

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal From The Michigan Court of Appeals and the
Circuit Court for the County of Macomb)

SHERYL L. SPIGNER,

Plaintiff-Appellee/~~Cross-Appellee,~~

v

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

Third-Party Plaintiffs-
Defendant/Appellants,

and

W & D LANDSCAPING & SNOW PLOWING,
INC.,

Third-Party Defendant-
~~Appellant/Cross-Appellee.~~

Appellee.

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No. 315616

Macomb Circuit Court

LC No. 2011-002037-NO

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANTS-THIRD
PARTY PLAINTIFFS/APPELLANTS YARMOUTH COMMONS ASSOCIATION AND
KRAMER-TRIAD MANAGEMENT GROUP, LLC.

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-vs-

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Third-Party Defendant-Appellant and
Appellee.

SULLIVAN, WARD, ASHER & PATTON, P.C.

**APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANTS-THIRD
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STATEMENT OF ORDER APPEALED FROM

This is an application for leave to appeal from a September 30, 2014 decision of the Michigan 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") and concurred in by Defendants. (Exhibit E) Defendant and W&D requested summary disposition 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. The Trial Court and Court of Appeals held that, although the condition was open and obvious, it was effectively unavoidable because Plaintiff could not retrieve her mail without walking upon 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 the open and obvious defense.

This Court should review this appeal because the majority Court of Appeals Opinion is - as the dissenting Court of Appeals Judge K. Kelly explained - contrary to multiple decisions of the Supreme Court applying the open and obvious doctrine to wintry conditions. 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 *Hoffner* that "an 'effectively unavoidable' condition *must be an inherently dangerous hazard* that a person is inescapably required to confront under the circumstances" and that the Supreme Court has never held an ice patch to be an "inherently dangerous hazard," especially one that can be avoided simply by driving one's car upon it. *Id.* (emphasis added).

The proper application of the open and obvious doctrine by Michigan's intermediate appellate court is "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), as elaborated upon, *infra*. Leave to appeal should therefore also be granted under MCR 7.302(B)(5).

Also raised in this Application are issues concerning application of common principles of contractual indemnity and the contractual duty to insure which were misapplied by the erroneous analysis of the Court of Appeals' majority Opinion.

STATEMENT OF ISSUES

- I. IS THIS ACTION, ARISING FROM A SLIP AND FALL UPON CLEARLY VISIBLE AND AVOIDABLE SNOW AND/OR ICE, BARRED BY THE OPEN AND OBVIOUS DANGER DOCTRINE AS A MATTER OF LAW?**

Defendants and Third Party Plaintiffs- Appellants say “yes.”

Plaintiff-Appellee says “no.”

The trial court and Court of Appeals said “no.”

- II. ARE YARMOUTH AND KRAMER-TRIAD ENTITLED TO SUMMARY DISPOSITION AS A MATTER OF LAW REGARDING THEIR THIRD PARTY CLAIMS FOR INDEMNIFICATION AND BREACH OF CONTRACT IN THIS ACTION ARISING IN CONNECTION WITH THIRD PARTY DEFENDANT’S SNOW PLOW ACTIVITIES?**

Defendants and Third Party Plaintiffs- Appellants say “yes.”

Third Party Defendant- Appellee says “no.”

The trial court and Court of Appeals said “no.”

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

This premises liability suit arises out of a slip & fall incident on February 4, 2011. Sheryl Spigner (Plaintiff) claims that she slipped and fell upon snow and ice in the street after retrieving mail from her mother's mailbox, at Defendant Yarmouth Commons Association's (Yarmouth Commons) condominium complex. Yarmouth Commons hired Defendant Kramer-Triad Management Group, LLC (Kramer-Triad) to manage the property. In turn, Kramer-Triad contracted with W&D Landscaping & Snow Plowing, Inc. (W&D) for snow and ice removal services.

The Plaintiff's complaint alleged Yarmouth Commons & Kramer-Triad were liable under two theories: general negligence and violation of MCL 554.139 and MCL 125.536 (Landlord/Tenant Statutes). The statutory claims have been dismissed and, currently, only the common law negligence action remains. Yarmouth Commons & Kramer-Triad filed a subsequent Third-Party complaint against W&D claiming breach of contract and contractual indemnity regarding liability for Plaintiff's claims, per the snow removal contract. The viability of the defenses to the third party action also remains at issue in this appeal.

