

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

DONNA LIVINGS,

Appellee,

Supreme Court No. _____
Court of Appeals No. 339152
Trial Court No. 2016-1819-NI
Trial Court Judge:
Hon. Edward A. Servitto

v

SAGE'S INVESTMENT GROUP, LLC,
a Michigan limited liability company,
T&J LANDSCAPING & SNOW REMOVAL,
INC., a Michigan Corporation and GRAND
DIMITRE'S OF EASTPOINTE FAMILY
DINING, a Michigan Corporation

Appellants.

**ORAL ARGUMENT
REQUESTED**

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**DEFENDANT-APPELLANT'S REPLY TO PLAINTIFF-APPELLEE'S ANSWER TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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ARGUMENT

In her answer to the Defendant-Appellant's ("Sage's") application for leave to appeal, the Plaintiff-Appellee ("Plaintiff") takes a precarious path that is more treacherous than the alleged "snow, ice and water covered parking lot" in which she fell when claiming that the condition was effectively unavoidable.¹ Plaintiff significantly stretches the truth when suggesting that Sage's has not argued she could park elsewhere (including in the front lot) to avoid the open and obvious condition. Plaintiff further relies upon unpublished case law without explaining why she does not rely upon the published cases and binding precedent *of this Court* to further her unfounded allegations, in violation of MCR 7.215(C)(1). Finally, Plaintiff pontificates about how this Court "should" abandon stare decisis apparently in favor of something more forgiving to her than this Court's precedent provides. Relief must be granted in favor of Sage's to preserve this Court's binding and time-honored decisions.

I. The Plaintiff significantly stretches the truth to support her claims

The Plaintiff has alleged, incorrectly, that only during Sage's motion for reconsideration in the Court of Appeals did it "argue that plaintiff could have parked in 'front' of the 'plaza.'" In Paragraph 12 of Sage's motion for summary disposition it stated:

[Plaintiff] could have parked in the front lot (where the owners of Grand Dimitre's salted the sidewalks and where chef, Robert Spear, parked). ([Plaintiff's deposition], pg. 34, 40). After she fell, [Plaintiff] was able to traverse the parking lot and reach the front door. ([Plaintiff's deposition], pg. 46) Both Debra Buck and Robert Spear were able to walk across the parking lot and gain entrance to the building without issue. ([Plaintiff's deposition], pg. 34-35)

See Sage's Application, Exhibit F, page 3, paragraph 12.

¹ Note, Plaintiff's continues the farce that the "entire" parking lot was covered in snow and ice despite admitting in her trial testimony (for which she obtained leave from the Court of Appeals to preserve) that she could not see the entire lot.

Meanwhile, in Sage's Application for Leave to Appeal to the Court of Appeals, Sage's argued as follows:

She could have parked in the front lot – where the owners of Grand Dimitre's salted the sidewalks and where chef, Robert Spear, parked. ([Deposition of Plaintiff, pp. 34, 40]) **Both Debra Buck and Robert Spear were able to walk across the parking lot and gain entrance to the building without issue.** ([Deposition of Plaintiff], pp. 34-35)

See Sage's Application for Leave to Appeal, Exhibit I, page 10. (emphasis in original)

Again in Sage's Brief on Appeal in the Court of Appeals, it argued verbatim as it did in its Application for Leave to Appeal:

She could have parked in the front lot – where the owners of Grand Dimitre's salted the sidewalks and where chef, Robert Spear, parked. ([Deposition of Plaintiff, pp. 34, 40]) **Both Debra Buck and Robert Spear were able to walk across the parking lot and gain entrance to the building without issue.** ([Deposition of Plaintiff], pp. 34-35)

See Sage's Brief on Appeal, Exhibit J, page 11. (emphasis in original)

Why would the Plaintiff go to such great lengths to misrepresent the arguments that Sage's made before coming to the Michigan Supreme Court for relief? What other arguments has Plaintiff stretched, misrepresented or misconstrued in hopes of misleading this Court into an improper ruling?

The answer to the former requires a clairvoyance that neither Sage's nor its counsel possess. However, the answer to the latter is: several. First, Plaintiff suggests employees were required to use **only** the rear parking lot. However, she failed to mention on page 13 of her brief that Chef Robert Spear and Debra Buck used the front door on the day she fell, when suggesting that the Court of Appeals' analysis is "supported by the record." See Sage's Application for Leave to Appeal, Exhibit B, page 34. In fact, even after her fall the Plaintiff was able to go back to work

and gain entrance to the restaurant without incident. See Sage's Application for Leave to Appeal, Exhibit B, page 46. Plaintiff fails to provide this Court that information when suggesting that the record supports her version of the events. It clearly does not.

