

STATE OF MICHIGAN
IN THE SUPREME COURT

DENISE FOWLER as Next Friend of
VIRGINIA JANE RAWLUSZKI,

Plaintiff-Appellee,

Supreme Court Docket
No. 152519

vs.

Court of Appeals Docket
No. 310890

MENARD, INC.,

Defendant-Appellant,

L.C. File No. 11-3317-NO-JS
Hon. Joseph K. Sheeran

and

DALE PAUL VAN WERT and
LISA GINGERICH,

Defendants.

SKINNER PROFESSIONAL LAW CORPORATION

BY: DAVID R. SKINNER (P20551)
STACI M. RICHARDS (P64566)

Attorneys for Plaintiff-Appellee

P.O. Box 98
Bay City, MI 48707-0098
(989) 893-5547

SMITH, MARTIN, POWERS & KNIER, P.C.

BY: ALAN R. SULLIVAN (P41613)
Attorneys for Defendant-Appellant

900 Washington Avenue
P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

OUTSIDE LEGAL COUNSEL

BY: PHILIP L. ELLISON (P74117)
Attorneys for Plaintiff-Appellee

P. O. Box 107
Hemlock, MI 48626
(989) 642-0055

DEFENDANT-APPELLANT MENARD, INC.'S SUPPLEMENTAL BRIEF

Prepared by:

SMITH, MARTIN, POWERS & KNIER, P.C.

BY: Alan R. Sullivan (P41613)

Attorneys for Defendant-Appellant Menard, Inc.

900 Washington Avenue, P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

TABLE OF CONTENTS

Index of Authorities ii

Statement of Questions Presented iii

Concise Statement of Facts and Material Proceedings 1

Argument I. 2

 Crosswalk Was Avoidable 3

 Crosswalk Not Unreasonably Dangerous. 4

Argument II. 8

Conclusion and Relief Requested. 9

INDEX OF AUTHORITIES

Cases

Bradley v Burdick Hotel Co,
 306 Mich 311; 11 NW2d 275 (1943). 7

Bullard v Oakwood Annapolis Hospital,
 308 Mich App 403; 864 NW2d 403 (2014). 4

Hoffner v Lanctoe,
 492 Mich 450; 821 NW2d 88 (2012). 2, 3, 4, 7, 8, 9

Joyce v Rubin,
 249 Mich App 231; 642 NW2d 360 (2002). 4

Kennedy v Great Atlantic & Pacific Tea Co,
 274 Mich App 710; 737 NW2d 179 (2007). 6

Lugo v Ameritech Corp, Inc,
 464 Mich 512; 629 NW2d 384 (2001). 2, 3, 4, 5, 6, 8

Richardson v Rockwood Center, LLC,
 275 Mich App 244; 737 NW2d 801 (2007). 5

Stopczynski v Woodcox,
 258 Mich App 226; 671 NW2d 119 (2003). 7

STATEMENT OF QUESTIONS PRESENTED

WHETHER THE DEFENDANT’S CROSSWALK LACKED A SPECIAL ASPECT THAT WOULD CREATE LIABILITY FOR AN OPEN AND OBVIOUS CONDITION?

Defendant-Appellant answers, “Yes.”

Plaintiff-Appellee answers, “No.”

WHETHER A SPECIAL ASPECT CAN EXIST IF THE CONDITION IS NOT UNREASONABLY DANGEROUS?

Defendant-Appellant answers, “No.”

Plaintiff-Appellee’s answer is unknown.

CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-Appellant Menards, Inc., has provided a concise statement of the facts in its application, and it need not be restated herein. The material proceedings were also set forth in the application. Defendant would supplement those proceedings with this Court's April 28, 2016, order (attached as **Exhibit "1"**). This Court considered the application and directed that oral argument be scheduled on whether to grant the application or take other action. This Court requested supplemental briefs to address (1) whether the crosswalk installed by the Defendant had a special aspect that could create liability for even an open obvious hazard, and (2) whether such a special aspect can exist if the condition is not unreasonably dangerous. Defendant-Appellant submits this brief in supplement to its application to address those issues.

ARGUMENT I

THE DEFENDANT'S CROSSWALK LACKED A SPECIAL ASPECT THAT WOULD CREATE LIABILITY FOR AN OPEN AND OBVIOUS CONDITION.

