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STATE OF MICHIGAN

IN THE SUPREME COURT

DONNA LIVINGS,

Plaintiff-Appellee,

Docket no. 159692
Court of Appeals docket No. 339152
Macomb Circuit Court
Hon. Edward A. Servitto
LC No. Case No. 2016-00180-NI

-vs-

SAGE'S INVESTMENT GROUP, LLC, a Michigan limited liability company,

Defendant-Appellant.

_____/

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PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT OR ORDER APPEALED FROM

Plaintiff filed a complaint on May 25, 2016 in the Macomb Circuit Court, against Sage's Investment Group, LLC. Sage's named T & J Landscaping & Snow Removal, Inc., and Grand Dimitre's of Eastpointe Family Dining as "nonparties at fault." Plaintiff then amended the complaint to add T & J and Grand Dimitre's.

Grant Dimitre's motion for summary disposition was granted in an order dated December 9, 2016 and is not at issue in the present appeal. Grant Dimitre's is no longer a party and should properly be omitted from the case caption.

Sage's moved for summary disposition on May 22, 2017. While the motion was pending, the matter was referred for facilitation. As a result, plaintiff settled with T & J and it was dismissed by stipulated order entered June 6, 2017. T & J, therefore, is also not a party to the present appeal and should not have been included in the caption.

Sage's motion for summary disposition was heard on June 19, 2017. (Tr I.) The court, Edward A. Servitto, J., denied the motion at the hearing and entered a "praecipe order" with the same date. Sage's filed a timely application for leave to appeal on July 11, 2017.

The Court of Appeals granted Sage's application for leave to appeal in an order dated October 3, 2017. On February 26, 2019, the Court of Appeals issued an opinion (Sage's Exhibit A), affirming the trial court's order. *Livings v Sage's Investment Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued 2/26/19 (Docket No. 339152).

Sage's filed a timely motion for reconsideration, which was denied in an order dated April 23, 2019. Sage's filed a timely application for leave to appeal to this Court.

RELIEF REQUESTED

Plaintiff Donna Livings, through her attorneys, Baratta & Baratta, P.C., asks that this Court DENY defendant Sage Investment LLC's application for leave to appeal.

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STATEMENT OF QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS ERR IN HOLDNG THAT THE "OPEN AND OBVIOUS" DEFENSE DID NOT APPLY TO PLAINTIFF'S PREMISES LIABILITY CLAIM?

Plaintiff-Appellant would answer "NO."

Defendant-Appellee would answer "YES."

The Court of Appeals answered "NO."

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I Proceedings (June 19, 2017)

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A Deposition of James Sage

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STATEMENT OF FACTS

This is a premises liability action arising out an accident that occurred on February 21, 2014.

In the lower courts, Sage's argued repeatedly that it did not have "possession" or "control" of the parking lot where plaintiff was injured. See, e.g., Tr I, pp 4-5. The Court of Appeals rejected this position (Opinion, p 7) and Sage's appears to have abandoned the argument. The facts related to the condition of the parking lot and other matters relevant to Sage's application for leave to appeal, then, are largely undisputed.

Background. Plaintiff was a server (waitress) at a restaurant named "Grand Dmitri's Family Dining," at 25001 Gratiot in Eastpointe. (Sage's Exhibit B, deposition of Donna Livings, pp 19-20; Sage's Exhibit C, deposition of Debra Buck, p 9.) It is located in a strip mall at the southwest corner of 10 Mile Road and Gratiot. (Exhibit A, deposition of James Sage, pp 9-10.) Sage's Investment Group, LLC, owns the property. (Sage deposition, p 8.) James Sage is the sole member of the LLC. (Sage deposition, p 8.) He bought it in 1997. (Sage deposition, p 10.) The original tenants' leases were then assigned to him but have since expired. (Sage deposition, pp 25, 28.) "They've been a month-to-month for quite some time." (Sage deposition, p 25; Tr I, pp 4-5.)

The parking lot. There is one parking lot, that "surrounds the whole complex." (Sage's Exhibit B, deposition of Thomas Caramagno, p 17; Exhibit C, photos A, B, C [parking lot, front and rear together].) The parking area adjacent to Grand Dmitri's would be used by its employees and customers. (Sage deposition, p 54.) It is "all the employee parking." (Caramagno deposition, p 20; Tr I, p 4.)

