

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

DONNA LIVINGS,

Plaintiff-Appellee,

v

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

Defendant-Appellant,

and

T&J LANDSCAPING & SNOW REMOVAL,
INC., a Michigan Corporation and GRAND
DIMITRE'S OF EASTPOINTE FAMILY
DINING, a Michigan Corporation

Defendant-Appellees.

Supreme Court No. 159692
Court of Appeals No. 339152
Trial Court No. 2016-1819-NI
Trial Court Judge:
Hon. Edward A. Servitto

**ORAL ARGUMENT
REQUESTED**

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
ON ITS APPLICATION FOR LEAVE TO APPEAL

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SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT SHOULD GRANT LEAVE BECAUSE EMPLOYMENT IS AN IRRELEVANT CONSIDERATION IN DETERMINING WHETHER A CONDITION IS EFFECTIVELY UNAVOIDABLE?

The trial court answered “no.”
The Court of Appeals majority answered “no.”
The Court of Appeals minority answered “yes.”
The Defendant answers “yes.”
The Plaintiff answers “no.”

II. WHETHER THE COURT SHOULD GRANT LEAVE WHERE THERE IS NO MATERIAL QUESTION OF FACT CONCERNING WHETHER THE PARKING LOT CONSTITUTED AN EFFECTIVELY UNAVOIDABLE CONDITION?

The trial court answered “no.”
The Court of Appeals majority answered “no.”
The Court of Appeals minority answered “yes.”
The Defendant answers “yes.”
The Plaintiff answers “no.”

INTRODUCTION

Overview

In the Court's February 7, 2020 order scheduling oral argument on the Application for Leave to Appeal, it directed the parties to address two specific questions:

1. Whether the Plaintiff's employment is a relevant consideration in determining whether a condition is effectively unavoidable; and
2. Whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition.

What follows *infra* is Sage's supplemental brief in response to this Court's questions presented and the rationale for why this Court should grant leave, reverse the trial court and Court of Appeals' orders and remand for the entry of summary disposition in Sage's favor. It is Sage's position that employment is not a relevant consideration in determining whether a condition is effectively unavoidable. Further, Sage's position is that there is no material question of fact that the parking lot at issue was avoidable.

Sage's positions are based upon what has become a tangled mess within the premises liability law in Michigan. In the early 2000's this Court decided that employment was not a proper consideration within the objective open and obvious arithmetic. Its decisions held until recently. What has started to form in the wake of this Court's reasoned decisions is a subjective test to determine whether a claimant's "special circumstances" are enough to make an otherwise open and obvious condition effectively unavoidable. In fact, "special circumstances" is taking the place of "special aspects" when it comes to determining the duty to warn of open and obvious conditions, and this movement is an affront to precedent. The jurisprudence in this area of the law is turning from an objective based discussion to a subjective based inquiry.

This is no clearer than in the context of employment. Recent Court of Appeals decisions have ruled in favor of employees that have subjectively testified and argued that they "must"

encounter open and obvious conditions in order to appear for and perform their job. The subjectivity that is required to make such a ruling is inapposite of this Court's historical directive and the Restatement Second of Torts.

This Court should take note, and indeed, should grant leave in this case to calm the waters and tamp out the eroding tide of subjectivity that started within the Court of Appeals only a few short years ago. This legal question will not relent and will only make for a harder and harsher adjustment if it is not addressed here. Granting leave in this case and restoring the only viable and workable test, the objective test, is critically important to ensuring justice is distributed evenly and fairly among all litigants within the State.

Underlying Facts

Briefly, the facts in this matter are not in dispute and are properly taken in the light most favorable to the Plaintiff-Appellee. On February 21, 2014, the Appellee (also referred to as "Plaintiff") was an employee at a restaurant called "Grand Dimitri's." (Appellant's Appendix, Tab O, Deposition of Plaintiff, pp. 1022a, 1033a). Plaintiff arrived at the restaurant in the early morning hours, after two other employees were able to successfully enter the restaurant. (Appellant's Appendix, Tab O, Deposition of Plaintiff, pp. 1034a, 1037a and 1038a). This fact alone - that Plaintiff was in the course and scope of her employment - has overwhelmingly influenced this case, perhaps to the point where it has been overlooked that others were able to enter the restaurant from the front, alternative entrances without issue. As she attempted to enter the restaurant, she slipped and fell on ice in the subject parking lot that she knew was present and was therefore ruled to be open and obvious by the trial court, an issue that is not on appeal here. (Appellant's Appendix, Tab O, Deposition of Plaintiff, p. 1035a). She also knew the parking lot might be slippery. (Appellant's Appendix, Tab O, Deposition of Plaintiff, p. 1035a) Despite that

knowledge, and despite multiple other options she could have chosen to utilize to avoid the icy parking lot, she attempted to enter the restaurant from one of its three entrances and fell after making the decision to do so. (Appellant's Appendix, Tab Q, Deposition of Debra Buck, p. 1228a).

For a more complete recitation of facts, Sage's incorporates the summary of same from its Application for Leave to Appeal at pages 3-5.

Procedural History

At the close of discovery Sage's filed a Motion for Summary Disposition on the issues of possession and control and the open and obvious doctrine.¹ (Appellant's Appendix, Tab M, Motion for Summary Disposition, p. 848a). The trial court denied Sage's Motion for Summary Disposition, finding that the ice that covered the parking lot was open and obvious, but also finding that it contained special aspects because it was effectively unavoidable. (Appellant's Appendix, Tab E, Trial Court Order, p. 20a, and Appellant's Appendix, Tab F, Trial Court Transcript, 21a). Sage's filed an application for leave to appeal to the Court of Appeals, and that application was granted. (Appellant's Appendix, Tab I, Sage's Application for Leave to Appeal, p. 100a) In a two-to-one decision, the Court of Appeals affirmed the denial of summary disposition. *Living's v Sage's Investment Group, LLC, et al.*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2016, COA Docket No. 339152 (SHAPIRO, JJ., concurring; TUKEL, P.J., concurring in part and dissenting in part). (Appellant's Appendix, Tab A, Majority Opinion, p. 1a, Appellant's Appendix, Tab B, Concurring Opinion, p. 12a, Appellant's Appendix, Tab C, Opinion Concurring in part and Dissenting in part, p. 14a). On the basis of what it deemed to be a material misunderstanding of the record on appeal, Sage's filed a motion for reconsideration in the Court of Appeals and said motion was denied, again in a two-to-one decision. (Appellant's Appendix,

¹ The dispositive arguments raised as to possession and control are not at issue in this appeal.

Tab D, Court of Appeals Order Denying Sage’s Motion for Reconsideration, p. 19a, and Appellant’s Appendix, Tab L, Sage’s Motion for Reconsideration in the Court of Appeals, p. 756a). Sage’s then filed the present application for leave to appeal to this Court. (Appellant’s Appendix, Tab G, Sage’s Application for Leave to Appeal to the Michigan Supreme Court, p. 41a)

For a more complete recitation of the procedural history of this matter, Sage’s incorporates the summary of same from its Application for Leave to Appeal at pages 52a - 54a.

Supplemental Statement for the Need for Leave to be Granted

Premises liability is a staple area of personal injury litigation in Michigan and has been for decades. This Court’s opinions span generations and develop the common law that is cited and discussed in detail below. This case is unique in certain respects because it intersects with injuries that occur in the course and scope of employment. In that intersection, this Court has previously upheld common law premises liability tenets in a number of decisions.

“Courts decide legal questions that arise in the cases that come before [them] according to the rule of law.” *HHS v Manke*, ___ Mich ___ (VIVIANO, J., concurring) (MSC Docket No. 161394, issued June 5, 2020). Recently, however, the Court of Appeals has not been deciding cases based upon the rule of law before it in this arena, and instead is permitting an erosion to the law. Despite this Court’s recent request for supplemental briefing, this matter is not the most recent case where that erosion has occurred. On May 7, 2020, the Court of Appeals issued an opinion in the matter of *Kassof v Page Avenue, et al*, unpublished opinion per curiam of the Court of Appeals, decided May 7, 2020 (COA Docket No. 347509) (CAMERON, P.J., SHAPIRO AND LETICA, JJ.). (Appellant’s Appendix, Tab VV, *Kassof* Court of Appeals decision, p. 1372a) In that case, the plaintiff was walking during her employment from one building at a medical campus to another when she slipped on snow and ice, fell, and injured herself. The defendant filed a motion for

summary disposition claiming that the icy condition was open and obvious and that the plaintiff had at least one option available to her to avoid the ice. The trial court denied the defendant's motion. The Court of Appeals affirmed but took specific note of this Court's grant of oral argument on the questions presented and addressed in this supplemental brief. ("The Supreme Court has granted oral argument on the question whether the need to enter one's workplace makes encountering a hazard effectively unavoidable.") The Court of Appeals' nod to this Court's decision is recognition that this is an issue that both arises frequently (as is evident by this case and the *Kassof* case both being on appeal currently, and the recent decision in the Court of Appeals decision in *Lymon*, for example) and is in need of clarification.

The need for clarification in this area is therefore based upon both the regularity in which this issue arises and the confusion that exists surrounding the correct, common law outcome. Therefore, this case provides an opportunity for this Court to address the Court of Appeals' decisions that depart from its opinions in *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) and restore the rule of law, as well as fairness and predictability within this premises liability arena.

Summary of Argument as to Question 1 - Employment is not a relevant consideration in determining whether a condition is effectively unavoidable.