The general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). In *Lugo*, this Court went on to further conclude:

. . . The critical question is whether . . . there are truly “special aspects” of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, *i.e.*, whether the “special aspects” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

The special aspect exception to the open and obvious doctrine is narrow. *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). Under this limited exception, liability may be imposed only for an “unusual” open and obvious condition that is “unreasonably dangerous” because it “presents 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”. *Id.*, at 462, citing *Lugo*. The narrow special aspects exception recognizes there could be a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable even in the light of its open and obvious nature. *Hoffner*, at 462. There are two instances that were discussed in *Lugo* in which the special aspects of an open and obvious condition could give rise to liability. The first was when the danger is effectively unavoidable.

The other is when the danger is unreasonably dangerous. As noted in *Hoffner*, in either situation, the dangers are those that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided, and must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards. It is important to remember that a common condition or an avoidable condition is not uniquely dangerous. *Lugo*, at 520. Typical open and obvious dangers do not give rise to the existence of special aspects.

Crosswalk Was Avoidable

This is not a case in which Plaintiff was forced to encounter the crosswalk. Mrs. Rawluszki had other choices around the crosswalk. Photographs show that the crosswalk does not encompass the entire area. There is a walkway along the front of the store that customers can walk along without being in the traveled portion of the parking lot. Customers can proceed parallel along the front of the store before heading to their vehicle without passing through the crosswalk. There are also open areas on each side of the crosswalk where customers can walk without encountering the crosswalk. Additionally, there are parking spaces along the front of the store that customers can utilize and avoid the crosswalk altogether.

This Court, in *Hoffner*, discussed this effectively unavoidable aspect concluding:

. . . the standard for “effectively unavoidable” is that a person, for all practical purposes, must be *required or compelled* to confront a dangerous hazard. (Emphasis in original).

When a person has a choice, a hazard cannot be truly unavoidable. That is the exact situation in the present case. Plaintiff had differing options and was not required or compelled to confront the crosswalk.

In *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), the Court of Appeals rejected plaintiff's argument that the snowy sidewalk was effectively unavoidable. In reaching its decision, it noted that plaintiff had alternative routes to gain access to the home other than across the snowy sidewalk. Plaintiff was not effectively trapped so that she must encounter the snowy sidewalk. As such, there was no special aspect and, therefore, no duty on the part of defendant.

Likewise, in *Bullard v Oakwood Annapolis Hospital*, 308 Mich App 403; 864 NW2d 403 (2014), the Court of Appeals held that the ice on which plaintiff slipped was not effectively unavoidable. Again, the appellate court noted that plaintiff made certain choices, any one of which could have decided differently and avoided the hazard. Plaintiff was in no way "effectively trapped." Special aspects did not exist as to the icy 2' x 8' planks on which plaintiff was walking at the time of his fall.

As in the present case, there is nothing to suggest that Mrs. Rawluszki was "essentially trapped" and forced to encounter the crosswalk. There were other ways Plaintiff could have gone without confronting the crosswalk. No special aspect exists on the basis that the crosswalk is effectively unavoidable.

Crosswalk Not Unreasonably Dangerous

In *Lugo, supra*, this Court discussed a second type of special aspect that may give rise to a liability. This type of case involves a condition that would be unreasonably dangerous to maintain because it involves an unreasonably high risk of severe harm. As was stated in *Hoffner*:

Under this limited exception, liability may be imposed only for an “unusual” open and obvious condition that is “unreasonably dangerous” because it “presents 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”. (At page 462).

Plaintiff claims that the crosswalk creates an extremely high risk of severe harm because it lacks signs. However, in *Richardson v Rockwood Center, LLC*, 275 Mich App 244; 737 NW2d 801 (2007), the court held:

The lack of signs or other traffic control devices or markings does not constitute a “special aspect” that would remove this case from application of the open and obvious doctrine.

Based on this decision, the crosswalk is not and cannot be considered unreasonably dangerous because of the lack of signs. The analysis then turns to whether it can be said that the crosswalk itself presents an extremely high risk of severe harm such that the crosswalk should be removed or eliminated. Common sense tells us that no reasonable person would view the crosswalk as presenting an unreasonable risk of harm.

It is important to remember that typical and common conditions are not uniquely dangerous and do not give rise to an unreasonable risk of harm. *Lugo*, at 520; *Richardson*, at 249. Crosswalks are typical, common, everyday conditions and are, therefore, not unreasonably dangerous.

Remember, there is nothing about this crosswalk that creates an unreasonably dangerous condition. The crosswalk is hazardous only because of an inattentive driver and / or pedestrian. The crosswalk was utilized safely by thousands in the several years this crosswalk was in place before the incident. This was the only vehicle-pedestrian accident occurring on

the premises. There are no vision obstructions or other surrounding circumstances that impact the condition.