The Incident

On February 4, 2011, the Plaintiff was driven to Yarmouth Commons by Terry Wadowski. Plaintiff had been living with Mr. Wadowski for about 1 week when this incident occurred, yet claims that she was a tenant with her mother at Yarmouth Commons. (See Plaintiff's deposition, p. 25, attached hereto as **Exhibit A**). The Plaintiff does not appear on any contract or other document that demonstrates that she was a tenant.

The Plaintiff decided to retrieve the mail before visiting her mother. No one had retrieved the mail from the day before. The mailbox was situated immediately adjacent to

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Yarmouth Street. Wadowski parked the vehicle along a cross street, Harbor Lane. They could have driven the vehicle onto Yarmouth and turned it around so that the driver's seat would have been immediately adjacent to the mailbox, but chose not to. (Exhibit A, pp. 181-182).

Instead, Plaintiff exited the vehicle on Harbor Lane then walked to the mailbox on Yarmouth Street. Mr. Wadowski's photographs, taken immediately after the alleged fall, and Plaintiff's deposition demonstrate that the middle of the Yarmouth roadway had been plowed, resulting in compacted snow forming around fresh and older tire tracks in front of the mailbox and tall 2.5 feet snow-banks surrounding the mailbox. See Wadowski photographs attached as Exhibit B. The photographs demonstrate the accessibility of the mailbox to approaching vehicles.

Once Plaintiff was at the mailbox, she admitted placing one foot into the snow-bank next to the mailbox while keeping her other foot on the compacted snow in the roadway. Id. at p. 1. The Plaintiff further substantiated that the compacted snow she stepped onto **had tire marks; she presumed the tire marks were from the postal truck or from her neighbor.** See Exhibit A, pp. 32-33, 41. Once she retrieved the mail, she pushed the mailbox to get off of the snow-bank, turned around partially, took "one or two steps" to the right and fell. (Id. at pp. 32, 35, 36 & 38, 171-179). At her deposition, **she marked an "X" where she had fallen upon the tire tracks.** (See Exhibit A, pp. 38-40, 175-176, Exhibit B at p. 4). **The photographs demonstrate that Plaintiff could have avoided the tire tracks by walking straight back upon the road, which was completely clear of snow and ice (Exhibit B)!**

The Plaintiff fell directly onto her buttocks. Mr. Wadowski eventually came to the fall area; however, Plaintiff was able to pick herself up and walk to his Jeep upon the clear road.

Plaintiff then went into her mother's condominium unit and called Kramer- Triad to tell them about the area of the fall and to tell them to "put some salt down" in the area (**Exhibit A**, pp. 45, 55)

Snow Removal Contract

As noted above, Kramer-Triad contracted with W&D Landscaping & Snow Plowing, Inc. (W&D) to remove compacted snow from the roadways, including in front of mailbox stands. (See snow removal contract attached as **Exhibit C**, p. 3). In Section 6 of the contract, Third Party Defendant W&D identified its insurance carrier as "American Casualty" and promised to name both Defendants/Third Party Plaintiffs as "additional named insureds":

"NOTE: Contractor shall have its insurance company furnish Kramer-Triad Management Group, LLC, with an original proof of insurance certificate, naming both Kramer-Triad Management Group, LLC, and the Association as 'An Additional Named Insured,' directly by U.S. Mail."

Id, p.2.

"6.2.3 The Contractor shall have insurance certificates produced listing the Association and Kramer-Triad Management Group, LLC, as 'additional named insured.'"

Id. p. 8

During the deposition of Walter Duda, the owner of W&D Landscaping, he testified that despite this clause he did not ask his insurance company to add Defendants/Third Party Plaintiffs as additional insureds within its policy. (See Duda Deposition, p. 30, attached as **Exhibit D**).

Also, in Section 6, the contract also required W&D to indemnify Yarmouth Commons & Kramer-Triad against claims arising out of the performance of the contract, as follows:

"6.3 Indemnification Requirement

The Contractor shall indemnify, defend and save harmless the Association and Kramer-Triad Management Group, LLC,

Against all liability or loss, and against all claims or actions based upon, or arising out of, damage or injury, including death, hereinafter the "claims," to persons or property caused by or sustained in connection with its performance of the Contract or by conditions created thereby, or based upon any violation of any statute, ordinance, building code or regulation, and against the defense of such claims to actions, provided, however, that the Contractor's indemnity shall be comparatively reduced to the extent that the claim is caused in part (or shall be eliminated in whole if the claim is caused in whole) by the negligent, grossly negligent or intentional act of the Association, any other contractor of the Association, or any other party indemnified hereunder."