In no less than 25 cases, either this Court or the Court of Appeals has issued opinions that touch in some respect on employment-related slip and fall accidents. A large swath of those opinions is unpublished, but the rule of law that can be derived from Michigan jurisprudence on this issue is that employment is not a proper consideration for determining whether a condition is effectively unavoidable. In fact, only one, stray published Court of Appeals decision has ever found that employment should be considered in determining whether a condition is effectively unavoidable, *Lymon v Freeman*, 314 Mich App 746; 887 NW2d 456 (2016) (SHAPIRO, P.J.,

O'CONNELL AND BORRELLO, JJ.), and that case is clearly distinguishable from the particular facts of this case.

Work considerations are wholly irrelevant when determining whether a condition is effectively unavoidable for five primary reasons. First, as this Court has previously noted, allowing consideration of employment into the duty analysis required by the open and obvious doctrine would judicially create a hybrid status on land that changes the duty owed to a business invitee, a change that is not based upon either Michigan common law or the *c. See, Hoffner, supra; Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2001) (BANDSTRA, C.J., SAAD, P.J., AND WHITBECK, J.). Second, while the Restatement Second of Torts is a guidepost for Michigan premises liability, it has never wholeheartedly endorsed it, and has indirectly rejected many of the illustrations contained within the Comments of Section 343A. Third, considering employment when weighing whether a condition is effectively unavoidable would mutate what has always been an *a priori* objective analysis into a subjective analysis of an employee's state of mind as to her reason for being on the premises, which leads to an unpredictable resolution to a legal question. *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384, n. 2; *see also, Hoffner, supra*, at 461; and *Bragan v Symanzik*, 263 Mich App 324; 687 NW2d 881 (2004) (MURPHY, P.J., JANSEN AND COOPER, JJ.). Fourth, injuries that occur while at work have historically been resolved through the Legislature's enactment of the Workers' Disability Compensation Act ("WDCA"), MCL 418.101 *et seq.*, as the Plaintiff filed and pursued here, and not through civil suit. Fifth, and finally, this Court has already ruled twice that employment is not a proper consideration when undertaking a special aspects analysis and the rule of stare decisis requires a consistent ruling here. *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

Summary of Argument as to Question 2 – There is no question of fact that the ice in the parking lot was effectively avoidable.

In over 300 cases, this Court and the Court of Appeals have engaged in determining whether an open and obvious condition was effectively unavoidable. In doing so, the jurisprudence created by *Lugo* and that has developed over time has assessed whether the claimant made a choice, among others available, to encounter the open and obvious condition on the land. *Id.*; see also, *Hoffner, supra*; *Bullard v Oakwood Annapolis Hospital*, 308 Mich App 403; 864 NW2d 591 (2014) (RIORDAN, P.J., SAAD AND TALBOT, JJ.); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002) (MARKEY, P.J., NEFF AND SAAD, JJ.). Where a claimant makes the choice to encounter an open and obvious condition but has other options available to avoid her, the party in possession and control cannot be held liable. Consistent with Michigan jurisprudence, Sage’s has demonstrated that Plaintiff could have made a number of other choices to avoid the open and obvious condition, yet failed to do so, thereby absolving Sage’s of liability.

ARGUMENT

I. THE PLAINTIFF’S EMPLOYMENT IS NOT A RELEVANT CONSIDERATION IN DETERMINING WHETHER A CONDITION IS EFFECTIVELY UNAVOIDABLE.

Introduction to the first question presented

Whether the Plaintiff is employed at a location where she ultimately slips and falls is a subjective “special circumstance,” not an objective “special aspect,” and is irrelevant to determining whether the condition that caused her to fall was effectively unavoidable. As will be addressed first by Sage’s *infra*, this Court has previously examined a change to the liability landscape for those that have a legitimate business or contractual interest and specifically addressed whether the duty owed to them should be expanded. *Hoffner, supra*. Despite this, in

the present case the Court of Appeals' majority opinion does not reflect this Court's prior weighing of this issue and, therefore, has denied not only Sage's but all future litigants the ability to understand why it came to the opposite conclusion it did. Fundamentally, that leads to an unfair and unreasoned result.

The more reasoned approach and the one that has been followed consistently throughout history is to examine the rule of law and apply it to the facts so as to assure a consistent ruling. In this case, that requires a full-throated discussion of the *Hoffner* decision authored by this Court less than one decade ago and, more generally, the Restatement Second of Torts §343A. As this Court previously noted in *Hoffner*, permitting a "legitimate business or contractual" interest to seep into the discussion of whether a condition is effectively unavoidable would essentially create a fourth status on the land, adding to those that already exist: trespasser, licensee and business invitee. However, expanding the duty owed to a fourth type of visitor to land would reshape premises liability and would serve as a significant departure from the Second Restatement upon which much of our jurisprudence in this area is unofficially founded. In so doing, this Court would implement a system where even the most trivial of subjective business interests combined with a hazardous condition would impose liability. In effect and for all practical purposes, this would make a landowner the insurer for injuries that occur on their land for this new class of persons. Such a result is inconsistent with this Court's prior rulings and those of the Court of Appeals and therefore, must be avoided.

This is not to say that the Restatement Second of Torts does not have its limitations in Michigan jurisprudence. Arguments have historically been made to expand liability in this area consistent with the illustrations contained within the Comments of § 343A. Those arguments have systemically been rejected and have not become a part of this State's jurisprudence or common

law. Therefore, while the Plaintiff will cite to illustration five in § 343A as her primary source, this Court should affirm the fact that our Courts have never extended premises liability law to include the illustrations contained within the Restatement. Those illustrations, like the one the Plaintiff will seek to enforce here, are all subjective inquiries and deal with situations where an injured person could cite to “special circumstances” such as distractions due to signs in a store and boxes she is carrying. The Courts’ prior treatment of these subjective excuses is proof positive that the Plaintiff’s arguments here present a deviation from Michigan common law that is a step too far.

The reason why Plaintiffs’ desired outcome is a step too far is contained within Sage’s third argument. The illustration that the Plaintiff will argue for here is a request to consider her “special circumstances.” Thus, the Plaintiff is seeking the implementation of a subjective standard to be used in ascertaining whether a condition contains special aspects. The only time the text of the Restatement permits utilizing a subjective analysis is when there is an injury upon public land or utilities. See Restat. 2d of Torts, § 343A(2). As all parties agree, the Plaintiff here was entering private land owned by Sage’s, and further, Michigan Courts have never embraced the “special circumstances” that bring someone to the land. Accordingly, after determining a visitor’s status upon the land, considerations for the purpose upon which Plaintiff was present is irrelevant when determining the duty owed to her.

Thereafter, Sage’s will argue that Michigan jurisprudence has always viewed the determination of whether a condition contains special aspects as narrow, limited, but most importantly, has made the inquiry an entirely objective process. Taking the subjective purpose why a person was “required” to encounter a potentially dangerous condition on land is not permitted under this Court’s ruling in *Lugo*, and further, is contrary to nearly 20 or more years of

precedent. Furthermore, maintaining the objectivity requirement is the critical lynchpin in keeping premises liability law tethered to the reasonable person standard upon which it is based. *Levinson v Trotsky*, 199 Mich App 110; 500 NW2d 762 (1993) (SHEPARD, P.J., WEAVER AND TAYLOR, JJ.). (“We decline to make plaintiff’s subjective beliefs part and parcel of this objective standard as plaintiff would prefer, because doing so would result in a subjective standard and not an objective ‘reasonable person’ standard.”)

Fourth, Sage’s will argue that subjective requirements of employment have no business being discussed within the confines of the effectively unavoidable analysis because traditionally, and legislatively, those considerations are accounted for under the Workers’ Disability Compensation Act. Here, both in arguments made by the Plaintiff but also by, for example, the concurring Court of Appeals’ decision, it has been suggested that it offends “substantive justice” if Michigan jurisprudence does not consider the needs of employment when considering whether a condition is effectively unavoidable. *Livingston, supra*. (SHAPIRO, JJ., concurring) (Appellant’s Appendix, Tab B, p. 12a) What those arguments fail to consider is that there is a remedy at law for an employee who subjectively believes she is required to encounter a perceived dangerous condition because she must report to work – the WDCA. Allowing that subjective perception of the apparent absolute need to encounter a dangerous condition regardless of the risks of doing so to leech the reasonable person standard of premises liability is a judicial expansion of the protections the Legislature has already considered and implemented.

Fifth and finally, Sage’s will argue for the need to adhere to *stare decisis*. The ideal that all persons respect this Court’s prior decisions is paramount where the decisions that provide the greatest insight into what result should occur here were made within the past two decades. If we are unable to adhere to our most recent precedent as our landmark for future cases, we will have

done a disservice to that which as attorneys we have all sworn to uphold. And while modifications are certainly permissible where precedent has been wrongly decided, neither the Plaintiff nor the Court of Appeals has provided any argument as to why cases such as *Lugo*, *Hoffner*, and *Perkoviq* should be thrown out in favor of a subjective test that has consistently been rebuffed not only by this Court but also the Court of Appeals.

A. This Court has Previously Examined and Refused to Include Employment Considerations into the Effectively Unavoidable Analysis

A number of important cases have been decided by this Court that should guide the decision in this case. The Plaintiff has failed to provide an analysis of those cases to explain why this Court's prior decisions were wrongly decided. Perhaps the most important of those cases is *Hoffner*.

