals majority did not follow these principles, and instead stretched the notion of what is “effectively unavoidable” to its conceptual limits, based upon an argument that Plaintiff raised as an afterthought. (See W&D’s Application, p 21 n 11.) This Court’s review is therefore warranted under MCR 7.302(B)(3) and, particularly, (B)(5) (“a decision of the Court of Appeals ... conflicts with a Supreme Court decision...”).

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 attached to W&D’s Application, p 5.) The Court of Appeals majority expressed no disagreement with this finding. (Ex. B attached to W&D’s Application, p 7.) The question, then, is whether the condition presented a “special aspect.” 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.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). 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. 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.* “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*, 492 Mich at 463.

This Court’s analysis in *Hoffner* confirms 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....” *Id.* at 455.<sup>1</sup> 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

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<sup>1</sup> Plaintiff suggests that this argument was not preserved for appellate review by W&D in the trial court and therefore, the Court of Appeals should not have considered it. (Answer to Application, pp 6-7.) W&D previously debunked the supposed issued preservation problem in its Court of Appeals Reply. (See Ex. 1, pp 6-7.) Particularly telling is the fact that the trial court at one point *granted* W&D’s Motion for Summary Disposition, on reconsideration, based on a finding that there were no special aspects. (*Id.*, pp 7-8.) The Court of Appeals, in rejecting W&D’s open and obvious argument on its merits, did not express any doubts about whether this argument had been preserved. Moreover, *Wayne County v Britton Trust*, 454 Mich 608, 621 n 9; 563 NW2d 674 (1997) indicates that this Court can consider even unpreserved issues if their consideration “is necessary to a proper determination of a case.”

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*, 492 Mich 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.

This 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.” *Hoffner*, 492 Mich 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*, 492 Mich 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*, 492 Mich 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 trial court found a fact question as to “effective unavoidability.” (Ex. C attached to W&D’s Application, p 5.) However, in order to be considered “effectively unavoidable,” a condition must first be deemed “an inherently dangerous hazard....” *Hoffner*, 492 Mich 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 really only engaged a straw man,<sup>2</sup> 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 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 attached to W&D’s Application, p 8.)

<sup>2</sup> “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).

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*, 492 Mich 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 attached to W&D’s Application, 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.”

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*, 492 Mich 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*.<sup>3</sup> Therefore, contrary to the averments in Plaintiff's Answer, this Court's review is warranted because the Court of Appeals' decision is in direct conflict with this Court's precedent.

*Hoffner* confirms 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*, 492 Mich at 455-456.

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)<sup>4</sup> – which the Court of Appeals majority found to be critical (Ex. A attached to W&D's Application, p 8) – *Parker-Dupree v Raleigh*, unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013) (Ex. N attached to W&D's Application) is instructive. In *Parker-Dupree*, the Court of Appeals rejected a "special aspects"

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<sup>3</sup> *Hoffner* also tells us that this determination cannot be made in hindsight. *Hoffner*, 492 Mich 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 attached to W&D's Application, p 4.)

<sup>4</sup> As W&D noted in its Application, 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 MCR 2.116(C)(10) rulings based on the record as it existed at the time of the motion hearing. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999) and *Quinto v Cross & Peters Co*, 451 Mich 358, 367 n 5; 547 NW2d 314 (1996).

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.”

In *Parker-Dupree* – a decision that was ignored by the Court of Appeals majority and by the Plaintiff in her Answer to this Application – the 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 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.<sup>5</sup> 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.<sup>6</sup> 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 attached to W&D's Application, 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,

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<sup>5</sup> 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 attached to W&D's Application): "*Hoffner* suggests that plaintiff's personal obligation does not make the hazard effectively unavoidable."

<sup>6</sup> 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*.

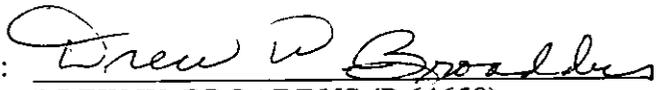
surprise, or excusable neglect.” Plaintiff apparently relied upon an alleged “mistake” by the trial court, in granting summary disposition on reconsideration. However, relief is proper under this court rule only “when the circumstances are extraordinary and the failure to grant the relief would result 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 attached to W&D’s Application, pp 7-8), and the Plaintiff has ignored it in her Answer to this Application.