Grand Dmitri's employees used the back door. (Buck deposition, pp 18, 20; Exhibit D, photos D, E, F [rear door].) They park in the back of the building. (Livings deposition, p 40.)

They were required to park there. (Livings deposition, p 40.) "Normally," that was where they would park. (Buck deposition, p 14.) Some customers parked in the rear as well, but "the majority of cars back there were employees." (Livings deposition, pp 40, 56.) No other businesses used that part of the parking area. (Livings deposition, p 41.)

It was undisputed that "T & J Landscaping and Snow Removal, Inc." did the snow plowing at the property.

The accident. The winter of 2013-2014 was snowy. By the time of the accident in February, snow "had been accumulating every day for two months." (Livings deposition, pp 42, 52.) Every time there was new snow, it would be plowed. (Livings deposition, p 42.) They never "saw cement." (Livings deposition, p 42; Tr I, p 6.) There were "trucks there every day." (Livings deposition, p 104.) "Thursday was delivery day." (Livings deposition, p 104.)

> Here's the situation. It had been snowing for over a month. Every time it snowed, a snowplow would come and plow the area for everybody to walk. The next day, a snowplow would come if t had snowed and plow the area for everybody to walk. [Livings deposition, pp 37-38.]
>
> In addition to that, vehicles would be driving through this area for several reasons. One, it was our parking are to park, so that's where w parked; two, it was the alley for the plaza, so trucks and delivery people would be going through the alley to deliver to the plaza. It was a solid sheet of white. Whether it be packed snow or ice I have no idea. [Livings deposition, p 38.]
>
> Originally, like when the snow first started, they plowed. Everything when up against the wall. Then the snow would come, but they wouldn't come until, you know, 10:00 o'clock in the morning, so all of the cars and everything coming in would start packing the snow down. So when they would come to plow, they would only plow whatever was brushed up, so the rest was - then the next two days, whenever it snowed again, it would snow and cars are coming in and you kept getting these ruts packing this stuff down. They never scraped to the bottom, so it just kept accumulating over time. [Livings deposition, pp 116-117.]

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The parking lot was completely covered with snow; there was no asphalt visible. (Livings deposition, p 113.) "When the lot was plowed, it was never plowed to the ground and salted." (Livings deposition, p 116; Tr I, p 6.)

The employees "complained all the time to [Shkouhani]" about the parking lot. (Livings deposition, p 100.) "Some mornings" the customers would complain. (Livings deposition, p 100.) There was salt in the building, but it was for "the customer sidewalks in the front of the building and the side of the building." (Livings deposition, p 40.) There was salt inside the building. (Buck deposition, p 24.) Buck had only used it "once, twice," "[j]ust right at the front door." (Buck deposition, p 24.) Shkouhani put salt out, also at the front door. (Buck deposition, p 24.)

Plaintiff and Buck both started work at 6:00 a.m. on Friday, February 21, 2014. (Buck deposition, p 10; Livings deposition, pp 30, 41; Shkouhani deposition, pp 19, 33-34.) Buck arrived before plaintiff; her car was already in the parking lot. (Livings deposition, pp 31, 34-35.)

The parking lot was "a sheet of ice with water on top." (Buck deposition, p 13.) "Snow, ice, water." (Buck deposition, p 13.) The ice covered the parking lot. (Buck deposition, p 13.) There was water covering the back parking lot. (Buck deposition, p 22.) "I remember snow, ice and water pretty much through the parking lot." (Buck deposition, p 23.) "It was covered." (Buck deposition, p 23.) So was the sidewalk. (Buck deposition, p 23.) There was no surface that did not have snow, water or ice on it. (Buck deposition, p 23.) She estimated "a couple [of] inches" of snow." (Buck deposition, p 23.)

Normally, Buck would park close to the rear door, "closest to the wall," near the trash bin. (Buck deposition, pp 31, 32; Exhibit E, photo G [wall]; photo F.) She could not park there that morning. (Buck deposition, pp 31-32, 33-34.)

> Normally we park closer to the door, but from what I recall there was . . . a mound of snow in that area, so I could not park that way, and I parked about three or four

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> spots down, still to the back, but not in . .. the spot where I normally park. [Buck deposition, p 14.]