Plaintiff also suggests that the record supports her theory because she "would have been unable to enter through the front door, because she did not have the key" at page 13 of her brief. Yet, Plaintiff fails to advise this Court that she in fact **did** enter the front door: "...I called to the restaurant when I got to the front door where Debra Buck answered. She opened up the front door for me. I went inside...." Sage's Application for Leave to Appeal, Exhibit B, page 46.

Finally, Plaintiff cites to Mr. Shkouhani's testimony for the proposition that he testified the entire surface was covered in water and ice at page 13 of her brief. On top of describing water and ice only around the drain in the back parking lot, Mr. Shkouhani testified that there was no ice where he parked his car. Sage's Application for Leave to Appeal, page 35. He also testified that he did not recall any ice or snow in the front parking lot. Exhibit R, deposition of Thomas Shkouhani, page 39. Again, Plaintiff has not explained why she completely misconstrued the record evidence and represented Mr. Shkouhani's testimony about the condition of the premises as something it was not; however, it is clear that she has done it consistently with an intent that leaves nothing to the imagination.

II. Plaintiff prefers to ignore precedent in favor of non-binding opinions

In its Application for Leave to Appeal to this Court, Sage's relied upon and discussed in significant detail this Court's decisions in *Lugo v Ameritech*, 454 Mich 512; 629 NW2d 384 (2001), *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd.*, 466 Mich 11; 643 NW2d 212 (2002), and *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), in support of its position that this Court's precedent was undermined by the Court of Appeals. Plaintiff chose not to reference,

discuss or even mention *Perkoviq* or *Lugo* in her brief. While Plaintiff does cite *Hoffner*, she cites it only for black letter law and provides no analysis of its decision. Note, Sage's filed the present application based upon MCR 7.305(B)(5)(a) and (b), and cited the above cases as the basis for its grounds on appeal. Plaintiff's failure to acknowledge those cases is a tacit admission that the Court of Appeals has inexplicably undermined this Court's precedent in an indefensible manner.

Instead of dealing with the actual issue at bar, Plaintiff instead cited non-binding, unpublished Michigan Court of Appeals decisions. MCR 7.215 states in relevant part as follows:

An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citations appears.

MCR 7.215 applies to this Court via MCR 7.305.

In her answer to Sage's Application for Leave to Appeal, Plaintiff does not provide an explanation for the reason for citing the unpublished opinions referenced in her brief, and on that basis alone, her brief is nonconforming pursuant to MCR 7.305(F). At a minimum this Court should strike pages 12 and 13 which reference said cases, and exhibits F and G.

Regardless, the unpublished cases that Plaintiff cites are distinguishable by this Court's precedent. Plaintiff cites *Ehrler* for the proposition that an "all-encompassing" condition as being one that is effectively unavoidable. What Plaintiff fails to understand is that the plaintiff in *Ehrler* had no options but to encounter the condition, whereas, she had numerous options, all of which would have allowed her to successfully avoid the ice in the Grand Dimitre's parking lot. See Sage's Application for Leave to Appeal, pp. 2, 8.

Equally unpersuasive is the Plaintiff's reliance on *Van Wynsberghe*. Plaintiff cites that matter for the proposition that employment alone can make a condition effectively unavoidable. As this Court has found in *Perkoviq* and the Court of Appeals found in the published decision of *Bullard v Oakwood Annapolis Hosp.*, 308 Mich App 403; 864 NW2d 591 (2014)², employment alone (unless the job requires what amounts to a life or death situation³) does not mutate an open and obvious danger into one that is automatically unavoidable. Plaintiff fails to establish (or reference) the life or death circumstances that were present in *Lymon*, that require a similar result here.

III. Plaintiff pontificates, as did the Court of Appeals, as to what the law should be instead of focusing on what the law actually is

This appeal arises out of the Court of Appeals statement that “it simply cannot be the law” that an alleged all-encompassing hazard is effectively unavoidable. The dissenting opinion, as does Sage's application for leave, provides a clear and cogent rationale for why the majority's analysis is misguided. Not to be outdone by the Court of Appeals, Plaintiff states in her brief at page 13 as follows:

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.

Plaintiff's point, as was the Court of Appeals' majority's point, is that this Court's binding precedent is wrong because, essentially, it puts the cart before the horse. Plaintiff is advocating

² Note, *Bullard* is another extremely important decision for this Court to evaluate given the issues in the case at bar. Plaintiff did not cite, reference, mention or discuss that case here in answer.