### 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 *Hoffner*, 492 Mich 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 attached to W&D’s Application.) 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.<sup>7</sup> 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, Third-Party Defendant-Appellant, W&D Landscaping and Snow Plowing, Inc. respectfully requests that this Honorable Supreme Court enter an Order granting leave to appeal from the September 30, 2014 decision of the Court of Appeals or in the alternative, peremptorily reversing that decision.

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<sup>7</sup> 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.) 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).

# EXHIBIT

1

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

Appeal from the Circuit Court for the County of Macomb  
The Honorable Peter J. Maceroni, Circuit Judge

SHERYL L. SPIGNER,

Plaintiff-Appellee,

-vs-

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

Defendants,

-and-

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

Third-Party Plaintiffs/Cross-Appellants,

-vs-

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant/Cross-Appellee.

Court of Appeals No. 315616

Circuit Court No. 11-2037 NO

**THIRD PARTY**  
**DEFENDANT-APPELLANT**  
**W & D LANDSCAPING &**  
**SNOW PLOWING, INC.'S**  
**REPLY BRIEF**

***ORAL ARGUMENT***  
***REQUESTED***

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RECEIVED by Michigan Court of Appeals 10/22/2013 10:31:29 AM

**TABLE OF CONTENTS**

Index of Authorities	ii
Argument	1
Conclusion and Request for Relief	10

RECEIVED by Michigan Court of Appeals 10/22/2013 10:31:29 AM

## INDEX OF AUTHORITIES

### CASES

<i>Allison v AEW Capital Mgmt,</i> 481 Mich 419; 751 NW2d 8 (2008)	9
<i>Buhalis v Trinity Continuing Care Servs,</i> 296 Mich App 685; 822 NW2d 254 (2012)	7,10
<i>Forster v Delton School Dist,</i> 176 Mich App 582; 440 NW2d 421 (1989)	9
<i>Gillispie v Bd of Tenant Affairs of Detroit Housing Comm,</i> 145 Mich App 424; 377 NW2d 864 (1985)	3
<i>Hoffner v Lanctoe,</i> 492 Mich 450; 821 NW2d 88 (2012)	<i>passim</i>
<i>ISB Sales Co v Dave's Cakes,</i> 258 Mich App 520; 672 NW2d 181 (2003)	4
<i>Jones v Enterel, Inc,</i> 467 Mich 266; 650 NW2d 334 (2002)	9
<i>Kennedy v Great Atlantic &amp; Pacific Tea Co,</i> 274 Mich App 710; 737 NW2d 179 (2007)	9
<i>McKim v Forward Lodging, Inc.,</i> 474 Mich 947; 706 NW2d 202 (2005)	7
<i>Mudge v Macomb County,</i> 458 Mich 87; 580 NW2d 845 (1998)	10
<i>O'Donnell v Garasic,</i> 259 Mich App 569; 676 NW2d 213 (2003)	9
<i>Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd,</i> 472 Mich 479; 697 NW2d 871 (2005)	9
<i>Parker-Dupree v Raleigh,</i> unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013)	6

*Smith v Foerster-Bolser Constr,*  
269 Mich App 424; 711 NW2d 421 (2006) 8

*Woodbury v Bruckner,*  
467 Mich 922; 658 NW2d 482 (2002) 9

**STATUTES**

MCL 554.139 9

MCL 559.241 1,8-10

MCL 559.241(1) 9

**COURT RULES**

MCR 2.116(C)(10) 3

MCR 2.119(F) 4

MCR 2.612 3

MCR 2.612(C) 3,4

MCR 2.612(C)(1) 3

MCR 2.612(C)(1)(a) 3,4

### ARGUMENT

Despite the dizzying procedural history below (which Plaintiff-Appellee contorts in her Brief on Appeal), this appeal presents two simple questions: (1) whether the snow and/or ice Plaintiff allegedly encountered on February 4, 2011 could, as a matter of law, constitute a special aspect under *Hoffner v Lanctoe*, 492 Mich. 450; 821 NW2d 88 (2012); and (2) whether a private right of action exists under MCL 559.241. Third-Party Defendant-Appellant W&D Landscaping (“W&D”) respectfully submits that the answer to both questions is no.