In *Hoffner*, the plaintiff argued that the icy condition she encountered was different than other icy conditions because she had a contractual right to enter the defendant's place of business. Essentially, she argued that her "special circumstances" should be taken into consideration, i.e., her contractual right to use the premises, should be part of the analysis used by Michigan court's when determining whether a condition is open and obvious. This Court responded *directly* to the "special circumstances" argument that the plaintiff proposed there, and the Plaintiff proposes here:

We reject these conclusions permitting recovery for a typical hazard confronted under ordinary circumstances as inconsistent with the law of this state regarding the duty owed to invitees and premises owners' resultant liability for injuries sustained by invitees. The law of premises liability in Michigan provides that the duty owed to an invitee applies to *any business invitee*, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees. This Court has stated that the crucial question when determining invitee status is the commercial nature of the relationship between the premises owner and the other party[.]

The Court did this for a very specific reason: allowing subjective circumstances to invade the open and obvious/special aspects opens the door to providing an even more heightened duty than the common law ever intended to bestow upon an invitee. Therefore, *Hoffner* stands for the proposition that we must adhere to our common law classifications of visitors upon land and the respective duties they are owed:

Perhaps what is most troubling regarding the theory of liability advanced by plaintiff is that it would result, if upheld, in an expansion of liability by imposing a new, *greater* duty than that already owed to invitees. By providing that a simple business interest is sufficient to constitute an *unquestionable necessity* to enter a business, thereby making any intermediate hazard "unavoidable," plaintiff's proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship. Such a rule would transform the very limited exception for dangerous, effectively unavoidable conditions into a broad exception covering nearly all conditions existing on premises where business is conducted. Such a rule would completely redefine the duty owed to invitees, allowing the exception to swallow the rule. This proposed rule appears to be an erroneous extrapolation of the basic principle that invitees are owed a greater duty of care than licensees or trespassers. Simply put, Michigan caselaw does not support providing special protection to those invitees who have paid memberships or another existing relationship to the businesses or institutions that they frequent above and beyond that owed to any other type of invitee. Neither possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard. To conclude otherwise would impermissibly shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*.

Id., at pp. 469-471 (emphasis in original). These statements made by this Court in *Hoffner* are an unequivocal refusal to expand premises liability to include the type of "special circumstances" that the Plaintiff desires.

Examining the reasons why this Court so firmly held this belief requires a review of the case law and purpose behind the separate classifications of persons who enter upon land. “Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), citing, *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987). These classifications have not been abandoned and they designate what duty is owed by a possessor of land. *Id.* (citing, *Reetz v Tipit, Inc*, 151 Mich App 150; 390 NW2d 653 (1986) (BEASLEY, P.J., V.J. BRENNAN, AND CYNAR, J.).

Of significance here is the classification or status as an invitee. This status was discussed in detail in this Court’s decision in *Stitt*. There, the Court recognized that its “prior decisions have proven to be less than clear in defining the precise circumstances under which a sufficient invitation has been extended to a visitor to confer ‘invitee’ status.” *Id.* This Court noted that some of its decisions relied upon a “commercial business purpose” to ascertain whether a person is a business invitee. *Id.* (citing, *Perl v Cohodas, Peterson, Paoli, Nast Co.*, 295 Mich 325; 294 NW 697 (1940); *Diefenbach v Great Atlantic & Pacific Tea Co*, 280 Mich 507; 273 NW 783 (1937); *Sink v Grand Trunk Western R Co.*, 227 Mich 21; 198 NW 238 (1924)). It contrasted those cases, however, with others that suggested that the “broad language... of the Restatement’s ‘public invitee’ definition” was the appropriate manner to analyze the issue. *Id.* (citing, *Polston v S Kresge Co*, 324 Mich 575; 37 NW2d 638 (1949); *Sheldon v Flint & P M R Co*, 59 Mich 172; 26 NW 507 (1886); *Hargreaves v Deacon*, 25 Mich 1 (1872)). Reconciling those divergent cases, this Court harmonized them by concluding “the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner’s commercial business interests.” *Id.* at pp. 603-604. Stated differently, “[i]t is

the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies the imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees." *Id.* at 604.

It is important to highlight that of all the classifications available under common law, business invitees are entitled to the highest duty of care. *Id.* The payoff for that higher level of care is the economic benefit the landowner enjoys by inviting consumers onto his land. *Id.* Therefore, well before this case came to this Court, it had consummated a tradeoff for a heightened duty in exchange for commercial conduct occurring on the landowner's property. It stands to reason that commercial conduct includes the subjective need to work. In fact, any number of cases (published and unpublished) have found that such visitors to land are entitled to invitee status. *See, e.g., Perkoviq, supra; Joyce, supra; Knoll v GMC*, unpublished opinion per curiam of the Court of Appeals, Docket No. 245387 (decided March 16, 2004) (JANSEN, P.J., MARKEY AND GAGE, JJ.); *Slater v Marvin Brandle*, unpublished opinion per curiam of the Court of Appeals, Docket No. 260867 (decided June 23, 2005) (O'CONNELL, P.J., SCHUETTE AND BORRELLO, JJ.); *Wozniak v Venture Industries*, unpublished opinion per curiam of the Court of Appeals, Docket No. 274026 (decided May 31, 2007) (COOPER, P.J., MURPHY AND NEFF, JJ.); *Nazal v Autoalliance Int'l, Inc.*, unpublished opinion per curiam of the Court of Appeals, Docket No. 306690 (decided February 26, 2013) (RIORDAN, P.J., HOEKSTRA AND O'CONNELL, JJ.); *Barch v Ryder Transportation Services*, unpublished opinion per curiam of the Court of Appeals, Docket No. 327914 (decided October 20, 2016) (K.F. KELLY, P.J., O'CONNELL AND BOONSTRA, JJ.).² (Appellant's Appendix,

² Pursuant to MCR 7.215(C)(1), Sage's is citing these and other unpublished opinions as they directly reflect the jurisprudence of this State and establish that considerations of employment, A) are considered when determining status upon land and offer an employee the highest standard of care possible within our State, and B) is not considered during a discussion of whether an open and obvious condition contains special aspects. There are limited published cases that pertain to the questions presented by the Court, and therefore while understandably not precedentially binding, they are illustrative of the harmony both this Court and the Court of Appeals have used when presented with this issue in the past.

Knoll Court of Appeals decision, Tab T, p. 1266a, *Slater* Court of Appeals decision, Tab V, p. 1275a, *Wozniak* Court of Appeals decision, Tab EE, p. 1300a, *Nazal* Court of Appeals decision, Tab QQ, p. 1356a, and *Barch* Court of Appeals decision, Tab UU, p. 1369a)

Accordingly, the Plaintiff in this matter has already been privy to the highest common law duty available. By seeking an even more heightened duty, the Plaintiff is ignoring years of precedent, and hoping that this Court will ignore the fact that it has already horse-traded the higher standard for economic gain. She does this in hopes that this Court will create for her something that has never before existed: a new, uber-heightened duty based upon a new, never-before seen status that applies to her special circumstances. The fact that neither this Court nor the common law Courts before it created the uber-heightened duty Plaintiff seeks should speak volumes as to why the *Hoffner* Court found such a radical departure troubling.

In fact, the type of change that the Plaintiff and the Court of Appeals seek in this matter is troubling because it is forcing a departure from what has been the standard that has most often guided the State's jurisprudence in premises liability: the Restatement Second of Torts. While it is true that this Court "has never adopted wholesale the Restatement of Torts, it has consistently relied on the principles in the Restatement to develop Michigan's law of premises liability." *Finazzo v Fire Equip Co*, 323 Mich App 620, 682; 918 NW2d 200 (2018) (SERVITTO, P.J., MARKEY AND O'CONNELL, JJ.). The most notable example of this is found in *Lugo, supra*, where this Court relied upon sections 343 and 343A of the Second Restatement of Torts to clarify the application of the open and obvious doctrine within the realm of premises liability:

Accordingly, the open and obvious doctrine should not be viewed as some type of "exception" to the duty generally owed invitees, but rather as an integral part of the definition of that duty. This Court further elaborated in *Bertrand*:

When §§ 343 and 343A [of the Restatement Torts, 2d are read together, the rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions.

In sum, 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.

Id. at pp. 516-517 (select internal citations omitted). From this Court’s adherence to the Restatement in *Lugo*, and generally the common law of this State, it established the principles that have been used to ensure stability in this arena. Departing from these principles would be troubling because it would create a legally fictitious heightened duty of care that is based solely on the subjective nature of the Plaintiff’s “special circumstances” that brought her to the premises. This has never been done within this state and is not advocated for by the Restatement.

In fact, the only time the Restatement directly advocates for such a radical departure from Michigan common law is contained within §343A(2):

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of **public land**, or of the facilities of a **public utility**, is a factor of importance indicating that the harm should be anticipated.

2 Restatement of Torts 2d, § 343A (emphasis added). In subsection 2 of §343A, the only time such a subjective consideration could be made is when the invitee is entering upon *public land* or the facilities of a *public utility*. *Id.* However, the parties admit that the Plaintiff here was confronted

with a condition upon *private land* owned by Sage's. Accordingly, the primary source material for this State's premises liability jurisprudence also does not permit consideration of the Plaintiff's subjective need to enter upon the land.