³ See, *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016), which the dissenting opinion called into question.

for a change in this Court's analysis of premises liability law, which is the very reason this application **must** be accepted. Change on the level that the Court of Appeals and Plaintiff are requesting requires a thorough vetting by this Court, to harmonize the proposed change to the state of the law.

Indeed, this Court **must** look at the Court of Appeals' decision because it upends stare decisis. "Stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

This is not to say that stare decisis is the only guiding principle in this appeal; however, it is important. The Court of Appeals' decision avoids an analysis of decades' worth of precedent that establishes whether a condition on land is open and obvious. Were this Court not to take up the present matter, premises liability law would not be "evenhanded, predictable" or consistent. *Id.*

This is no clearer than in the Plaintiff's own statement above, where she implores what this Court "should" be doing instead of what it "is" and "has been" doing. The same can be said for the Court of Appeals when it declared what "simply cannot be the law." Certainly, stare decisis should not be "applied mechanically to forever prevent the Court from overruling earlier erroneous decisions." *Id.* However, this Court has previously established a standard for when stare decisis should be overruled, and neither the Court of Appeals nor the Plaintiff have held to that standard. *Id.* See also, *Lignons v Crittenton Hosp.*, 490 Mich 61; 803 NW2d 271 (2011), (Where a plaintiff "has not argued why [the Court] should veer away from the stare decisis course" this Court is well within its right to decline to revisit the historical cases which guide its predictable conclusion.).

In this case, stare decisis has been turned on its head by the Court of Appeals, with an assist from the Plaintiff, despite a massive void rationalizing that departure. Numerous opinions from this Court should have but did not guide the Court of Appeals in making an evenhanded, predictable and consistent ruling. This Court, standing as the last Court of recourse, should recognize the errors that have been made and grant Sage's Application for Leave to Appeal.

CONCLUSION

Sage's has taken a path to this Court that was established by the Michigan Court Rules and created by this Court to avoid injustice that stems from an improper and unpredictable application of law. Sage's has relied upon three primary cases to support its argument that the Court of Appeals' majority opinion violates the time-honored principles of stare decisis; yet, there is a large swath of cases that are impacted by its decision.

The Court of Appeals' decision erodes the impact and import of this Court's decision in *Lugo* and, at last check, the 761 Michigan cases that cite it. In fact, it takes the intentionally narrow circumstances that give rise to "special aspects" that avoid application of the open and obvious doctrine and creates a new standard that is inapposite of the decision in *Lugo*, and *Bullard*, and *Perkoviq*, and *Hoffner*, and many, many others. In the face of all of those opinions where this Court actually created the rule of law or sanctioned it, the Court of Appeals finds that "it simply cannot be the law" that an invitee with options to avoid the allegedly dangerous icy condition of a parking lot is precluded from recovery in tort.

Ultimately, it is this Court's decision whether an icy parking lot, where the Plaintiff was not trapped, is effectively unavoidable. It is this Court's opinion that matters when it comes to whether the special aspects exceptions should be narrow, as they have historically been, or if they should be broad as the Plaintiff and Court of Appeals' argue they should. But, if we use stare

decisis as our guide in this case, as both the Court of Appeals and Plaintiff should have done but did not do, it is evident that this Court has never sanctioned the type of wholesale changes they seek.

Plaintiff, to support her campaign for change, has taken to misleading this Court of what the record actually says, in some instances shockingly so. The Court of Appeals in its concurring opinion took to discussing jet packs to make this Court's precedent appear ridiculous and Plaintiff joined in that fun in her brief. Yet, neither the Court of Appeals nor the Plaintiff take to discussing the legal precedent upon which this Court's decision must be based and that their results-centric analysis ignores. It is apparently easier to mislead and poke fun than to use logic and discourse to come to a reasoned conclusion. The reasons why Plaintiff uses those tactics says more about what result this case should bring than the hollow arguments and citations she has provided this Court.

Respectfully, Sage's asks the Court to stand behind its precedent and decades of deliberate decision-making and grant its Application for Leave to Appeal.

Respectfully Submitted by:

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Dated: July 15, 2019

PROOF OF SERVICE

The undersigned certifies that she served a copy of Defendants-Appellants Sage's Investment Group, LLC's Reply to Plaintiff-Appellee's Answer to Defendant-Appellant's Application for Leave to Appeal, upon the attorneys of record of all parties to the above cause via True-Filing, the Court's e-filing system, on July 15, 2019.

/s/ Robyn A. Goldberg

Robyn A. Goldberg