This case arises out of an alleged slip and fall accident which took place on February 4, 2011. On that date “Plaintiff allegedly slipped and fell near the mailbox of her residence at the Yarmouth Commons Condominiums.” (Ex. C attached to W&D’s Brief on Appeal, p 2.) She further alleges that she suffered injuries “caused when she fell on ice/snow that surrounded the mailbox.” (Id., p 4.) W&D, which had been hired to perform snow removal services for the condominiums, moved for summary disposition, arguing that the condition was open and obvious and presented no special aspects. The lower court initially denied the motion, finding that although the snowy/icy condition was “clearly ... present around the mailbox in question,” the open and obvious doctrine did not bar Plaintiff’s claim because the condition could have been, in the lower court’s view, “effectively unavoidable.” (Id., p 5.) After initially granting reconsideration, the lower eventually reversed itself a second time, and reinstated its decision to deny W&D Landscaping’s motion, on March 25, 2013.

Given the undisputed factual record, the denial of W&D’s Motion for Summary Disposition is irreconcilable with *Hoffner*, which underscored the difficulty of arguing “special aspects,” in the context of snow and ice. *Hoffner* 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, *Hoffner, supra* at 456 clarified that an “effectively unavoidable” condition “must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances.” In order for a plaintiff to make an “effectively unavoidable” argument, she must demonstrate that the condition at issue “give[s] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards.” *Id.* at 463. Thus, *even an unavoidable condition will not* be a “special aspect” – and the open and obvious defense will apply – if the condition does not pose a risk that differs from “ordinary conditions.”

*Hoffner* 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. *Hoffner* also clarified what is “unavoidable,” defining “unavoidability” as “an inability to be avoided, an inescapable result, or the inevitability of a given outcome.” *Id.* at 468. Thus, the “standard for ‘effective unavoidability’ is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so.” *Id.* at 468-469 (emphasis in original). Here, the lower court ignored *Hoffner*, and found a fact question as to “effective unavoidability” without any finding that the ice or snow encountered by Plaintiff on February 4, 2011 was “inherently dangerous.” or that she was “inescapably required to confront [it]....”

In her Brief on Appeal, Plaintiff dances around the substantive issues, devoting undue attention to a number of specious procedural arguments. For example, Plaintiff argues that the

applicable standard of review is abuse of discretion because, at least as to the premises liability claim, W&D's Motion for Summary Disposition was ultimately denied via a "Motion for Relief from Order pursuant to MCR 2.612." (Plaintiff's Brief on Appeal, p 9.) Indeed, Plaintiff goes as far as to criticize W&D for not adequately addressing the abuse of discretion standard "presumably because that standard of review is not favorable to [W&D]." (Id.) However, this was addressed at page 7, footnote 6 of W&D's Brief on Appeal. The explanation offered there bears repeating: applying the abuse of discretion standard under these circumstances would be absurd, because the March 25, 2013 Order merely reinstated the November 14, 2012 Order denying W&D motion under MCR 2.116(C)(10). The subsequent waffling by the lower court should not convert that ruling into something that is reviewed *more* deferentially on appeal. Indeed, if that were the rule, trial judges could effectively shield themselves from *de novo* review by deciding every (C)(10) motion under MCR 2.612(C)(1). Moreover, subjecting W&D to a *more* deferential standard of review on appeal, due to these unusual procedural developments, would effectively punish W&D for prevailing on its Motion for Reconsideration (the only motion for reconsideration that was filed within 21 days of the November 14, 2012 Order).

Moreover, Plaintiff has failed to address W&D Landscaping's argument that MCR 2.612(C) *was not even applicable* under these circumstances. To obtain relief under MCR 2.612(C)(1)(a), Plaintiff was required to show "[m]istake, inadvertence, surprise, or excusable neglect." Plaintiff apparently asserted "mistake" by the lower 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 lower 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 initial 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 file a *second* motion reconsideration *after* her first request for reconsideration of the January 30, 2013 Opinion and Order had been denied on March 6, 2013.

While a challenge to how Judge Maceroni evaluated a properly filed MCR 2.612(C) motion would (under normal circumstances) be reviewed for an abuse of discretion, a challenge to whether the court rule's plain language even permitted such an evaluation is reviewed on appeal *de novo*. "Review *de novo* of a trial court's interpretation of the court rules must occur ... with the primary goal to give effect to the intent of the Supreme Court by examining the plain language of the court rule." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 528-529; 672 NW2d 181 (2003). W&D has argued, among other things, that there was no "[m]istake, inadvertence, surprise, or excusable neglect," as would be required to even open the door to such a motion under the plain language of MCR 2.612(C). Here the court rule was invoked in an effort to rationalize a second motion for reconsideration, with no regard for its plain language.