An interesting takeaway from subsection 2 of §343A is that the type of land upon which an invitee is traversing is important to its determination of whether a condition is open and obvious. **Michigan law has never accepted the idea that the commercial purpose of the land has any influence over whether the conditions upon it are open and obvious.** Instead, this Court has focused upon the condition itself, *a priori*, to determine whether it is open and obvious, and the condition alone, to ascertain whether it contains special aspects. Thus, when the Plaintiff inevitably cites to the comments of §343A for the argument that the Restatement has considered the questions raised by this Court, it will be at the expense of this Court's common law adherence to the objective nature of the condition upon the land in guiding its decisions. *See, e.g., Lugo, supra.* Instead of special aspects, the Plaintiff proffers the theory that her "special circumstances" warrant recovery. The Plaintiff's aim will be to undermine the objectivity that provides for predictability and consistency. Plaintiff will justify this by suggesting the results are fair and the "special circumstances" she is championing are small compared to the benefits reaped (by her) if the door is opened just a crack to allow for *her* analysis. This is a dangerous, slippery slope and this case presents a threshold demarcated as one where, if this Court steps over that line, there is no return to the predictability and consistency the objective analysis provides.

The issues raised by altering our objective standard to Plaintiff's "special circumstances" are discussed in more detail *infra*. The importance to this section is that this Court has analyzed taking the step the Plaintiff requests, in *Lugo*, in *Perokviq*, in *Joyce*, in *Hoffner*, and in literally all of the other premises liability cases that have analyzed the open and obvious doctrine. This Court

has never looked beyond the condition to determine whether it was open and obvious and whether it contained special aspects. There is no need to alter that standard now, 19 years after *Lugo*, a case that studied our common law and came to the reasoned solution that a person, using reasonable care and caution, does not need to be warned and guided around those things of which she knows and can plainly see. Accordingly, in full harmony with *Lugo* and all the cases that have come since its release, this Court should grant leave and remand to the trial court for entry of summary disposition in favor of Sage's.

B. The Restatement Comments Do Not Provide Justification to Redefine Michigan Common Law

The worst kept secret in this appeal is illustration 5 contained within the Comments of section 343A of the Restatement Second of Torts - an illustration that Plaintiff will likely discuss when arguing her "special circumstances" should lead this Court to affirm the Court of Appeals:

5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

At first blush, the illustration does appear to provide cover for the Plaintiff's position. Yet, upon examination it is clear that Michigan has never followed the illustrations and, therefore, is not compelled to do so here. On the contrary, Michigan law stands for the opposite proposition of each of the illustrations contained within section 343A.

Illustration 2 of section 343A of the Restatement Second of Torts states as follows:

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

If illustration 2 sounds familiar, that is likely because it closely resembles the Court of Appeals decision in *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007) (JANSEN, P.J., NEFF AND HOEKSTRA, JJ.). In *Kennedy*, the plaintiff fell in the defendant's grocery store on a crushed grape. The plaintiff argued after filing suit that she was distracted by displays and merchandise in the store, and therefore did not see the crushed grape. The Court of Appeals provided a clear response to the plaintiff's argument:

Like plaintiff in the present case, who argues that he was distracted by the displays and merchandise in defendants' supermarket, the plaintiff in *Lugo* argued that she did not notice or observe a potentially hazardous pothole because she was "distract[ed]" by moving vehicles in the parking lot. The *Lugo* Court ruled that the relevant inquiry was not merely whether the plaintiff was distracted, but whether there was anything "unusual" about the plaintiff's distraction that would preclude application of the open and obvious danger doctrine. The Court concluded:

While plaintiff argues that moving vehicles in the parking lot were a distraction, there is certainly nothing "unusual" about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine.

[P]otholes in pavement are an "everyday occurrence" that ordinarily should be observed by a reasonably prudent person. Accordingly, in light of plaintiff's failure to show special aspects of the pothole at issue, it did not pose an unreasonable risk to her.

In light of *Lugo*, we conclude that there was nothing unusual about plaintiff's purported distraction; nor is there anything unusual about spilled grapes or grape residue on a supermarket floor.

Id. at p. 717 (internal citations omitted). Accordingly, this Court has directly rejected the rationale utilized in section 343A, illustration 2.

The same problems arise with illustration 3 of section 343A of the Second Restatement of Torts:

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

Illustration 3 is similar to *Salinas v Omar's Mexican Restaurant, Inc*, unpublished opinion per curiam of the Court of Appeals, Docket No. 263845 (decided December 20, 2005) (OWENS, P.J., SAAD AND FORT HOOD, JJ.). (Appellant's Appendix, Tab Z, *Salinas* Court of Appeals decision, p. 1286a). In *Salinas*, the plaintiff entered the defendant's restaurant to purchase take-out food. To enter the restaurant, he ascended one step. As he was leaving the restaurant, he opened the door, stepped to avoid three other people and fell, severely injuring his ankle. The record revealed that "plaintiff acknowledged that he was distracted by other patrons, and simply forgot the step existed." *Id.* The trial court granted summary disposition and the Court of Appeals affirmed. Because the plaintiff "simply forgot" the step existed, the Court held that he "failed to demonstrate existence of any special aspect that made the step unreasonably dangerous in spite of its open and obvious nature." *Id.*

Finally, the same holds true for illustration 4 of the Second Restatement of Torts section 343A:

4. Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles which obstruct her vision, and does not see the spout. She trips over it, and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.

Illustration 4 is similar to *Miller v S M Hong Assocs*, unpublished opinion per curiam of the Court of Appeals, Docket No. 302016 (decided May 10, 2012) (M.J. KELLY, P.J., FITZGERALD AND DONOFRIO, JJ.). (Appellant's Appendix, Tab PP, *Miller* Court of Appeals decision, p. 1352a). In

Miller, the plaintiff was at the defendant's laundromat and carrying a basket of clothes. As he made his way through the laundromat, the plaintiff tripped over a slightly raised drain cover and fell. "The plaintiff testified that he was holding the laundry basket straight out in front of his body, slightly above hip level, and did not see the drain cover before he fell." *Id.* The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed. The Court of Appeals discussed the plaintiff's inability to see the condition because of what he was carrying and responded as follows:

Plaintiff argues that *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), provides the proper test to be applied in this case, which is "not . . . whether plaintiff should have known that [the condition] was hazardous, but . . . whether a reasonable person in his position would foresee the danger." To that end, plaintiff contends that because most laundromat customers carry baskets of laundry in front of their bodies, obstructing the view of the floor, the hazard was not open and obvious to plaintiff because he was carrying a laundry basket and could not see the hazard. Plaintiff's argument, rather than employing an objective test, improperly focuses on his subjective knowledge of the condition. In determining whether a condition is open and obvious, however, courts utilize an objective standard and consider the objective condition of the premises rather than the subjective degree of care used by the plaintiff. Applying an objective test, a reasonable person in plaintiff's position would have looked where he was walking, even while carrying a laundry basket, and would have been able to discover the drain cover upon casual inspection. In short, to rule that the hazard was not open and obvious because plaintiff did not see it because of circumstances unique to him would convert the open and obvious test from objective to subjective and run counter to established precedent.

Id. (some internal citations omitted)

By now it is clear that the illustrations within section 343A of the Restatement Second of Torts are not adhered to by Michigan Courts because they are incongruent with Michigan common law. Thus, should Plaintiff argue for implementation of illustration 5, she will need to explain why it, and not the above illustrations, warrant such a departure.

Certainly, it could (and likely will) be argued that each illustration should be left to its own merits. Assuming that to be true, that argument leaves each case to its own specific facts; however, that is precisely what the Plaintiff does not want to happen here. If this Court were to review the facts here, it would note that the Plaintiff had several options (other than to forego her employment to avoid the icy parking lot, unlike employee C had in illustration 5). Those options are discussed in response to the Court's second question, *infra*.

But also, illustration 5 encapsulates the problem with *all* of the illustrations provided: they seek the implementation of a subjective standard just like the Plaintiff is attempting to do here. That is problematic because it does not correspond to Michigan's common law application of the open and obvious doctrine. In fact, this Court has gone out of its way many, *many* times to explain that the open and obvious inquiry is objective and not subjective. Therefore, Michigan common law has rejected each of the Restatement Second of Torts' illustrations in section 343A because they do not adhere to this basic tenet of premises liability law in Michigan. As is discussed below in section C, the illustrations and the Plaintiff's arguments must be rejected because they would open the flood gates and make premises owners the insurers of their invitees if Plaintiff's subjective test was adopted. Michigan common law precludes the Plaintiff from succeeding in her argument because common sense says that it is an impractical test that would bog down the Courts and force inconsistent rulings based upon "special circumstances" that are impossible to measure.

C. Assessing Whether a Premises Condition is Open and Obvious and Contains Special Aspects is an Objective Analysis that must be Performed *A Priori*

The parties in this case have waged a battle on whether a subjective or objective test is appropriate when determining whether a condition is effectively unavoidable. This is a battle that has been waged on many fronts in many other venues throughout time. History and precedent

again point this Court to the more-reasoned course, particularly as it relates to premises liability law, and a ruling in favor of Sage's.

This Court in *Radtko v Everett*, 442 Mich 368; 501 NW2d 155 (1993), discussed at length the reasonable person standard and how it applied in the employment context, specifically as it related to sexual discrimination. There the Court, while obviously addressing a different area of the law, nonetheless weighed the benefits of and hinderances to using an objective standard. Prior to this Court's review of the matter, the Court of Appeals implemented a "reasonable woman" standard in the context of workplace discrimination. Plaintiff and the Court of Appeals reasoned "that a standard which views harassing conduct from the 'reasonable person' perspective has the tendency to be male-biased and runs the risk of reinforcing the prevailing level of discrimination which the state Civil Rights Act and Title VII were designed to eliminate." *Id.* at pp. 388-389.