Buck did not have a key to the building; she had to wait for the chef to come to open the door. (Buck deposition, p 18.) He went in the front door and came through the building to open the back. (Buck deposition, pp 18, 22.) The front door was relocked, because the restaurant was not yet open. (Buck deposition, p 26.) She and the chef went inside together. (Buck deposition, pp 9, 14, 22.) Buck had difficulty walking in. (Buck deposition, pp 13-14.) She "kinda shimmied" her way in. (Buck deposition, p 22.)

Buck's shift ended at 2:00 p.m. (Buck deposition, p 18.) There was still snow and ice on the parking lot when she left. (Buck deposition, p 25.)

Plaintiff arrived about 5:50 a.m. (Livings deposition, pp 30, 41, 90.) It was cold, "in the negative numbers." (Livings deposition, p 93.) It had not been above freezing in the preceding 24 hours. (Livings deposition, p 93.) There had been snow or ice in the parking lot before. (Livings deposition, p 39.) She did not report it. (Livings deposition, p 39.)

Plaintiff did not have a key to enter the building from the front. (Livings deposition, p 34.) The employee [rear] entrance was the only one she could use. (Livings deposition, p 114.) She parked in the rear of the building. (Livings deposition, p 33.) There was one other car in the lot. (Livings deposition, p 31.) It belonged to Buck. (Livings deposition, pp 31, 34-35.)

It was dark. (Livings deposition, pp 41, 91.) There was "a night light over the back door." (Livings deposition, p 41.) There was some light in a rear window, but it did not illuminate the parking area. (Livings deposition, p 93.) It was about as bright as an interior nightlight. (Livings deposition, p 41.) "It just did the door." (Livings deposition, p 42.) "It didn't come out into the parking area." (Livings deposition, p 42.) She did not have a flashlight. (Livings deposition, p 93.)

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Plaintiff parked where she was supposed to. (Shkouhani deposition, p 14.) She estimated she was 70 feet from the building. (Livings deposition, pp 33, 106, 114.) She could not have parked any closer. (Livings deposition, p 34.) "[T]he parking area was all piled up with snow[;] [t]hat was the first available full parking spot." (Livings deposition, pp 34, 112-113.) "[T]he fifth parking [spot] was where I parked because one through four was a solid snow mound up to the wall." (Livings deposition, p 113.) The other spots were unavailable because snow had been plowed onto them. (Livings deposition, p 113.)

She was looking down. (Livings deposition, p 35.) She saw "a sheet of white ice." (Livings deposition, p 35.) Plaintiff estimated that there was approximately six inches of "packed snow" on the ground. (Livings deposition, pp 34, 39, 101, 114.) It was "flat where it had been plowed." (Livings deposition, pp 35, 36.)

> It was solid. There was no soft stuff. It was solid block. It was just one big block of ice and ground trodden. . . packed. [Livings deposition, p 36.]
>
> It was trodden. It was flattened to the ground. There was no fluffy snow. [Livings deposition, pp 35, 105.]
>
> [T]he whole complete area from the driveway coming in which was another 70, 80 feet to the 70 feet that I had to go to the 190 feet going along the building, everything was white, packed snow. [Livings deposition, p 107.]

She was wearing rubber-soled shoes and carrying her purse. (Livings deposition, pp 43-44.) She started to walk toward the rear door, "and maybe three steps and I fell straight back." (Livings deposition, pp 30, 45, 101.) She tried to get up immediately, but it was too slippery. (Livings deposition, pp 45, 102.)

> I tried to stand up and was slipping everywhere, so I got down on my hands and knees and crawled across the parking area. I tried to get to the back door. I could not, so I ended up walking the snow drift, plowed area, whatever you want to call it to walk around the building [Livings deposition, p 46.]

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She called the restaurant from the front door. (Livings deposition, p 46.) Buck opened the door for her. (Livings deposition, pp 46, 101.) She was able to work that day, but at a reduced level. (Livings deposition, pp 48-49.) The next day, however, she was unable to work when she arrived at the restaurant and went for medical help. (Livings deposition, p 49.) She has had three surgical procedures for her back injury. (Livings deposition, pp 66-69.) She still has significant pain. (Livings deposition, p 74.) She has not worked since the day after the accident and is considered completely disabled. (Livings deposition, pp 17, 21, 18.)