(Exhibit C, p. 8, emphasis added)

The snow removal services Third Party Defendant promised to provide to Defendants/Third Party Plaintiffs included the following:

2.2 Snow Removal—Selection of Services

- () All
- (X) Porches/Steps
- (X) Garage Door Fronts
- (X) Mailbox Stands
- (X) Streets
- (X) Driveways
- (X) Sidewalks
- () Other Areas (See Special Instructions)
- (X) Fire Hydrants
- (X) Parking Areas
- () Carports

The Contract includes the following details as to how the snow removal was to be performed:

5.0 Snow Removal Operations to be Performed

5.0.1 Roads, driveways and parking areas: The Contractor agrees to remove all snow from roads, driveways and parking areas after an ACCUMULATION (see 2.3 Snow Removal—Definitions) AS MEASURED AT THE SITE as outlined on the attached Bid Summary Sheet. The Contractor must remove all accumulations that occur while the Contractor is on the site.

5.2 General Specifications

5.2.1 Streets and Parking Areas: Streets and parking areas shall be plowed the entire length and width.

5.2.2 Driveways: Driveways shall be plowed the entire length and width.

5.2.5 Mailbox Stands: Mailbox areas shall be cleared in such a manner as to provide clear access to the postal service when making delivery. Snow piled in front of mailbox stands must be removed to allow this access.

5.2.6 Follow-up and Inspections: The Contractor will inspect his work following a snowfall to insure proper clearing of all accumulations.

As noted above, Third Party Defendant W & D agreed to clear snow from the roadways and driveways on the property at issue and around all mailboxes. This promise included clearing the entire length and width of all roads, parking areas, and driveways. **The promise also explicitly included the responsibility to provide "clear access" to the mailboxes.** During Mr. Duda's deposition he testified that he agreed that W&D had the responsibility to clear snow from in front of the mailbox. He further stated that he believed that the snow had been cleared sufficiently because they plowed as close as they could to the mailbox. He admitted that there is no language in the contract limiting that responsibility to the best he could do through plowing. (See **Exhibit D**, pp. 24 -28). He also admitted he could have cleaned closer to the mailbox with use of a shovel:

Q. Okay. What I am saying is – well, you could have gotten closer with a shovel, right? You Acknowledge that.

A. Yeah, you could have shoveled it by hand, yes.

Q. Okay. So if somebody says, that is not close enough, that you should have cleared closer to that mailbox, then you would have breached the contract, right?

Mr. BALLENTINE: Object to form and foundation.

THE WITNESS: I should have shoveled it by hand, but we cleaned as close as we could.

Q. With a truck.

A. We cleaned as close as we could.

Q. With a truck, right?

A. Yes.

Q. Okay. Not as close as you could with a shovel.

- A. Yes.
Q. Okay. Now, nevertheless, you can see that snow there, right?
A. Yes.
Q. And you can see the snow on the driveway, right?
A. On the street, yes.

Id, pp.44-45.

Summary Disposition Proceedings

Yarmouth and Kramer-Triad rely upon the lengthy chronology of summary disposition proceedings set forth in the Application for leave to Appeal on Behalf of W&D (regarding the claims of the Plaintiff).

In addition, Yarmouth and Kramer-Triad filed a motion for summary disposition regarding its third party complaint against W&D. At a hearing on July 22, 2013, the trial court held that material factual questions remained about whether W&D breached the snow removal contract by failing to name Yarmouth and Kramer-Triad as additional named insureds within its insurance policy and by failing to indemnify them in accordance with its contractual obligations. While the court's ruling was not elaborative, the court seemed to be persuaded by W&D's arguments that it had been unclear whether Plaintiff's fall was upon snow or, in the alternative, an accumulation of ice which was not covered by the contract (Tr. 7/22/13, p. 7, attached hereto as **Exhibit F**). A written order denying the motion for summary disposition regarding the third party claims was entered on August 9, 2013.

Court of Appeals Proceedings

Third Party Defendant W & D filed an Application for Leave to Appeal with the Michigan Court of Appeals from the denial of its Motion for summary Disposition against the Plaintiff. The Court of Appeals granted leave to appeal in an Order dated August 13, 2013.