This Court disagreed with that analysis. In doing so, this Court provided a number of reasons why an objective standard is preferable. It first noted that the Michigan Civil Rights Act requires the use of an objective standard and found that if the Legislature had intended a different standard, it would have indicated as such. *Id.* at pp. 389-390. This Court did not stop there, however, stating that "the reasonable person standard should be utilized because it is sufficiently flexible to incorporate gender differences." *Id.* at p. 390. It also noted that "the 'chief advantage of this standard' is that it enables triers of fact 'to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being.'" *Id.* at pp. 390-391 (citing 2 Restatement Torts, 2d., §283, comment c, p. 13). Ultimately, and perhaps most persuasively, this Court stated as follows:

Furthermore, the reasonable person standard examines the totality of the circumstances to ensure a fair result. *Highlander v K F C Nat'l Management Co.*, 805 F2d 644, 650 (CA 6, 1986); *Babcock v Frank*, 783 F Supp 800, 808 (SD NY, 1992). Hence, the reasonable

person standard is sufficiently flexible to incorporate gender as one factor, without destroying the vital stability provided by uniform standards of conduct.

Id. at p. 391.

The Court then juxtaposed that position with the subjective standard that was proffered by the plaintiff, finding both that a subjective standard “places undue emphasis on gender and the particular plaintiff” and that it was also “clearly contrary to the gender-neutral principles underpinning the Michigan Civil Rights Act.” *Id.* at pp. 392-393.

This Court in *Lugo* embraced the reasonable person standard, i.e., an objective standard, for the determination of whether a condition is open and obvious. *Lugo, supra* at p. 524 (“Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in ‘open and obvious’ cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.”); *see also, Hoffner, supra* at 461 (“Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person of ordinary intelligence would have discovered it upon casual inspection. This is an *objective standard*, calling for an examination of ‘the objective nature of the condition of the premises at issue.’”). Therefore, what is clear is that heretofore, premises liability law has been based upon the reasonable person standard and objective.³

The Plaintiff is seeking a departure within premises liability law from an objective standard and wants the future focus of this and other Courts to be subjective, and reliant on her “special circumstances” theory. Plaintiff asked both the trial court and Court of Appeals to rule in her favor because she subjectively believed that she had to go to work or park in certain areas or use certain

³ While it does not bare the weight of a statute, the Restatement Second of Torts §343A also recognizes that the determination of whether a condition is open and obvious is inherently objective. *See*, 2 Restatement of Torts 2d §343A, Comment on Subsection (1), b. (“‘Obvious’ means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.”).

doors.⁴ These arguments seek precisely what this Court has refused to permit previously. By suggesting that the Court must take her “special circumstances” into account, the Plaintiff is asking it to set in stone a subjective standard. Under a subjective standard, this Court and all of premises liability law would lose the flexibility that is provided by an objective standard. It would also lose the stability that is promoted by uniform standards of conduct, something this Court has supported. *Radtke, supra* at p. 391. In fact, making “plaintiff’s subjective beliefs part and parcel of this objective standard as plaintiff would prefer... would result in a subjective standard” and therefore would depart from the common law preference of a more easily applied and stable objective standard. *Levinson, supra*.

Plaintiff’s reference to her subjective need to encounter the parking lot (i.e., her “special circumstances”) is also an attempt to subjectively change the temporal perspective required for reviewing whether a condition is open and obvious. As *Lugo* explained, “it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case.” *Lugo, supra* at p. 518, n. 2. Here, Plaintiff’s approach is to suggest that the condition was open and obvious but declare that special aspects existed because she *had* to go to work. Not only is that an obviously subjective standard as discussed above, but it provides an excuse for why she got out of her car and attempted to walk across the parking lot. Any excuse as to why a plaintiff encountered a potentially dangerous condition is not analyzed *a priori*. Indeed, looking back at why a particular plaintiff acted as she did is a retrospective analysis that *Lugo* specifically cautions against. *Id.* Thus, an *a priori* analysis does not include consideration of what “had” to be done or a plaintiff’s “special circumstances”,

⁴ There is no evidence in the record to suggest Plaintiff would have been terminated or other adverse employment action would have been taken had she, for example, gone in the front door like two of her co-workers did on the day in question. In fact, there is evidence to the contrary. (Appellant’s Appendix, Tab P, deposition of Shkoukani, p. 1178a)

but instead inquiries into whether there were options available to avoid the dangerous condition prior to an injury occurring.

By maintaining the proper perspective, the intent of the special aspects exceptions to the open and obvious danger doctrine remains as intended: narrow and limited. *Bullard, supra; see also, Hoffner, supra* (citing, *Lugo, supra* at 519) (“It bears repeating that exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited, extreme situation.*”) (emphasis in original). Thus, when one looks prospectively at what a plaintiff can do, the standard remains objective and narrow to the extent that, in an extreme situation where she has no alternative option but to encounter the condition upon the land, liability will attach.

Given the above precedent, the various considerations required by the open and obvious doctrine clearly remain objective. Injecting Plaintiff’s employment as a consideration removes the objectivity in favor of a subjective standard that is unstable, unpredictable, difficult for the Courts to manage and inconsistent with both the common law and the Restatement Second of Torts. Thus, as this Court has historically done, the open and obvious doctrine should remain objective and any subjective considerations must be avoided.

D. Employment Considerations are Best Left to the Workers’ Compensation System

By asking the parties whether Plaintiff’s employment is a relevant consideration in this matter, the Court has perhaps unintentionally inquired whether employees are in need of additional protections when their path to work allegedly contains an unavoidable condition. By Legislative action, employees already have a right to recover under the WDCA. MCL 418.101, *et seq.* Therefore, when an employee is injured approaching her place of employment, special consideration is *already* given to her and a right to recover for being unable to avoid a dangerous condition is available.

Viewed in this manner, the question here is not whether the Plaintiff's employment should be a consideration in premises liability, but whether, under the circumstances, an employee should be given an expectation to a heightened level of care and, concomitantly, a separate cause of action upon which she can prevail that is in addition to the one she can present pursuant to the WDCA. Sage's is of the opinion that the Legislature has already provided an adequate avenue of recovery and, therefore, there is no need to change the current model.

Plaintiff, the majority opinion in the Court of Appeals and the Concurring Opinion in the Court of Appeals all argue that the condition was effectively unavoidable because the Plaintiff *had* to go to work. Removing for a moment the subjectivity of that argument, what all three seek to impose is a right to recover simply on the basis of the Plaintiff's employment, which all agree is the only reason she *had* to get out of her car. Their argument is one based upon fairness, as has been addressed in Sage's briefs previously. The evocation of sympathy for someone caught in predicament like that, especially one that is an hourly employee, is nevertheless one that is worth noting.

The recognition of the unfortunate situation that arose here, however, does not mean that every unfortunate situation requires judicial action to ensure equity is accomplished. "Judging is an art. It is not best served by reaching absurd results or by reaching decisions that lack common sense or violate the intention of the Legislature." *Nippa v Botsford General Hospital*, 257 Mich App 387, 393, n. 5; 668 NW2d 628 (2003) (WHITEBECK, P.J., O'CONNELL AND METER, JJ.). In fact, Sage's believes that the sympathy driven intentions behind the Plaintiff's and Court of Appeals arguments are accomplished by the WDCA. Therefore, to consider employment in a premises liability case provides an employee a greater opportunity to recover than would any other

similarly situated non-employee. There is no need to provide that greater opportunity where the Legislature has already provided an avenue for employment consideration and recovery.

Indeed, workers' compensation benefits "are intended to compensate only those economic injuries 'which produce disability and thereby presumably affect earning power.'" *Great American Ins Co v Queen*, 410 Mich 73, 104, n. 7; 300 NW2d 895 (1980) (COLEMAN, J., concurring). Where an employee, as here, is injured approaching her job, the primary considerations raised by the employment aspects of the injury coincide with the intent of the Act. That is, a person who is injured while she happened to be approaching her job already realizes benefit from the fact that she was approaching her job because she can apply for and recover workers' compensation benefits. Perhaps stated more simply and clearly: the Legislature has determined that the overarching public concern when an employee is injured is ensuring that she can recover economic damages. The WDCA is intended to do that and, therefore, the employment-related considerations raised by the Plaintiff and the Court of Appeals majority and concurring opinions are met.

Meanwhile, no authority has been provided by the Plaintiff or the Court of Appeals to demonstrate that there exists a concurrent public interest in ensuring that an employee be similarly compensated for non-economic damages arising out of an employment accident. Presumably, if the Legislature had recognized such a public interest or intended to create one, it would have included it in the WDCA. Or, it would have done so in a manner similar to the other Legislatively created frameworks (e.g., the Michigan No-Fault Act) that would give employees an alternative path to recover non-economic benefits. The fact is that the absence of that intent by the clear lack of such a recovery in the WDCA or by the creation of some other similar Legislative framework reveals that none exists; therefore, arguing that employment considerations should be included in the recovery of non-economic damages in a common law premises liability claim, for example,

has no cognizable legal basis. In fact, more than that, the Legislature has already determined none exists and therefore it would be improper for the Court to find one here.