Plaintiff also argues that W&D has "abandoned" the question of "whether the ice and snow were effectively unavoidable as a result of [Plaintiff's] need to confront that hazard." (Plaintiff's Brief on Appeal, p 5.) Plaintiff acknowledges that W&D advanced this argument below (*Id.*) and in its Brief on Appeal. (*Id.*, pp 14-15.) Plaintiff seems to be saying that W&D abandoned this argument by not raising it in its Application for Leave to Appeal. (*Id.*, pp 5-6,

17.) However, the first Question Presented in W&D's Application was whether the lower court erred in denying W&D'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?" (W&D's Application, p xv.) Consideration of "special aspects" entails an analysis of whether the condition was "unreasonably dangerous" *and* whether it was "effectively unavoidable." *Hoffner, supra* at 472. So the Statement of Questions Presented in W&D's Application did not narrow the focus in the manner Plaintiff now suggests.

Moreover, W&D's Application went on to clarify that it was attacking *both prongs* of the lower court's "special aspects" finding:

*Hoffner* also clarified what is "unavoidable," defining "unavoidability" as "an inability to be avoided, an inescapable result, or the inevitability of a given outcome." ... Thus, the "standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." ... Here, the lower court ignored *Hoffner*, and found a fact question as to "effective unavoidability" without any finding that the ice or snow encountered by Plaintiff ... was "inherently dangerous." *or that she was "inescapably required to confront [it]...."* (W&D's Application, p xi-xii, emphasis added.)

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Even if the condition encountered by Plaintiff on February 4, 2011 could be deemed "unreasonably dangerous" under *Hoffner*, there was no evidence that she was "inescapably required to confront" it. 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.... (W&D'S Application, p 25.)

W&D's Application also explained that W&D *had at one point prevailed in the lower court on this precise issue*, before the lower court reversed itself a second time:

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.... (W&D's Application, pp 4-5, quoting the 1/30/13 Order.)

Under these circumstances, it is unclear what more W&D could have done to avoid "abandoning" this argument.

Plaintiff's desire to avoid the merits of this argument is understandable, as the lower court's unavailability finding – that "people have the right to make a determination that I want to get my mail" (3/25/13 trans, p 15) – is irreconcilable with this Court's analysis in *Parker-Dupree v Raleigh*, unpublished opinion per curiam of the Court of Appeals, rel'd 6/18/13 (No. 310013) (Ex. N attached to W&D's Brief on Appeal), a decision that Plaintiff does not address in her Brief on Appeal. In *Parker-Dupree*, this Court 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." (See W&D's Brief on Appeal, pp 21-22.) 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. The fact that the plaintiff was delivering the mail in *Parker-Dupree* did not render the condition "effectively unavailability," and the fact that the Plaintiff here was getting her mail should likewise have no impact on the special aspects analysis. This is especially true where, as the *Parker-Dupree* opinion reflects, courts do not even reach "effectively unavailability" unless and until the condition is shown to be inherently dangerous – which snow and ice almost never are.

Plaintiff again invokes a distorted concept of appellate procedure in asserting that W&D's related argument – that snow and ice can almost never be a "special aspect," apart from

its avoidability, because it is not because they are not inherently dangerous – is not preserved for appellate review. (Plaintiff’s Brief on Appeal, p 17.) It must be reiterated that this argument flows in large part from *Hoffner*, which was released after W&D filed its summary disposition briefs but before the motion was first heard. (See 8/27/12 trans, pp 7-8.) Nonetheless, W&D’s counsel did raise *Hoffner* at the initial summary disposition hearing of August 27, 2012. (Id.) Moreover, in its December 3, 2012 Motion for Reconsideration, W&D argued:

[T]he risk of slipping and falling on the snow-covered patch of ice does not pose an “unreasonably high risk of severe harm,” such as that presented by an “unguarded thirty foot deep pit in the middle of a parking lot.” (Ex. 1, p 9.)

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Indeed, **snow and ice in the wintertime will almost never constitute a special aspect**, as illustrated by *McKim v Forward Lodging, Inc.*, ... 474 Mich 947; 706 NW2d 202 (2005). (Ex. 1, p 9, emphasis added.)

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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** ... 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. (Ex. 1, p 11, emphasis added.)

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[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.** (Ex. 1, p 11, emphasis added, quoting *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012).)