From that Order, Defendants Yarmouth and Kramer-Triad filed a claim of cross appeal, which included challenges to the trial court's Orders which denied summary disposition relative to the Plaintiff's claim and relative to the Third Party Complaint for indemnity and breach of contract.

The Court of Appeals issued its 2-1 decision on September 30, 2014 (See **Exhibit E**). The majority decision affirmed the denial of the motions for summary disposition as against the plaintiff's common law negligence claim, but directed the grant of summary disposition in favor of Defendant against the statutory claims. The Court of Appeals majority held that the ice patch was "open and obvious," but was not "effectively unavoidable." The majority also affirmed the denial of the motion for summary disposition relative to the third party claims for indemnity and breach of contract against W&D due to perceived issues of material fact. *Id.*

Court of Appeals Judge K. Kelly dissented. She would have held that the "open and obvious" danger doctrine barred the common law claim in its entirety because the patch of ice at issue was readily apparent and entirely avoidable (*id.*, J. Kelly dissenting).

Defendants-Third Party Plaintiffs Yarmouth and Kramer-Triad seek leave to appeal or peremptory reversal from the September 30, 2014 Court of Appeals' majority opinion for the reasons set forth in Judge Kelly's dissenting opinion as against the common law claim of the Plaintiff. Third Party Plaintiffs also seek reversal of that part of the majority opinion which affirmed the denial of the Motion for Summary Disposition regarding the Third Party Claims.

STANDARD OF REVIEW

Defendants Yarmouth et al rely upon the standard of review set forth in the Application for Leave to Appeal filed on behalf Third Party Defendant W&D Landscape with this Court.

ARGUMENT I

THE PRINCIPAL ACTION IS BARRED BY THE OPEN AND OBVIOUS DANGER DOCTRINE AS A MATTER OF LAW BECAUSE THE PATCH OF ICE IN QUESTION WAS "OPEN AND OBVIOUS" AND ENTIRELY "AVOIDABLE"

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (footnote added). This duty does not extend to open and obvious dangers, however, unless a "special aspect" of the condition makes even an open and obvious risk unreasonably dangerous. *Id.* at 517. In such cases, the premises possessor has a duty to take reasonable measures to protect invitees from the risk.

"Whether a danger is open and obvious depends upon whether it is reasonable to expect an average [person] with ordinary intelligence to discover the danger upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012), *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995) . The test is objective and does not involve whether a particular plaintiff should have known that a condition was hazardous. *Hoffner*, supra; *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). Rather, the test looks to whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.*

"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 v Trinity Continuing Care Services*, 296 Mich App 685, 694; 822 NW2d 254 (2012) (quotation marks and citation omitted). In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006), the Michigan Court of Appeals held "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it

may be slippery." See also *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007) ("[T]he potential danger posed by the snow-covered parking lot was open and obvious even absent some other factor suggesting that the surface was slippery.")

However, "special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519. Special aspects exist only "when the danger is unreasonably dangerous or when the danger is effectively unavoidable." *Hoffner v Lanctoe*, *supra*, 492 Mich at 463. The Supreme Court has emphasized that, in both of these circumstances, liability may be imposed for an open and obvious condition only where the danger gives "rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided". *Id.* As the Michigan Supreme Court recently recognized 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.**

Id., at 455-456 (emphasis added).

The *Hoffner* Court explained:

Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented."

492 Mich at 462 (citation omitted).

The risk presented by these hazards must be "so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature." *Hoffner*, *supra*, 492 Mich at 462. Further, the determination that a special aspect is present must be based upon the nature of the

condition at issue, and must not be based retrospectively on the fact that a particular plaintiff in fact suffered severe harm. *Lugo*, supra, 464 Mich at 518, fn. 2, 523-24.

The controlling standards are not difficult to grasp or apply. The Michigan Supreme Court has never held that that the presence of clearly visible snow and ice is a “special aspect” that triggers a duty to protect. When confronted with the issue under the current controlling standards, the Supreme Court has always held that the presence of snow and ice does not present a “special aspect”. *Hoffner*, supra; *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd.* 466 Mich 11, 19-20; 643 NW 2d 212 (2002) [presence of snow and ice on sloped rooftop is not a “special aspect” nor is “unreasonably dangerous” when open and obvious], *Kenny v Kaatz Funeral Home, Inc.* 472 Mich 929; 697 NW 2d 526 (2005).