Therefore, in this matter where the Plaintiff has admittedly received benefits under the WDCA, (Appellant's Appendix, Tab O, deposition of Plaintiff, p. 1031a) consideration of her employment has already been made, and the public interest in compensating her for her economic injuries has been met. There being no similar public interest in compensating her, as an employee, for non-economic damages, her status as an employee is irrelevant to the determination of her premises liability claims.

E. Stare Decisis Directs this Court to Disregard the Plaintiff's Employment when Considering Whether the Parking Lot was Effectively Unavoidable

Finally, we must recognize that this Court and the Court of Appeals have already decided cases that involve slip and fall injuries on open and obvious conditions in employment situations, and that in those rulings this Court declined the opportunity to include employment as a consideration for anything other than identifying the employees' status upon the land. For example, this Court dismissed the plaintiff's claim in *Perkoviq, supra*, where he was injured after falling off an icy or frosty roof. In *Joyce, supra*, the Court of Appeals affirmed dismissal of a case where a former employee was retrieving her personal effects. In *Bullard, supra*, the Court of Appeals reversed the denial of summary disposition where an employee had to walk across icy, elevated planks to reach generators he was required to inspect. There are many other cases where employment was or could have been a consideration, but those cases are unpublished and for the purposes of stare decisions are not precedentially binding and, therefore, have no bearing on this argument.⁵

⁵ The cases that Sage's has been able to locate that arise out of or concern issues of employment include the following: *Knoll, supra*; *Feole v Ruggero's*, unpublished opinion per curiam of the Court of Appeals, Docket No. 245047 (decided April 27, 2004) (BANDSTRA, P.J., SAWYER AND FITZGERALD, JJ.) *Slater, supra*; *Brownlee v GMC*,

“This Court generally adheres to the principle of stare decisis.” *Bezeau v Palace Sports and Entertainment, Inc*, 487 Mich 455, 466; 795 NW2d 797 (2010) (citing *Robinson, supra* at 462 Mich 463). There are, however, occasions upon which this Court can and should reexamine the propriety of its prior rulings. There is a process that this Court undertakes when it does so; that process was not recognized, discussed or implemented by either the Plaintiff or the Court of Appeals. Utilizing that process, it would have been abundantly clear that this Court’s prior decisions relative to the open and obvious decisions do not require an examination of employment considerations.

unpublished opinion per curiam of the Court of Appeals, Docket No. 252867 (decided August 30, 2005) (ZAHRA, P.J., GAGE AND MURRAY, JJ); *Mead v Barrett*, unpublished opinion per curiam of the Court of Appeals, Docket No. 261197 (decided August 30, 2005) (ZAHRA, P.J., CAVANAGH AND OWENS, JJ); *Brent v Tom Holzer Ford*, unpublished opinion per curiam of the Court of Appeals, Docket No. 256695 (decided November 29, 2005) (SMOLENSKI, P.J., SCHUETTE AND BORRELLO, JJ); *Kelly v Clay, Inc.*, unpublished opinion per curiam of the Court of Appeals, Docket No. 255314 (decided February 7, 2006) (SAWYER, P.J., WILDER AND H. HOOD, JJ); *Lacross v Rankin Industrial Parkway*, unpublished opinion per curiam of the Court of Appeals, Docket No. 258953 (decided May 23, 2006) (FORT HOOD, P.J., SAWYER AND METER, JJ); *Brennan v CBP Fabrication*, unpublished opinion per curiam of the Court of Appeals, Docket No. 267094 (decided June 20, 2006) (KELLY, P.J., MARKEY AND METER, JJ); *Stanton v Fitness Management Corp.*, unpublished opinion per curiam of the Court of Appeals, Docket No. 267623 (decided August 17, 2006) (DAVIS, P.J., SAWYER AND SCHUETTE, JJ); *Wozniak, supra*; *Dyer v Russell*, unpublished per curiam opinion of the Court of Appeals, Docket No. 273574 (decided December 18, 2007) (DAVIS, P.J., MURPHY AND SERVITTO, JJ); *Van Wynsberghe v American Axle*, unpublished per curiam opinion of the Court of Appeals, Docket No. 277094 (decided April 15, 2008) (JANSEN, P.J., DONOFRIO AND DAVIS, JJ); *Becker v Glaister*, unpublished per curiam opinion of the Court of Appeals, Docket No. 281481 (decided January 22, 2009) (MURPHY, P.J., O’CONNELL AND DAVIS, JJ, DAVIS, J. CONCURRING); *Brown v Eastman Outdoors*, unpublished per curiam opinion of the Court of Appeals, Docket No. 286844 (decided January 7, 2010) (SERVITTO, P.J., FORT HOOD AND STEPHENS, JJ); *Ganaway v Hanhof*, unpublished per curiam opinion of the Court of Appeals, Docket No. 288072 (decided February 25, 2010) (GLEICHER, P.J., O’CONNELL AND WILDER, JJ); *Barrett v Allen*, unpublished per curiam opinion of the Court of Appeals, Docket No. 295342 (decided February 10, 2011) (HOEKSTRA, P.J., FITZGERALD AND BECKERING, JJ); *Mission v Corbett*, unpublished per curiam opinion of the Court of Appeals, Docket No. 294905 (decided February 17, 2011) (JANSEN, P.J., OWENS AND SHAPIRO, JJ); *Walker v Kilpatrick*, unpublished per curiam opinion of the Court of Appeals, Docket No. 293626 (decided March 1, 2011) (MURPHY, P.J., METER AND SHAPIRO, JJ, SHAPIRO, J. DISSENTING); *Jajo v Village Banquet Hall*, unpublished per curiam opinion of the Court of Appeals, Docket No. 296917 (decided May 5, 2011) (BECKERING, P.J., WHITBECK AND M.J. KELLY, JJ, M.J. KELLY, J. CONCURRING); *Walder v St. John the Evangelist*, unpublished per curiam opinion of the Court of Appeals, Docket No. 298178 (decided September 27, 2011) (BORRELLO, P.J., METER AND SHAPIRO, JJ, SHAPIRO, J. DISSENTING); *Nazal, supra*; *Pifer v Dow Chemical*, unpublished per curiam opinion of the Court of Appeals, Docket No. 311361 (decided June 6, 2013) (BECKERING, P.J., SAAD AND O’CONNELL, JJ); *Parker-Dupree v Raleigh*, unpublished per curiam opinion of the Court of Appeals, Docket No. 310013 (decided June 18, 2013) (RIORDAN, P.J., TALBOT AND FORT HOOD, JJ); and *Macklin v HJR*, unpublished per curiam opinion of the Court of Appeals, Docket No. 317397 (decided November 18, 2014) (M.J. KELLY, P.J., BECKERING AND SHAPIRO, JJ); *Barch, supra*. For the Court’s reference, the opinions cited herein have been included in the Appellant’s appendix. (Appellant’s Appendix, Tabs T through UU respectively, pp. 1266a – 1369a)

Most recently in *Bezeau*, this Court identified the steps necessary to review its prior decisions:

[W]e should reexamine precedent when legitimate questions have been raised about the correctness of a decision. Upon such reexamination, our first step is to determine whether the precedent was wrongly decided. Should we determine that precedent was wrongly decided, we also “examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance.” “As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practice real-world dislocations.”

Id. (citing *Robinson, supra*). As the Court of Appeals majority opinion and the argument set forth by Plaintiff is contrary to established precedent, including but not limited to *Lugo, Perkoviq, Joyce*, and *Bullard*, the first step necessary is to examine whether they should be overturned because those cases were wrongly decided.

For the sake of brevity, it is Sage’s opinion that those decisions were not wrongly decided. Sage’s has briefed the Court already on the decisions in *Lugo, Perkoviq*, and *Bullard*. Consistent with the Restatement and common law, they all employed an objective standard to ascertain *a priori*, whether the conditions presented were open and obvious to a reasonable person. From there, they consistently reviewed whether there were objective, narrow and limited special aspects that avoided dismissal by application of the open and obvious doctrine.

As for *Joyce*, the analysis was the same. There, the plaintiff was “a live-in caregiver for [the defendants’] mentally impaired daughter” that lived at the defendants’ home until March 1998 when she left their employ to work as a mortgage banker. *Joyce, supra* at 233. The plaintiff was removing her belongings from the defendants’ home when she fell on an icy sidewalk. *Id.* The opinion further reveals the plaintiff felt compelled to use the front door of the defendants’ home

because she had asked to use other entrances or means to enter the home and was denied same. Despite the subjective need to remove her items because of her change in employment, the plaintiff was not given the type of special consideration the Plaintiff seeks here.

Plaintiff has not offered any semblance of an argument as to why *Lugo* and its progeny were wrongly decided. In fact, the Plaintiff works within the *Lugo* framework but claims she was compelled to go to work and, therefore, is entitled to relief. While Plaintiff would likely argue if pressed that she is not seeking such a wholesale change of premises liability law, there is no question she is. *Lugo* established the limited and narrow exceptions to the open and obvious doctrine, and she wants her employment considerations utilized to expand those limited exceptions and thereby create a subjective analysis. The only manner in which the Plaintiff can successfully reach that result is for this Court to overturn *Lugo*, reject this Court's reliance on the Restatement and modify decades of common law premises liability precedent. Despite the enormity of the request the Plaintiff is making, she provides no basis for why this Court should abandon its general adherence to stare decisis. *Bezeau*, supra.