The crosswalk also does not present a continuous hazard. The unguarded 30-foot deep pit example in *Lugo* reflects the recognition of a continuous hazard that is unreasonable to be allowed to continue to exist. A crosswalk lacks a continuously unreasonable hazard. It is dangerous only because of an inattentive driver or pedestrian. This crosswalk is yellow crosshatched. Use of the yellow color for roadway markings is universal to provide warnings to not only drivers, but pedestrians, as well, reducing the likelihood of inattentiveness. This is also a fairly large crosswalk, thereby providing an early warning.

In *Lugo*, this Court noted that there is nothing unusual about vehicles being driven in a parking lot. In that case, plaintiff argued that the moving vehicles were a distraction such that she did not notice or observe the pothole in the parking lot. This Court disagreed.

Likewise, in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), the Court of Appeals determined that the merchandise and displays in a supermarket were not the type of distractions that would prevent the customer from discovering what was obvious—in that case, the crushed grapes on the floor.

As in the present case, there is nothing about the crosswalk that would “distract” a pedestrian from observing vehicles in the parking lot. This assertion that the crosswalk creates a “safety zone” is, in essence, a variation of the distraction argument. However, even though a pedestrian may feel safer crossing through a crosswalk, there is nothing to indicate this feeling would prohibit discovery of cars moving and approaching in the parking lot. To conclude

otherwise would suggest that a crosswalk acts as an insurer of a pedestrian's safety. This runs afoul of the longstanding principle that a premises owner is not an insurer of the safety of an invitee. *Bradley v Burdick Hotel Co*, 306 Mich 311; 11 NW2d 275 (1943).

To conclude that a crosswalk is unreasonably dangerous would mean there is no sensible reason for the crosswalk to exist. An argument similar to this was made by the plaintiff in *Stopczynski v Woodcox*, 258 Mich App 226; 671 NW2d 119 (2003). In that case, plaintiff argued that an unreasonably high risk of harm applies to remove swimming pool diving accidents from the open and obvious danger doctrine. The Court of Appeals disagreed, reasoning that plaintiff's argument compels the conclusion that all swimming pools in Michigan shallow enough to allow a diver to hit bottom be removed. Eliminating above-ground pools was not the desired result.

There is nothing in the present court case that would suggest that crosswalks be removed because of their "inordinate risk" of severe harm. This makes absolutely no sense when considering that the risk still remains and has not been removed when no crosswalk is present. A pedestrian traversing a parking lot without crosswalks remains at risk for being hit by a car. There are obvious advantages to crosswalks, which make them worthy of continuing placement in parking lots.

When assessing the unreasonably dangerous condition, it must be something that is not just dangerous, but unreasonably so. *Hoffner*, at 472. The critical inquiry is whether there was something unusual about the crosswalk because of its character, location, or surrounding conditions. This case presents no unique circumstances. One is not left with the feeling that

the danger has been concealed by defendant. Special aspects do not exist taking this case out of the open and obvious doctrine.

ARGUMENT II

A SPECIAL ASPECT CANNOT EXIST IF THE CONDITION IS NOT UNREASONABLY DANGEROUS.

Lugo recognized that there are conditions which, despite the open and obviousness of the condition, remain unreasonably dangerous. The narrow “special aspects” exception to the open and obvious doctrine, thus, recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable. *Hoffner*, at 462. This analysis looks at the character, location, and / or surrounding condition to determine whether there was something unusual giving rise to an unreasonable risk of harm. It is the unreasonableness of the hazard that remains the key. If the condition is not unreasonably dangerous, then there can be no special aspect.

The “special aspect” is part and parcel of what makes the condition unreasonably dangerous. One cannot exist without the other. Otherwise, the condition would be considered typical, common, or avoidable. These types of conditions do not rise to the level of unreasonably dangerous. It is only when there are special aspects that differentiate the risks from typical conditions, thereby creating a uniquely high likelihood of harm or severity of harm, that special aspects exist. It is the special aspects that define the uniquely unreasonable hazard. The two cannot be separated.

Remember, the special aspect exceptions are intended to be narrow and designed for dangers in limited, extreme situations. *Hoffner*, at 472. Creating circumstances where there

are special aspects, but the condition is not unreasonably dangerous, becomes a distinction without a difference. The focus shifts from the unreasonable risk of harm to the particular differentiating characteristics. The narrow, limited, extreme situation exception becomes watered down. The exception becomes meaningless and unworkable.

As reiterated in *Hoffner*, “The touchstone of the “special aspects” analysis is that the condition must be characterized by its unreasonable risk of harm”. If the condition is not unreasonably dangerous, special aspects do not exist. The aspects are typical, common, or avoidable, and fall within the protections of the open and obvious doctrine. If the condition is not unreasonably dangerous, then there is no reason to consider whether there is a special aspect.