After the accident. Plaintiff told Shkouhani about her fall when he arrived, about 9:00 a.m. (Shkouhani deposition, p 11.) He went to the back to look at the area where she said she had fallen. (Shkouhani deposition, p 11.) The surface of the plaintiff slopes toward a drain. (Shkouhani deposition, p 15.) Water pools around it. (Shkouhani deposition, p 15.)

"Where she fell, it was water," "a lot of water." (Shkouhani deposition, pp 13, 43.) There was ice and debris around the drain. (Shkouhani deposition, p 43.) The water was up to his ankle. (Shkouhani deposition, p 12.) His foot was "soaked." (Shkouhani deposition, p 12.) "I think it was a sheet of ice underneath . . . the water." (Shkouhani deposition, p 13.) "[W]hen she stepped like from her car to the water, it was like a little ice underneath the water. [Shkouhani deposition, p 13

> I think it was like the leaves, and there was a little - like a little ice, because it used to get very cold and like at nighttime and like warm weather in / the morning. So it's like, you know, now they shovel the ice, they put them against the wall. When it gets warm, you know, the water start ed dripping. . . . Runoff. And when it freeze at nighttime it's like, you know, a lot of frozen water. [Shkouhani deposition, pp 11-12.]

Shkouhani "went back to the restaurant . . . grabbed sticks and I try to like, you know, tried to find the hole for the city water." (Shkouhani deposition, p 11.) The ice was not thick. (Shkouhani deposition, p 13.) He was able to "break" it in a few minutes. (Shkouhani deposition,

pp 13, 21.) He freed the drain; "like . . . five minutes everything is done." (Shkouhani deposition, p 11.)

Sage's explanation of the drainage problem was that it was the city's fault:

> The cities uses [*sic*] our parking lots, I have multiple buildings, as retaining ponds in many cases. So, for example you have six manholes, or catch basins that are about 12 inches in diameter of the drain. When they head out to the street, they do down about six inches. I just learned that. So what happens is, instead of flooding the streets, and instead of having backing up - backups on the streets and that, they hold it in your parking lot. So they use the parking lots as retention centers, as retention. . . [W]hen you get a lot of rain, the drains can only handle so much. [Sage deposition, p 48.]

Clearing standing water, according to Sage, was the tenants' responsibility. (Sage deposition, p 60.)

<u>T & J's description</u>. T & J had last plowed on February 18, 2014. (Caramagno deposition, pp 11, 38.) There was no salting "done on this property based on this time frame [January - March 2014]" (Caramagno deposition, pp 18, 47-48.)

Caramagno stated that T & J would push the snow into the employee parking area. (Caramagno deposition, p 20.)

> [M]y snowplow would angle everything going to the north side of the parking lot up against that wall. Meaning the plow is on an angle, and it, you know, constantly diverts the snow gong north . . . [Caramagno deposition, p 21.]

He denied that any significant amount of snow had been plowed into the parking spots:

> The whole length of the wall . . . will have a pile of snow from the diverted snow from the building going north. It's just that at the end of the run would be a pile there, and at the end of the run going this way toward Gratiot there would be a pile there. [Caramagno deposition, p 42.]

He denied knowing of any "drainage issues." (Caramagno deposition, p 27.) He also declared it impossible that six inches of snow could have accumulated. "If I am plowing that parking lot every time it snows, it is impossible to have a six-inch build-up of snow or ice."

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(Caramagno deposition, p 28.) "Typically if we plow every snowfall, it's pretty darn close to the surface of the parking lot." (Caramagno deposition, pp 29, 32.)

After he is done plowing, he does a drive-through. (Caramagno deposition, p 45). If he had seen a sheet of ice on February 18, he would have called Sage. (Caramagno deposition, p 39.) Sage stated that he "go[es] there to make sure it gets plowed, it gets cleaned," but not before the plowing is done. (Sage deposition, pp 23, 24.) "Occasionally" he "[does] a drive through and I have tenants that notify me if it does not get plowed." (Sage deposition, pp 23, 59.) He goes "weekly or biweekly basis or as needed if I get a phone call." (Sage deposition, p 24.) Shkouhani, however, testified he saw Sage only rarely, about once a month, when he came for the rent. (Shkouhani deposition, p 39.)