Equally puzzling is the Court of Appeals majority opinion that frustratingly comments that adherence to *Lugo*, *Bullard*, *Joyce*, *Perkoviq*, and *Hoffner*, to name a few, "cannot be the law." *Living's*, supra. (Appellant's Appendix, Tab A, p. 1a) The majority opinion does not engage in the *Bezeau* analysis to explain why this cannot be the law, or to convene a special panel to resolve its disagreement with the above cases. Instead, the Court of Appeals merely noted this "cannot be the law" and left it to Sage's and this Court to sort out whether that is accurate and, if so, to explain why. Standing as a stark reminder to the Court of Appeals' comment are the recent words of Justice Viviano: "Courts decide legal questions that arise in the cases that come before [them]

according to the rule of law.” *HHS, supra*. (VIVIANO, J., concurring) The Court of Appeals did not apply the rule of law, but instead applied what it thought the rule of law should be.

It is Sage’s opinion that there is no justification for the Court of Appeals decision to avoid the application of the rule of law, primarily for all of the reasons stated above, which do not need repeating here. The cases upon which the Court of Appeals should have relied serve as the rule of law, yet, its departure is not explained, discussed or rationalized. There is no discussion that the above precedent were incorrectly decided – likely because they were decided correctly; they followed the common law, they acknowledged precedent and applied it objectively as the Restatement requires. *Lugo*, for example, has been analyzed over 360 times since this Court decided it, and none of those 360 plus decisions found fault with its sound reasoning. This is likely true because *Lugo* established an easily understood apparatus for managing the “innumerable mishaps and injuries” that occur in winter each year. *Hoffner, supra* at 454. Meanwhile, *Bullard, Joyce* and *Perkoviq* deftly apply that apparatus in a cogent and even-handed manner. They, too, enforce the backbone of Michigan premises liability jurisprudence in a manner that cannot be described as “wrongly decided.” Thus, Plaintiff and the Court of Appeals majority are unable to clear the first *Bezeau* hurdle.

If they were to clear that hurdle, however, the havoc that their new premises liability calculus would bring would simply be unworkable in practice. The subjectivity required by the type of analysis the Plaintiff seeks would eliminate the stable system created by the objectivity of the current model and lead to inconsistent results. For example, if all employees are now entitled to abandon all care and encounter open and obvious conditions at will, are those that contract for use of services allowed to as well? What about those that have not yet contracted for services, but want to? What of people who simply need to refill a prescription or want to attend their Monday

night bowling league? Why should these people, who are most certainly differently situated than the Plaintiff is here be denied the same bullheaded right to encounter any and all conditions to complete the activity they so desire to perform? These are questions that need not be addressed presently, but will most certainly be asked in future cases if the Plaintiff prevails here. These questions reveal “real-world dislocations” that would result from overturning or even modifying *Lugo* and its progeny.

Further, Michigan has rightly opposed inviters being the absolute insurers of the safety of their invitees. See, *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975). The Court in *Quinlivan* referred to an Alaska Supreme Court decision for the rationale for this idea, *Id.* at 260 (quoting *Kremer v Carr’s Food Center, Inc*, 462 P2d 747 (Alas., 1969)), but also found that the “basis for [its] decision is grounded in cases such as *Torma*, which have recognized the rigorous duty owed an invitee.” *Id.* (citing *Torma v Montgomery Ward & Co*, 336 Mich 468; 58 NW2d 149 (1953)). Thus, for nearly 50 years, Michigan courts have avoided any attempts by invitees to make their inviters their absolute insurers. Should Plaintiff be successful here, the erosion of that general principle will be closer to reality than it is today, signaling a significant step backward – a step which would have major ramifications for small and large Michigan business owners alike.

None of the *Bezeau* factors provide a basis for the Plaintiff to request such a drastic departure from established Michigan law. Instead, Sage’s believes that this Court should adhere to the principles of stare decisis as it generally does. If the Court applies precedent and maintains objectivity as the standard when determining whether a condition is effectively unavoidable, it will ensure continued stability in this area of the law. Doing so serves Legislative intent, adheres to common law and Restatement underpinnings and provides a workable standard that can be easily

used in measuring the outcomes of future cases. All of these principles are within the public interest and far outweigh the results in this case, where the Plaintiff's claim must certainly be dismissed given the objectivity required. For this reason, Sage's requests that the Court grant its application and remand for entry of an order of dismissal.

II. THERE ARE NO QUESTIONS OF FACT CONCERNING WHETHER THE PARKING LOT CONSTITUTED AN EFFECTIVELY UNAVOIDABLE CONDITION BECAUSE THE PLAINTIFF HAD SEVERAL OPTIONS TO AVOID SAME.

Introduction to the second question presented

There are no questions of fact that remain to be addressed on the issue of whether the parking lot at issue was effectively unavoidable. Objectively, the Plaintiff had a number of options available to her, options which would have led her to avoid the icy areas of the parking lot, if not avoid the parking lot altogether. When an invitee has options but chooses to encounter a potentially dangerous condition despite them, the condition is said to be avoidable and the landowner is not held liable for the injuries. Sage's will demonstrate below, with citation to case law when appropriate, where each of the options the Plaintiff had prior to exiting her vehicle support dismissal of this action.

A. Option 1 - Plaintiff Could Have Parked in Other Areas to Avoid the Condition

One option the Plaintiff had available is that she could have parked in other areas to avoid the icy parking lot. The crux of Plaintiff's argument has always been that she was required to enter the rear door of the restaurant because that is where employees enter; but, there is no disagreement that there are front entrances to the restaurant. (Appellant's Appendix, Tab Q, Debra Buck's deposition, p. 1228a). There is also no disagreement that at least two employees entered the front entrance on the day the Plaintiff's fall occurred. (Appellant's Appendix, Tab O, Plaintiff's deposition, pp. 1037a – 1038a) There is also common ground on the fact that her employer had

salt within the restaurant and that it was regularly used to clear the sidewalk around the front door. (Appellant's Appendix, Tab O, Plaintiff's deposition, p. 1043a). Again, the parties agree that the front entrance, as depicted in the many pictures in the record, is covered. (Appellant's Appendix, Tab R, photographs of restaurant, p. 1245a). Given the facts that are not disputed above, it is clear that the Plaintiff could have parked closer to the front door as her coworkers did, or parked parallel to the covered, salted front entrance.

Further, the record does not suggest the Plaintiff was compelled to use the rear door to the detriment of common sense. This exact situation was raised in *Stanton, supra*. (Appellant's Appendix, Tab DD, p. 1297a)

In *Stanton*, the plaintiff was an independent contractor that delivered packages. *Id.*, at p. *1. One of the places she delivered packages was at the defendant's facility. *Id.* The plaintiff slipped on the way into the defendant's facility and, while carrying two large boxes out of the facility, slipped again and fell in a sloped area that was covered with ice. *Id.* at pp. *1-2. The plaintiff filed suit and a summary disposition motion was filed in the matter by the defendant. *Id.* at p. *1. The trial court granted summary disposition and the Court of Appeals affirmed.

On appeal, the plaintiff argued that she had no choice to enter and leave via the exit she did. *Id.* at *2. She further argued that the condition was effectively unavoidable because she had to perform her "contractual obligation" (i.e., the work she contracted to perform). *Id.* at p. *4. The Court disagreed with the plaintiff's assertions:

Plaintiff argues that the slippery area represented a special aspect because she was obligated to face it in order to enter and exit the building and perform her contractual obligation. We disagree. Plaintiff was in control of her own actions and was aware of the conditions before encountering them. There may have been negative consequences for her had she chosen to avoid the danger by not entering the building, but that does not change the fact that she had a choice. Would she have been obligated to enter a burning

building in order to make the pickup? The point being that the underlying principle of the open and obvious doctrine is that once a visitor is aware of a danger, it is their responsibility to determine whether to face it or avoid it. Plaintiff could have chosen to avoid it. That defendant City Transfer may have imposed unreasonable demand on plaintiff which affected the choice she made does not change the fact that she had a choice. Therefore, we cannot agree that she was obligated to face the danger upon entering the building.

Id. at p.*4.

Meanwhile, as is discussed in the *Lacross* case, *supra*, the Plaintiff could have utilized the same path and manner of entering the restaurant as both Ms. Buck and Mr. Spear did when they entered the front door the morning of Plaintiff's fall. *Lacross, supra* at p. *5. (Appellant's Appendix, Tab BB, p. 1292a)

Finally, the Plaintiff could have simply parked elsewhere. This was the determination in the Court of Appeals decision in *Walder, supra*. (Appellant's Appendix, Tab OO, p. 1349a) There, a volunteer intended to help with a Bingo game when she parked her car in a handicapped spot in a Church parking lot. The plaintiff argued that regardless of the door she entered, she would have had to encounter ice while traversing from her handicapped parking spot. The Court of Appeals first found that the condition was open and obvious. As for the options the plaintiff had to avoid the condition, the Court stated as follows:

The trial court properly granted defendant's motion for summary disposition after determining that there was no issue of material fact that plaintiff's claims were barred by the open and obvious doctrine. This case merely involved a slippery parking lot in winter. Although plaintiff claims that she had no choice but to cross the slippery parking lot to enter the building, plaintiff presented no evidence that the condition and surrounding circumstances gave rise to a uniquely high likelihood of harm or that it was an unavoidable risk. Plaintiff could have parked in a different spot and used a different entrance. Other bingo helpers and participants parked in the rear parking lot and used the rear entrance. In addition, Charlene Hamper, the bingo chairperson, testified that there were spots of ice in the rear area, not that it was completely ice covered. Also, after plaintiff fell, she got

up and walked into the building, evidently avoiding any other slippery spots.