Yet, the Michigan Court of Appeals majority opinion below misapplied the controlling standards and distorted the factual record to hold that, as a matter of law, the patch of ice upon which the Plaintiff here slipped constituted a “special aspect” as a matter of law! The majority opinion is palpably erroneous for the following separate and independent reasons.

First, in finding that the ice patch was “effectively unavoidable”, the Court of Appeals majority ignored *Hoffner’s* dictates that, to constitute an “effectively unavoidable” condition, a condition “must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances”. *Hoffner*, supra, at 456. Both *Hoffner* and *Perkoviq* held that the risk of harm associated with snow and ice is not an inherently dangerous hazard and does not create an unreasonable risk of harm so as to constitute a “special aspect” which gives rise to a duty to protect. *Perkoviq* went so far as to conclude as such even when the condition is situated on a sloped roof. 466 Mich at 19-20.

The Court of Appeals majority magnified its error by relying upon the holding in *Attala v Orcutt*, __ Mich App __ (2014) that “special aspects” may arise out of an “effectively

unavoidable” condition or one that “involves a uniquely high severity of harm” (Exhibit E, p. 8, majority opinion). It is apparent that the Court of Appeals opinion in *Attala* did not address whether a condition may be “effectively unavoidable” if it is not an “inherently dangerous” hazard”—an issue that was already resolved by the Supreme Court in *Hoffner*. **To the extent that *Attala* may be construed in the manner set forth by the majority opinion below, it was erroneously decided in violation of *Hoffner*. In any event, the majority decision below violates *Hoffner* by its implicit ruling that an “effectively unavoidable” condition need not be “inherently dangerous”.**

For this reason alone, affirmative relief is required from the Supreme Court.

Secondly, the Court of Appeals majority erroneously concluded that the Plaintiff had no way to avoid the patch of ice after retrieving her mail.

First and foremost in this regard and as was recognized by dissenting Judge K. Kelly, plaintiff could have stayed in the car while picking up the mail. Her deposition testimony substantiates that the mailbox was situated immediately adjacent to Yarmouth Street and that her companion Mr. Wadowski parked the vehicle along a cross street, Harbor Lane, and required Plaintiff to walk about 100 yards to the mailbox. **The controlling point here is that he could have instead driven the vehicle onto Yarmouth Street and turned it around so that the driver’s seat would have been immediately adjacent to the mailbox, but chose not to. (Exhibit A, pp. 181-182). Dissenting Judge Kelly properly observed that photographs showed fresh and nonfresh tire tracks immediately adjacent to the mailbox, upon which Plaintiff claimed to have slipped (Exhibit E, J. Kelly dissenting, p. 3, fn 1). Mr. Wadowski speculated that he could not drive his vehicle adjacent to the mailbox because of the accumulation of snow; however, he never tried (Wadowski dep., pp. 32-33, attached hereto as Exhibit F).**

Wadowski's speculation was insufficient by itself to contradict the reasonable inference of vehicle-accessibility created by the tire tracks adjacent to the mailbox and did not create an issue of fact regarding the "avoidability" of the condition. Yet, the Court of Appeals majority remarkably held that the mailbox was unavoidable as a matter of law! (**Exhibit E**, p. 8) This ruling was palpably erroneous as reasoned by dissenting Judge K. Kelly and should be reversed.

Equally as compelling, the Plaintiff was not required to confront the patch of ice compressed by the tire tracks while walking away from the tire tracks. **The Court of Appeals majority failed to recognize, that as demonstrated without contradiction by the photographs attached as Exhibit B, most of the roadway in front of the mailbox leading back to the parked vehicle was clear of ice!** After she retrieved the mail and turned around, Plaintiff proceeded to the right, where she slipped yet, **she could have instead walked straight back a few steps on the clear part of the road before turning right to avoid the ice (Exhibit B).**

Plaintiff alone bears the risk for confronting the patch of ice. Contrary to the erroneous Court of Appeals majority opinion, she was not compelled to do so while walking from the mail box. For this reason as well, the ice was not "effectively unavoidable" as a matter of law, as illustrated by the Michigan Court of Appeals Opinion in *Parker- Dupree v Raleigh*, 2013 Mich App LEXIS 1090 (Mich App 2013) is of import (See Exhibit N to W&D Landscaping's Application for Leave to Appeal).