Plaintiff’s Brief wholly ignores the fact that these arguments were presented below. W&D acknowledges that ordinarily, arguments raised for the first time on reconsideration are not considered preserved. However, this situation is unique for several reasons. First, the

Motion for Reconsideration was W&D's first opportunity to brief the implications of *Hoffner*. Second, W&D's Motion for Reconsideration was actually granted on January 30, 2013 – a fairly strong indication that the arguments raised therein were a part of the record. Third, W&D's Motion for Reconsideration – although temporarily granted – ended up being one in a series of briefs about *Hoffner*. Ultimately, the lower court did not end up definitively denying W&D's Motion for Summary Disposition until the hearing of March 25, 2013. Therefore, all of the arguments contained in W&D's Brief on Appeal were before the lower court, when it denied W&D's Motion for Summary Disposition once and for all on March 25, 2013.<sup>1</sup>

The lower court further erred by allowing Plaintiff to proceed under MCL 559.241. W&D's initial Motion for Summary Disposition did not address this issue only because § 241 does not appear anywhere in Plaintiff's Complaint. Plaintiff was later able to benefit from this omission when, on January 30, 2013, the case avoided being dismissed *solely on the basis of this unpled claim*. In short, nothing in the plain language of § 241 creates a private right of action.

Ostensibly arguing from the plain language of the statute,<sup>2</sup> Plaintiff offers a string cases for the proposition that the open and obvious doctrine does not apply to “a negligence action is premises on the violation of a statute....” (Plaintiff's Brief on Appeal, pp 19-20.) However, none of the decisions in this string cite involve MCL 559.241. Three of them dealt with

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<sup>1</sup> Even if there were something to Plaintiff's issue preservation argument, “this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.” *Smith v Foerster–Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Moreover, since Plaintiff acknowledges that this issue was raised in W&D's Application (Plaintiff's Brief on Appeal, p 17), her issue preservation argument presupposes that this Court granted leave on an unpreserved issue. (Plaintiff's Brief on Appeal, p 17.)

<sup>2</sup> Plaintiff acknowledges that “there are no cases in which a Plaintiff has” predicated a cause of action upon an alleged violation of MCL 559.241. (See Plaintiff's Brief on Appeal, p 22 n 2.)

MCL 554.139, the Landlord-Tenant Act.<sup>3</sup> As much as Plaintiff may want the Landlord-Tenant Act to be relevant here (see Ex. F attached to W&D's Brief on Appeal pp 13-15), it is not (see Ex. C attached to W&D's Brief on Appeal, p 4) as Plaintiff was not a tenant, and none of the Defendants were landlords. So on the one hand, Plaintiff argues that the statutory language is critical, going as far as to criticize W&D for not devoting enough of its Brief on Appeal to "the subject of statutory interpretation." (Plaintiff's Brief on Appeal, p 20.) But on the other hand, Plaintiff – by relying upon an entirely different statute – advances an argument which implies that the particular language of § 241 really isn't important at all. Any statute will do, on Plaintiff's view, so long as it in some way relates to property maintenance.

If Plaintiff is going to predicate a cause of action under MCL 559.241, she must establish a basis for doing so under the language of *that statute*. Apart from paying lip service to the first sentence of MCL 559.241(1) (which says nothing about remedies), Plaintiff fails to explain how the plain language of the statute supports her position.<sup>4</sup> "It is not enough for [a party] to

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<sup>3</sup> *Allison v AEW Capital Mgmt*, 481 Mich 419; 751 NW2d 8 (2008); *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002); and *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003). A fourth, *Jones v Enterel, Inc*, 467 Mich 266; 650 NW2d 334 (2002), dealt with the highway exception to governmental immunity. The fifth, *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 719-720; 737 NW2d 179 (2007), dealt with local ordinances and contains the following statement which is irreconcilable with Plaintiff's position: "We recognize that code violations may provide some evidence of negligence. ... However, ... even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous. ... In other words, even when a hazardous condition results from a code violation, [t]he critical inquiry is whether there is something unusual about [the alleged hazard] that gives rise to an unreasonable risk of harm."

<sup>4</sup> The fact that a "statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd*, 472 Mich 479, 496; 697 NW2d 871 (2005). "[A] private cause of action must be dismissed under a statute creating a new right or imposing a new duty unless the private cause of action was expressly created by the act or inferred from the fact that the act provides no adequate means of enforcement of its provisions." *Forster v Delton School Dist*, 176 Mich App 582, 584-585; 440 NW2d 421 (1989).



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. \_\_\_\_\_

Court of Appeals No. 315616

v

Lower Court No. 11-2037 NO

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

Defendants,

and

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

Third-Party Plaintiffs,

v

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant.