Contrary to plaintiff's assertions, the evidence does not indicate that the parking lot and the sidewalk area were completely covered with ice, as was the situation in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590; 708 NW2d 749 (2005). In that case, this Court determined that the plaintiff did not have an alternative, ice-free route from the gasoline pumps to the service station. Consequently, the ice was effectively unavoidable. The evidence presented in this case does not support such a conclusion because all of the parking lots, sidewalks, and entrances were not covered in ice and because, after she fell, plaintiff was able to safely traverse an alternative route to the entrance. The trial court properly concluded that there was no genuine issue of material fact regarding whether there were special aspects of the open and obvious condition that differentiated the risk from a typical open and obvious risk.

Id. at pp. *3-5 (select internal citations omitted).

In this matter, just as in *Walder*, the Plaintiff was able to find a safe path into the restaurant after her fall. She was also able to find a safe path inside when she returned to the restaurant to work after changing her clothes. Two of her coworkers that parked in the front parking lot were able to successfully enter the restaurant and, in addition, it is not a stretch to say that the Plaintiff's boss, Ayman "Tom" Shkoukani, and members of the general public were also able to enter the restaurant that day to gather and eat at the restaurant. (Appellant's Appendix, Tab P, deposition of Shkoukani, p. 1195a). Additionally, two other waitresses that worked for Grand Dimitre's were able to enter the restaurant without issue after the Plaintiff's fall. (Appellant's Appendix, Tab P, deposition of Shkoukani, p. 1178a)

Further, just as in *Walder*, Shkoukani's testimony is clear that the Plaintiff could have parked somewhere else. **In fact, Shkoukani asked the Plaintiff why she parked where she did, so close to ice and water by a drain in the rear parking lot.** (Appellant's Appendix, Tab P, deposition of Shkoukani, p. 1173a). Even Shkoukani, the Plaintiff's boss and the person who

allegedly forced the Plaintiff to park in the rear of the restaurant questioned the reason why the Plaintiff parked where she did. Given this information, it is clear she had other routes available to her, including the routes Buck, Spear, Shkoukani, Sandy and Maria took the morning of her fall to successfully avoid the water and ice that she knew existed, parked excessively close to and chose to encounter despite a multitude of other options. The factual record is clear, there is no question of fact as to the avoidability of the area where the Plaintiff fell.

B. Option 2 - Plaintiff Could Have Left and Returned When the Condition was Resolved

In addition to parking elsewhere, the Plaintiff had the choice to leave the premises and return after the condition was abated. The Court of Appeals decision in *Barrett, supra*, lends support to this argument. (Appellant's appendix, Tab KK, p. 1324a)

In *Barrett*, the plaintiff was working in his capacity as a tow truck driver when he arrived at the defendant's home. *Id.* at p. *1. The plaintiff recognized that the defendant's long, inclined driveway was icy and that the grass was covered with snow. *Id.* To best protect himself from slipping and falling, the plaintiff walked up the middle of the driveway where there was dirt. *Id.* at pp. *1-2. At the top of the driveway, the plaintiff met with the defendant's father, to whom he told that his tow truck would not make it up the icy driveway but that the disabled vehicle could be towed if they rolled it down the driveway. *Id.* at p. *2. As the plaintiff walked back down the driveway, he slipped and fell and as a result injured himself.

The plaintiff filed suit and thereafter the defendant moved for summary disposition on the basis of the open and obvious doctrine. The trial court granted summary disposition and the plaintiff appealed. The Court of Appeals affirmed, first finding that the icy driveway was open and obvious. *Id.* at pp. *4-5. As to special aspects, the Court stated as follows:

Furthermore, no special aspects existed in this case. Plaintiff argues that the condition in this case was effectively unavoidable. Although

there is some question about the existence of an alternative route along the driveway, the fact remains that plaintiff could have simply chosen not to provide service, or at the very least communicated to defendant's father that he would not be walking up the driveway. Plaintiff was under no obligation to provide service. In fact, plaintiff testified that in some cases when they can't get up the driveway, "we tell them to clear their driveway and we'll come back. It's driver discretion."

Id. at pp. *5-6.

Based upon the above, the Plaintiff had the option to either refuse to exit her vehicle (as discussed above) or in the alternative, to leave and return when the condition was abated. And, unlike in *Kassof, supra*, there is no evidence to support the proposition that the Plaintiff would have had negative employment consequences as a result. Despite those options, the Plaintiff voluntarily chose to encounter the condition and as a consequence the Defendant cannot be held responsible for her failure to utilize reasonable care for her own safety.

C. Option 3 - Plaintiff Could Have Used Her Cell Phone to Request Help

Another option the Plaintiff had to either avoid the condition or obtain assistance in overcoming it was to call for help. This issue was raised in Sage's application for leave to appeal and, for that reason and for the sake of brevity, that argument is incorporated by reference here.

D. Option 4 - Plaintiff Could Have Remained in the Vehicle Until the Ice was Cleared

Finally, the Plaintiff had the option to wait in her vehicle (where she was safe) until the condition was remediated. Plaintiff was carrying a cell phone in her car before she got out of it, (Appellant's Appendix, Tab O, deposition of Plaintiff, p. 1035a) and could have called her boss, the restaurant (where there was salt present) or her coworkers for help in getting into the building. In fact, in a similar fact pattern, that is exactly what the Court of Appeals decided in *Lacross, supra*.

In *Lacross*, the plaintiff was an employee attempting to enter the workplace. *Id.* at p. *4. She suffered from osteoarthritis and degenerative joint disease and therefore, she subjectively could not use the rear of the defendants' building to enter because she had difficulty climbing steps and there were six or seven at the rear entrance. *Id.* at pp. *3-4. Notably, most of her co-workers parked in the rear lot and she was the only person that parked in the front lot. *Id.* The plaintiff fell on ice on the sidewalk leading to the front entrance. The trial court dismissed the matter summarily and the Court of Appeals affirmed.

In its opinion, the Court stated that the plaintiff had access to the rear lot and could have entered the premises from that area regardless of her medical conditions. *Id.* at p. *5. Further, the Court stated as follows:

Alternatively, plaintiff could have waited in her car for another employee to come and assist her in walking to the front entrance or to put down salt on the front sidewalk, or plaintiff could have chosen not to encounter the icy sidewalk at all and could have returned home without ever exiting her car. Finally, although plaintiff fell while walking across the sidewalk, the evidence shows that other employees of VPSI, the two unidentified person who discovered plaintiff and both paramedics attending to plaintiff traversed the same sidewalk shortly after plaintiff fell without slipping and falling on the ice. Thus, the ice on the sidewalk was not so “effectively unavoidable” that it created a “uniquely high likelihood of harm,” and a reasonably prudent person in plaintiff’s position would have been able to avoid the icy sidewalk.

Id. at pp. *5-6 (citing *Mann v Shusteric Enterprises, Inc.*, 470 Mich 320; 683 NW2d 573 (2004) and *Lugo, supra.* (emphasis added)).

Accordingly, the Plaintiff had an option to remain in her vehicle until any one of a number of different situations occurred. Her choice to leave the vehicle even though she knew *a priori* that the parking lot contained ice and could be slippery is fatal to her claim. *Lugo, supra.*

Accordingly, this Court should grant Sage's application and remand the matter for entry of summary disposition in favor of Sage's.

CONCLUSION

This Court instructed the parties to prepare supplemental briefs addressing the proper consideration of employment in the realm of premises liability law. That consideration has been used historically to create the employee's appropriate status on land. But consideration of employment has and must end there. If this Court were to consider a claimant's "special circumstances" and subjective need to go to work when analyzing whether a condition is effectively unavoidable, it would not only create an unmanageable subjective test, but it would also contradict considerable common law precedent. It is dire to the stability and predictability of premises liability law that our jurisprudence adheres to the objective standard that was created at common law, recognized by the Restatement and embraced by nearly every Michigan Court that has considered this issue. Additionally, to the extent that special consideration should be made to injuries to employees who are attempting to get to work, the Legislature has already arranged for that by its enactment of the WDCA.

This Court also directed the parties to provide supplemental argument related to the parking lot at issue and whether the ice within it was effectively unavoidable. This question has traditionally been one where the Court analyzed before the accident what options the plaintiff had to avoid the condition; if the plaintiff had any reasonable options, the condition was determined to be avoidable and dismissal based upon the open and obvious doctrine was said to be appropriate. Here, the Plaintiff had a number of *a priori* options she could have utilized to avoid the icy area where she fell. Those options have been used in the past by the Court of Appeals to bar recovery. The Plaintiff's failure to utilize just one of those options is cause for dismissal of her premises

liability claim. Consequently, this Court should grant Sage's application, reverse the Court of Appeals and trial court, and remand for entry of judgment in favor of Sage's.

Respectfully Submitted by:

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Dated: July 8, 2020

PROOF OF SERVICE

The undersigned certifies that a copy of the Defendant-Appellant's Supplemental Brief on its Application for Leave to Appeal and this Proof of Service were served on the attorneys of record of all parties to the above cause via MiFile, the Court's e-filing system, on July 8, 2020.

/s/ Kelly Solak
Kelly Solak