In *Parker-Dupree*, Plaintiff was a mail carrier who slipped and fell upon ice on a snow covered pathway after delivering mail at Defendant's residence. She was aware of the presence of ice and acknowledged that she could have stepped off the pathway onto an area of unshoveled snow. The Michigan Court of Appeals affirmed the grant of summary disposition

in favor of Defendant, ruling that the condition of the sidewalk was open and obvious and that there were no special aspects creating an unreasonable risk of harm. The Court of Appeals stated:

[P]laintiff argues that the trial court erred in granting ... 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.

Id., p. 2

As in *Dupree*, the snow and/or ice upon which Plaintiff allegedly slipped was not “effectively unavoidable”. Plaintiff here knew that there was snow and ice on the ground and she navigated the roadway safely when she walked to the mailbox. She could have walked around the patch of ice or pulled the car up to the curb. If Plaintiff felt that the roadway was too dangerous, she could have asked an agent at the condominium-management’s office for help in securing the mail or in pouring salt in the area to make the area safer. Or she could have waited another day to pick up the mail, as she had done the day before. Plaintiff testified to no urgency which required her to secure the mail at the time in question. Just as the fact that the Plaintiff in *Parker-Dupree* was delivering mail at the time of his fall did not render the condition “effectively unavoidable” in that action, the fact that Plaintiff here was picking up mail likewise did not make the snow and ice “effectively unavoidable” to her—contrary to the palpably erroneous majority opinion below.

ARGUMENT II

YARMOUTH AND KRAMER-TRIAD ARE ENTITLED TO SUMMARY DISPOSITION AS A MATTER OF LAW REGARDING THEIR THIRD PARTY CLAIMS FOR INDEMNIFICATION AND BREACH OF CONTRACT, NOTWITHSTANDING WHETHER PLAINTIFF SLIPPED ON SNOW, ICE OR BOTH

A. Indemnity

An indemnity contract is construed in accordance with the rules for the construction of contracts in general. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich. App. 165, 172; 530 N.W.2d 772 (1995).

An indemnity contract is to be strictly construed against the drafter and against the indemnitee. *Triple E Produce Corp*, supra. The court must look for the intent of the parties in the words used in the instrument, and may not make a different contract for the parties or look to extrinsic evidence to determine their intent when the words comprising the contract are clear and unambiguous and have a definite meaning. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich. App. 599, 603-604; 576 N.W.2d 392 (1997). Contractual language must be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). If the contractual language is clear and unambiguous, its meaning also is a question of law. *Id.* at 491.

Third Party Defendant's duties to defend and indemnify the Association and Kramer-Triad in this action are triggered by the following contractual language:

"6.3 Indemnification Requirement

The Contractor shall indemnify, defend and save harmless the Association and Kramer-Triad Management Group, LLC, Against all liability or loss, and against all claims or actions based upon, or arising out of, damage or injury, including death,

hereinafter the “claims,” to persons or property caused by or sustained in connection with its performance of the Contract or by conditions created thereby, or based upon any violation of any statute, ordinance, building code or regulation, and against the defense of such claims to actions, provided, however, that the Contractor’s indemnity shall be comparatively reduced to the extent that the claim is caused in part (or shall be eliminated in whole if the claim is caused in whole) by the negligent, grossly negligent or intentional act of the Association, any other contractor of the Association, or any other party indemnified hereunder.”

(Exhibit C, p. 8, emphasis added)

Below, in denying Yarmouth et al’s Motion for Summary Disposition against the Third Party Defendant, the trial court and Court of Appeals’ majority opinion relied upon the existence of triable issues of fact as to whether the Plaintiff’s fall on snow or ice, was sustained “in connection with” the performance of W & D’s snow removal service (Exhibit E, pp. 9-10). However, contrary to the lower courts’ ruling, no genuine issue of fact existed as to whether, **under Sec. 6.3 of the contract, the injuries to the Plaintiff were “caused by or sustained in connection with” Third Party Defendant’s “performance of the Contract” or “by conditions created thereby”.**

At a minimum, the patch of ice to the side of the mail box where Plaintiff fell was created by the partial snow plow of the area by Third Party Defendant W & D. Since this is not disputed, the patch of ice was, as a matter of law, a condition created by the performance of W & D’s services under the contract. However, the Court of Appeals majority opinion held that because Defendant Yarmouth had not asked W & D to salt or de-ice the area where Plaintiff fell, an issue of fact existed as to whether the duties to defend and indemnify were triggered under Sec. 6.3 (Exhibit E, p. 10).