Procedural history

Plaintiff filed suit in the in the Macomb Circuit Court on May 25, 2016. "Sage's Investment Group, LLC" was the only defendant. (Docket entry.)

On August 9, 2016, Sage's named T & J Landscaping & Snow Removal, Inc., and Grand Dimitre's of Eastpointe Family Dining as "nonparties at fault" (Docket entry.) Plaintiff then amended the complaint to add T & J and Grand Dimitre's (Docket entry.)

Grant Dimitre's motion for summary disposition was granted in an order dated December 9, 2016. (Docket entry.) Plaintiff settled with T & J and it was dismissed by stipulated order entered June 6, 2017. (Docket entry.)

Sage's motion for summary disposition was heard on June 19, 2017. (Tr I.) The court, denied the motion at the hearing. (Tr I, pp 5, 6.)

> She had access to the front door but that was not, according to her, and it's a factual issue, permissible parking for employees. It's a question of fact for the jury. [Tr I, p 4.]

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> She also testified that snow was never fully removed from the parking lot, that the removal process always left a coating of snow and ice in the parking lot and it was unavoidable because it was the employee parking lot. [Tr I, p 6.]

A "praecipe order" was entered on June 19, 2017, stating that the motion for summary disposition was denied "for the reasons stated on the record" (Sage's Exhibit A.) Sage's filed a timely application for leave to appeal on July 11, 2017. The Court of Appeals granted the application in an order dated October 3, 2017.

The Court of Appeals

On February 26, 2019, the Court of Appeals issued an opinion (Sage's Exhibit A), affirming the trial court's order. *Livings v Sage's Investment Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued 2/26/19 (Docket No. 339152).

The majority affirmed the trial court's rulings.[1] It held that the ice was "open and obvious." (Opinion, p 9.) It went on, however, to find that "the record supports a finding that the entire parking lot presented an effectively unavoidable hazard of packed snow and ice." (Opinion, p 11.)

Judge Tukel dissented, finding that "plaintiff could have simply declined to enter the premises, thereby avoiding the hazard." (Opinion of Tukel, J., p 4.) The majority (Judges Shapiro and Beckering) responded, in part:

> Put simply, the hazard encompassed the entire premises and it was effectively unavoidable for anyone and everyone, whether coming or going. It simply cannot be the law that a premises owner can render an all-encompassing hazard on the property "effectively unavoidable" by claiming that no one should come near the property. [Opinion, p 11, n 6.]

[1] As noted *supra*, much of the lower court proceedings involved the issue of Sage's control of the premises.

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Judge Shapiro wrote separately, concurring with the majority opinion, noting that defendant-landowner, not the restaurant's owner or his employees, was responsible for maintenance of the parking lot." (Opinion of Shapiro, J., p 2.)

Sage's motion for reconsideration

Sage's filed a motion for reconsideration in the Court of Appeals. Only at that point did Sage's argue that plaintiff could have parked in "front" of the "plaza." Sage's motion for reconsideration, p 2. Plaintiff responsed to the motion for reconsideration, which was denied in an order dated April 23, 2019. Sage's filed a timely application for leave to appeal to this Court.

ARGUMENT I

THE LOWER COURTS DID NOT ERR IN DENYING THAT THE "OPEN AND OBVIOUS" DOCTRINE IS A BASIS FOR GRANTING SAGE'S MOTION FOR SUMMARY DISPOSITION .

Standard of review

"In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), the court considers the pleadings, affidavits and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party." *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A court reviewing a motion under MCR 2.116(C)(10) should review the record evidence and all reasonable inferences drawn from it and decide whether a genuine issue regarding any material fact exists to warrant a trial. *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999). "Summary judgment should only be granted when the plaintiff's claim is so clearly unenforceable as a matter

of law that no factual development can possibly justify a right to recovery." *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 220; 600 NW2d 427 (1999).

(a)

<u>The Court of Appeals analysis of "unavoidability" was correct.</u>

i. The exception to "open and obvious" applies if a condition is "effectively unavoidable."

A condition that is "effectively unavoidable" may be an exception to the "open and obvious" rule. As this Court stated in *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012), "[t]his Court has discussed two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable." 492 Mich 463. "An 'effectively unavoidable' hazard must truly be, *for all practical purposes*, one that a person is required to confront under the circumstances." 492 Mich 472 (emphasis supplied).