**PROOF OF SERVICE RE  
THIRD PARTY  
DEFENDANT-  
APPELLANT  
W & D LANDSCAPING &  
SNOW PLOWING, INC.'S  
REPLY TO PLAINTIFF-  
APPELLEE'S ANSWER  
TO APPLICATION FOR  
LEAVE TO APPEAL**

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PROOF OF SERVICE

STATE OF MICHIGAN )  
 ) ss  
COUNTY OF OAKLAND )

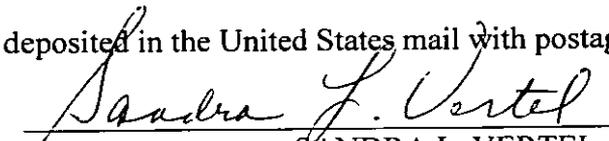
SANDRA L. VERTEL, first being duly sworn, deposes and states that on the 21<sup>st</sup> day of November, 2014, she served a true copy of *Third-Party Defendant-Appellant W & D Landscaping & Snow Plowing, Inc.;*'s Reply to Plaintiff-Appellee's Answer to Application for Leave to Appeal, upon:

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Same were deposited in the United States mail with postage fully prepaid thereon.

  
SANDRA L. VERTEL

Subscribed and sworn to before me this  
21<sup>st</sup> day of November, 2014.

  
Notary Public  
Oakland County, Michigan  
Acting in \_\_\_\_\_ County  
My Commission Expires: 12/28/2018  
2901413\_1

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

## MICHIGAN COURT OF APPEALS

COA Case Number: 315616

SCt Case Number: 150327

## SHERYL L SPIGNER V YARMOUTH COMMONS ASSOCIATION

1	SPIGNER SHERYL L Oral Argument: Y Timely: Y	PL-AE-XE	RET	(71493) DESMOND CHRISTOPHER P 535 GRISWOLD STREET SUITE 2632 DETROIT MI 48226 313-324-8300
2	YARMOUTH COMMONS ASSOCIATION Oral Argument: Y Timely: Y	TP-DF-XT	RET	(38199) LEDERMAN RONALD S 25800 NORTHWESTERN HWY SUITE 1000 SOUTHFIELD MI 48075 248-746-0700
3	KRAMER-TRIAD MANAGEMENT GROUP LLC	TP-DF-XT	SAM	
4	W & D LANDSCAPING & SNOW PLOWING INC Oral Argument: Y Timely: Y	TD-AT-XE	RET	(64658) BROADDUS DREW W 2600 TROY CENTER DRIVE P O BOX 5025 TROY MI 48007 616-272-7966

Status: Case Concluded; File Open SCT Status: APPL

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10/27/2014	69	SCT: Application for Leave to SCT Electronic Copy Available Supreme Court No. 150327 Notice Date: 11/18/2014 Fee: Paid Check No.:44657 For Party: 4 Attorney: 64658 - BROADDUS DREW W Related Supreme Court No.: 150396 Comments: W&D APPL	MEYERI	10/27/2014
11/06/2014	70	SCT: Application for Leave to SCT Electronic Copy Available Supreme Court No. 150396 Notice Date: 12/2/2014 Fee: Paid Check No.:44737 For Party: 2 Attorney: 38199 - LEDERMAN RONALD S Related Supreme Court No.: 150327 Comments: YARMOUTH APPL; COA RECORD ALREADY ORDERED FOR SC 150327	MEYERI	11/12/2014
11/13/2014	72	SCT: COA and TCt Received 4 files	CARLTONE	11/13/2014
11/17/2014	73	Answer - SCT Application Electronic Copy Available Filing Date: 11/17/2014 For Party: 1 SPIGNER SHERYL L PL-AE-XE Filed By Attorney:71493 - DESMOND CHRISTOPHER P Comments: re: 150327	MILLSJ	11/17/2014
11/24/2014	74	Reply - SCT Application Filing Date: 11/24/2014 For Party: 4 W & D LANDSCAPING & SNOW PLOWING INC TD-AT-XE Filed By Attorney:64658 - BROADDUS DREW W	MILLSJ	11/24/2014

11/26/2014 75 *Comments:* DFAT's reply in support of APPL in re: 150327  
**Answer - SCt Application** MILLSJ 11/26/2014  
Electronic Copy Available  
Filing Date: 11/26/2014  
For Party: 4 W & D LANDSCAPING & SNOW PLOWING INC TD-  
AT-XE  
Filed By Attorney:64658 - BROADDUS DREW W  
*Comments:* answer to application in 150396

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Case Listing Complete