CONCLUSION AND RELIEF REQUESTED

The open and obvious doctrine bars liability in this case. There can be no doubt that the crosswalk was discoverable upon casual inspection by an average person with ordinary intelligence. There can be no doubt that vehicles moving in a parking lot are discoverable upon casual inspection by an average person with ordinary intelligence. We also know that no special aspects exist to make the open and obvious risk unreasonable. This case does not involve an effectively unavoidable condition. Moreover, it cannot be said that the crosswalk presented a uniquely high risk of severe harm that the presence of the crosswalk was inexcusable. This is a case that involves common and avoidable conditions that are not uniquely dangerous. The decision of the trial court and Court of Appeals should be reversed and summary disposition granted in Defendant’s favor.

WHEREFORE, Defendant-Appellant Menard, Inc., respectfully requests this Honorable Court summarily reverse the trial court and Court of Appeals and grant this Defendant summary disposition of Plaintiff's claims or, alternatively, grant the application and reverse the decision of the trial court and Court of Appeals, or other such relief as deemed appropriate by this Court.

Dated: June 10, 2016

SMITH, MARTIN, POWERS & KNIER, P.C.

BY 

ALAN R. SULLIVAN (P41613)

Attorneys for Defendant/Appellant Menard, Inc.
900 Washington Avenue
P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

Order

Michigan Supreme Court
Lansing, Michigan

April 29, 2016

Robert P. Young, Jr.,
Chief Justice

152519

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

DENISE FOWLER, as Next Friend of
VIRGINIA JANE RAWLUSZKI,
Plaintiff-Appellee,

v

SC: 152519
COA: 310890
Bay CC: 11-003317-NO

MENARD, INC.,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the September 15, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order including, among the issues to be briefed, whether the crosswalk installed by the defendant had a special aspect that could create liability for even an open and obvious hazard, and whether such a special aspect can exist if the condition is not unreasonably dangerous. See *Hoffner v Lanctoe*, 492 Mich 450, 455 (2012); *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517 (2001). The parties should not submit mere restatements of their application papers.



t0426

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 29, 2016

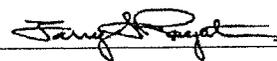

Clerk

EXHIBIT "1"

STATE OF MICHIGAN
IN THE SUPREME COURT

DENISE FOWLER as Next Friend of
VIRGINIA JANE RAWLUSZKI,

Plaintiff-Appellee,

vs.

MENARD, INC.,

Defendant-Appellant,

and

DALE PAUL VAN WERT and
LISA GINGERICH,

Defendants.

Supreme Court Docket
No. 152519

Court of Appeals Docket
No. 310890

L.C. File No. 11-3317-NO-JS
Hon. Joseph K. Sheeran

SKINNER PROFESSIONAL LAW CORPORATION
BY: DAVID R. SKINNER (P20551)
STACI M. RICHARDS (P64566)
Attorneys for Plaintiff-Appellee
P.O. Box 98
Bay City, MI 48707-0098
(989) 893-5547

SMITH, MARTIN, POWERS & KNIER, P.C.
BY: ALAN R. SULLIVAN (P41613)
Attorneys for Defendant-Appellant
900 Washington Avenue
P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

OUTSIDE LEGAL COUNSEL
BY: PHILIP L. ELLISON (P74117)
Attorneys for Plaintiff-Appellee
P. O. Box 107
Hemlock, MI 48626
(989) 642-0055

CERTIFICATE OF SERVICE

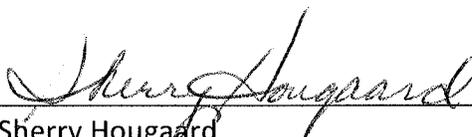
The undersigned certifies that, on June 10, 2016, she served DEFENDANT-APPELLANT MENARD, INC.'S SUPPLEMENTAL BRIEF, together with any exhibits, and this CERTIFICATE OF SERVICE, which were electronically filed on this date, upon all counsel of record via e-filing with the Court of Appeals TrueFiling system to their email addresses of records as disclosed on the Notice of Electronic Filing as follows:

David R. Skinner
daveskin@gmail.com

Philip L. Ellison
pellison@olcplc.com

and I hereby certify that on June 10, 2016, I have mailed, by United States Postal Service with postage fully prepaid, the foregoing documentation to the following:

Richard C. Sheppard
Smith & Brooker, P.C.
Attorneys at Law
703 Washington Avenue
Bay City, MI 48708-5798



Sherry Hougaard
900 Washington Avenue
P. O. Box 219
Bay City, MI 48707-0219
989-892-3924
asullivan@smpklaw.com