Lymon v Freedland, 314 Mich App 746; 887 NW2d 456 (2016), is of interest. The plaintiff was a nurse's aide. She provided home health care for the defendant's mother, who was severely disabled and could not be left alone. The house was located on a steep hill. The driveway was icy and the plaintiff was unable to drive up it. She parked in the street and walked. The only other way into the required walking on snow-covered grass, but it was still necessary to cross part of the driveway. She slipped and fell in the driveway. She sued the homeowner, arguing that the driveway was "unavoidable." The trial court denied summary disposition for the defendant; the parties stipulated to judgment so the defendant could appeal. The Court of Appeals affirmed.

> Evidence showed that some individuals were able to successfully navigate this route to the home. This evidence supported that the hazards on the driveway may have been avoidable. However, *other evidence left open a question of fact as to whether the yard provided a viable alternative route*. Evidence showed that the yard was steep and it was covered in snow. As this Court has previously explained, "a snow-covered surface might always, by its very nature, present an open and

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> obvious danger because it is likely to be slippery as a result of underlying ice or for some other reason." . . . [*H*]*ere, there was foliage next to the driveway that obstructed the path to the house.* [Two witnesses] both agreed that, because of the foliage, the alternate route would probably still require someone to traverse part of the driveway. Furthermore . . . at the time plaintiff arrived at the home, she believed that she needed ski poles to traverse the alternate route. [314 Mich App 761-762. Emphasis added.]

Attala v Orcutt, 306 Mich App 502; 857 NW2d 275 (2014), is also relevant. The plaintiff slipped and fell on ice in the parking lot of her apartment complex. The parties stipulated to the facts that the parking lot was covered with ice and the plaintiff had to traverse the parking lot to reach her car. The majority held that the condition was "unavoidable."

An unpublished decision, *Ehrler v Frankenmuth Motel, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 8/2/11 (Docket No. 296908) (Exhibit F), is also factually on point. A "glaze of ice that blanketed the premises of defendant's motor courtyard motel following an ice storm." *Id*. at *1. The desk clerk salted part of the exterior, but not the entire lot. One plaintiff fell while walking from the office area (where she went for breakfast) back to her room. The other fell while getting out of his car after driving to the office. The Court of Appeals reversed summary disposition for the defendant.

Also relevant is *Van Wynsberghe v American Axle & Mfg Holdings*, unpublished opinion per curiam of the Court of Appeals, issued 4/15/08 (Docket No. 277094) (Exhibit G), the plaintiff had been sent to the defendant's plant to service a machine. He slipped on a "sloped" floor covered with "slick coolant." The held that the condition was not "open and obvious." It went on to say it was also "unavoidable."

> First, the evidence shows that plaintiff could not have performed the maintenance that defendant required on defendant's machine without traversing the hazards that existed in the plant. Thus, the condition was effectively unavoidable. *Plaintiff would not have been able to perform his own job, at a risk to his own employment – which is hardly an idiosyncratic decision.* [*Id*. at *3. Emphasis added.]

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Plaintiff's situation here was similar to that of the plaintiffs in *Attala* and *Van Wynsberghe*. Everything around the building was thick with ice.

ii. The correct focus is on the nature of the defect, not the motivation of the plaintiff.

The Court of Appeals majority in this case wrote:

> The "touchstone" for permitting recovery under the "special aspects" exception to the open and obvious doctrine is the unreasonableness of the hazard. [*Hoffner, supra*] at 472. Thus, *we should not define whether a duty exists by the needs of the person seeking to use the property*. Rather, *we should define whether a duty exists by the unreasonableness of the hazard.* [Opinion, p 11, n 6. Emphasis added.]

In too many post-*Lugo* cases, the courts have decided that a specific risk was "avoidable" by looking at why the plaintiff was on, or approaching, the premises and then concluding that the reason was insufficient to render the situation "unavoidable." This sort of decision-making should be outside the purview of the courts under common law.

iii. The Court of Appeals' analysis is supported by the record.