This part of the Court of Appeals Opinion is also palpably erroneous.

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Simply, whether W & D was asked to de-ice or re-salt the area may be relevant to the separate but irrelevant issue of whether W & D breached its contract or was negligent. However, Third Party Defendant's duties to defend and indemnify are not triggered by a breach of contract or by negligent conduct. *Daimler Chrysler v G Tech Prof. Staffing Inc.*, 260 Mich App 183; 678 NW 2d 647 (2003), *Walbridge Aldinger v Walcon Corp*, 207 Mich App 566; 508 NW 2d 489 (1995). Rather, these duties are triggered by the facts that the Plaintiff's slip and fall was upon part of the area encompassed by the snow removal contract and that the ice patch was "a condition created" by the plowing activities.

The Court of Appeals' analysis is incomplete and erroneous; it must be reversed.

B. Breach of Contract

Separate from its duties to defend and indemnify, Third Party Defendant breached the snow removal contract by failing to designate Third Party Plaintiffs as additional named insureds on its insurance policy with "American Casualty". This is a condition of the contract specified in two separate occasions in that contract:

"NOTE: Contractor shall have its insurance company furnish Kramer-Triad Management Group, LLC, with an original proof of insurance certificate, naming both Kramer-Triad Management Group, LLC, and the Association as 'An Additional Named Insured,' directly by U.S. Mail."

Exhibit C, p. 2.

"6.2.3 The Contractor shall have insurance certificates produced listing the Association and Kramer-Triad Management Group, LLC, as 'additional named insured.'"

Id. p. 8

This contractual duty to provide insurance is separate and distinct from the duties to defend and indemnify. *Morgan v Menasha Corp*, 481 Mich 942; 751 NW2d 41 (2008), *Peeples*

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v Detroit, 99 Mich App 285, 299; 297 NW2d 839 (1980); *Sentry Ins Co v National Steel Corp*, 147 Mich App 214; 382 NW2d 753 (1985). Yet, Walter Duda, the owner of W&D Landscaping, testified that despite these contractual provisions, he did not ask his insurance company to add Defendants/Third Party Plaintiffs as additional insureds within its policy. (See: Duda Deposition, p. 30, attached as **Exhibit D**).

The duty to provide insurance was absolute and the Court of Appeals properly held that Third Party Defendant W & D breached this duty as a matter of law by failing to add Yarmouth and Kramer-Triad as additional insureds within its policy. However, the Court held that summary disposition could not yet be granted against W & D because the trial court record did not affirmatively establish that Defendants-Third Party Plaintiffs would have been defended by Third Party Defendant's insurance company if Defendants/Third Party Plaintiffs were listed as additional named insureds in W&D's insurance policy.

This ruling was also palpably erroneous.

The "duty to insure" provision is standard in contracts that contain indemnity provision. Unless the contract specifically states otherwise, the duty to insure provision is intended to assure the existence of a fund from which to pay claims arising from the contractor's performance under the contract and/or breach of the indemnity provision. See e.g., *Peeples*, supra. However, the Court of Appeals majority opinion specifically requires Third Party Plaintiffs to demonstrate that liability insurance coverage would have been provided to them from W & D's liability insurance policy as a condition to recovering under the breach of contract claim (**Exhibit E, p. 10**).

This ruling as well was erroneous. All that Third Party Plaintiffs are required to demonstrate is that (1) Plaintiff's injuries arose in connection with W & D's work or from a

condition created thereby; and (2) W & D breached its duty to insure Third Party Plaintiffs by failing to name them as additional named insureds within its liability policy. Third party Plaintiffs have established both as a matter of law and had a contractual right to receive coverage as a result.

Even if Plaintiff's claims are dismissed as a matter of law, Third Party Plaintiffs have incurred defense fees and related litigation expenses as a result of this contractual breach. Yarbrough et al are entitled to summary disposition on its Third Party Claim for breach of contract as a matter of law.

CONCLUSION

For the foregoing reasons, Defendants-Third Party Plaintiffs Yarmouth Commons, et al., respectfully request that this Court grant leave to appeal or peremptorily reverse the subject orders of the trial court and Court of Appeals and remand this action with directions that the trial court grant summary disposition in favor of Defendants as against the Plaintiff, as well as grant summary disposition in favor of Defendants relative to their Third Party Complaint.

Respectfully submitted,

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