In the present case, the record establishes or allows the reasonable inferences that:

- Plaintiff was required to use the rear parking lot. (Testimony of plaintiff, Buck and Sage.) Whether she should have ignored the rule and parked in front, or whether she even had reason to do so, considering that Buck had parked in the usual place and apparently reached the restaurant herself, are the kind of judgments that a factfinder should make, not a judge.
- Plaintiff would have been unable to enter through the front door, because she did not have the key. (Testimony of plaintiff and Buck.)
- There was packed snow on the surface of the parking lot. (Testimony of plaintiff, which must be credited for the motion for summary disposition.)
- Water and ice had formed on the entire surface of the lot. (Testimony of Buck and plaintiff; Shkouhani also testified to the presence of ice.)

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- The entire lot was slippery. (Buck's testimony that she "shimmied in" to the building.)
- Applying salt would not have eliminated the water. (General knowledge of the physical properties of water.
- Salt would not have melted the entire layer of ice within a reasonably time. (Caramagno's testimony; general knowledge of the physics of salt and ice.)
- It would not have been possible to remove the water in the dark. (Reasonable inference, based on Shkouhani's testimony that he had to inspect the area in order to find the source of the water, then break the ice covering the drain.)

Plaintiff's situation was similar to that of the plaintiff in *Lymon*, *supra*. While there may have been more than one route into the building, they were both equally hazardous. It is, therefore, immaterial whether plaintiff could have parked elsewhere or used her phone to call inside.

Taking the evidence in the light most favorable to the nonmoving party, plaintiff was required to traverse an ice-covered parking lot in the dark to enter the building. It was "unavoidable."

The trial court stated:

> [Plaintiff] also testified that snow was never fully removed from the parking lot, that the removal process always left a coating of snow and ice in the parking lot and it was unavoidable because it was the employee parking lot. [Tr I, p 6.]

The court correctly found that the "unavoidability" exception applied.

The Court of Appeals majority stated:

> Viewed in a light most favorable to plaintiff, *the record evidence creates a genuine issue of material fact as to whether any part of the parking lot was in a reasonably safe condition to traverse in order to enter the restaurant and report for work*. . . [T]he record supports a finding that *the entire parking lot presented an effectively unavoidable hazard of packed snow and ice*. [Opinion, pp 10-11. Emphasis added.]

The Court of Appeals' opinion is supported by the record. There is no need for this Court the intervene.

(b)

<u>Sage's alternative argument does not provide a basis for reversing the Court of Appeals</u>

Sage's has argued repeatedly that the ice was not "unavoidable" because plaintiff "could have parked in front of the building, called for help and waited until someone came out to salt the area and let her in." There are several reasons for rejecting this line of argument.

- Sage's position seems to be that if *any* combination of actions could prevent a plaintiff from encountering a hazard, it is "avoidable." The *Lugo* standard, however, is "effectively" unavoidable. At some point, common sense must prevail. If plaintiff had lacked a cell phone or had been the first to arrive, would that have rendered the ice "unavoidable"? What if she had been on her way out instead of in? A landowner's duty is to maintain the premises in reasonably safe condition; that duty should not depend on the actions of those on the premises. That is, it is not the invitee's burden to find *some* way around *any* potential hazard.
- Sage's argument ignores the fact that plaintiff would still have had to encounter the ice if she had parked in front, because she would still have had to walk from her car to the covered area; she did not have benefit of a magic carpet to transport her over the surface of the parking lot without touching the ground.
- In addition, Buck testified that the sidewalk was also covered with ice and there is no dispute that plaintiff would have had to walk on the sidewalk even if she had parked in front and entered through the front door.

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- As plaintiff pointed out in her lower court briefs, Buck and/or "Chef Bob," even if one of them had been prevailed on to come to plaintiff's rescue, would not have been able to remedy the situation. Caramagno testified that salt would not have melted the entire layer of ice within a reasonable time and applying salt would not have eliminated the water over the ice.
- It was dark in front.

In short, Sage's arguments might persuade a jury that plaintiff was comparatively negligent, but do not provide a basis for reversing the Court of Appeals.

Conclusion:

Plaintiff respectfully requests this Honorable Court to Deny Defendant, Sage's Investment Group, LLC's Application for Leave to Appeal.

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Dated: June 24, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) was filed via the Court's True Filing System which will send notice out to the attorneys of record of the filing.

/s/ Melany Dranberg
Melany Dranberg

Dated: June 24, 2019