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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 APPENDIX

RECEIVED by MSC 7/8/2020 5:41:14 PM

Table of Contents for Appellant's Appendix

A - Livings Majority Court of Appeals Opinion
B - Livings Concurring Opinion
C - Livings Concurring in Part and Dissenting in Part Opinion
D - Court of Appeals order Denying Appellant's Motion for Reconsideration
E - Trial Court Order Denying Summary Disposition
F - Trial Court Oral Argument Transcript
G - Appellant's Application for Leave to Appeal to the Michigan Supreme Court
H - Appellant's Reply to Appellee's Response to Application for Leave to Appeal to the Michigan Supreme Court
I - Appellant's Application for Leave to Appeal to the Michigan Supreme Court
J - Appellant's Brief on Appeal to the Michigan Court of Appeals
K - Appellant's Reply Brief on Appeal to the Michigan Court of Appeals
L - Appellant's Motion for Reconsideration in the Michigan Court of Appeals
M - Appellant's Trial Court Motion for Summary Disposition
N - Appellant's Trial Court Reply to Appellee's Response to Appellants Motion for Summary Disposition
O - Deposition Transcript of Plaintiff
P - Deposition Transcript of Ayman "Tom" Shkoukani
Q - Deposition Transcript of Debra Buck
R - Photographs of Premises
S - Trial Court Docket Sheet
T - Knoll v GMC, unpublished opinion per curiam of the Court of Appeals
U - Feole v Ruggeros, unpublished opinion per curiam of the Court of Appeals
V - Slater v Marvin Brandle, unpublished opinion per curiam of the Court of Appeals
W - Mead v Barrett, unpublished opinion per curiam of the Court of Appeals
X - Brownlee v GMC, unpublished opinion per curiam of the Court of Appeals
Y - Brent v Tom Holzer Ford, unpublished opinion per curiam of the Court of Appeals
Z - Salinas v Omar's Mexican Rest., unpublished opinion per curiam of the Court of Appeals
AA - Kelly v Clay, Inc., unpublished opinion per curiam of the Court of Appeals
BB - Lacross v Rankin Industrial Park, unpublished opinion per curiam of the Court of Appeals
CC - Brennan v CBP Fabriation, Inc., unpublished opinion per curiam of the Court of Appeals
DD - Stanton v Fitness Mgmt. Corp., unpublished opinion per curiam of the Court of Appeals
EE - Wozniak v Venture Indust., unpublished opinion per curiam of the Court of Appeals
FF - Dyer v Russell, unpublished opinion per curiam of the Court of Appeals
GG - Van Wynsberghe v American Axle, unpublished opinion per curiam of the Court of Appeals
HH - Becker v Glaister, unpublished opinion per curiam of the Court of Appeals
II - Brown v Eastman Outdoors, unpublished opinion per curiam of the Court of Appeals
JJ - Ganaway v Hanhof, unpublished opinion per curiam of the Court of Appeals
KK - Barrett v Allen, unpublished opinion per curiam of the Court of Appeals
LL - Mission v Corbett, unpublished opinion per curiam of the Court of Appeals
MM - Walker v Kilpatrick, unpublished opinion per curiam of the Court of Appeals

NN - Jajo v Village Banquet Hall, unpublished opinion per curiam of the Court of Appeals
OO - Walder v St. John the Evangelist Parish, unpublished opinion per curiam of the Court of Appeals
PP - Miller v S M Hong Assocs., unpublished opinion per curiam of the Court of Appeals
QQ - Nazal v Autoalliance Int'l, Inc., unpublished opinion per curiam of the Court of Appeals
RR - Pifer v Dow Chemical, unpublished opinion per curiam of the Court of Appeals
SS - Parker-Dupree v Raleigh, unpublished opinion per curiam of the Court of Appeals
TT - Macklin v HJR, unpublished opinion per curiam of the Court of Appeals
UU - Barch v Ryder Ransportation Svcs., unpublished opinion per curiam of the Court of Appeals
VV - Kassof v Page Ave., unpublished opinion per curiam of the Court of Appeals

RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

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DEFENDANT-APPELLANT, SAGE'S INVESTMENT GROUP, LLC'S MOTION FOR RECONSIDERATION PURSUANT TO MCR 7.215(I) AS TO THE COURT OF APPEALS OPINION DATED FEBRUARY 26, 2019, DOCKET NUMBER 339152

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

TABLE OF CONTENTS

Index of Authorities..... iii

Index of Exhibits..... iv

Introduction..... 1

Argument..... 1

Relief Requested..... 7

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

INDEX OF AUTHORITIES

Cases

Barch v Ryder Transp Services, unpublished Michigan Court of Appeals decision decided October 20, 2016 (docket no. 327914) **6**

Bullard v Oakwood Annapolis Hosp, 308 Mich App 403 (2014) **5, 6**

Hoffner v Lanctoe, 492 Mich 450 (2012). **4, 5**

Lymon v Freedland, 314 Mich App 746 (2016) **6**

Perkoviq v Delcor Homes-Lake Shore Pointe Ltd, 466 Mich 11 (2002). **4, 5**

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MCOA 3/18/2019 4:38:36 PM

INDEX OF EXHIBITS

A Court of Appeal's Opinions, February 26, 2019

B Deposition of Plaintiff

C *Barch v Ryder Transp Services*

RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MCOA 3/18/2019 4:38:36 PM

Introduction

Defendant-Appellant, Sage's Investment Group, LLC (hereinafter "Sage's") submits this motion for reconsideration based upon errors made in the opinion released on February 26, 2019 which requires a different disposition of this case. The Court's February 26, 2019 opinions, including the majority opinion, concurring opinion and dissenting opinion, are attached hereto as Exhibit A. Respectfully, Sage's asserts that the Court erred in the following ways:

1. The Court incorrectly described the location of the fall in an attached picture within its opinion, an error which limited the areas the Plaintiff could have parked and options she had to avoid the icy condition.

2. The majority erred in failing to adhere to binding precedent from both this Court and Michigan Supreme Court precedent related to "effectively unavoidable." Indeed, by suggesting that "[i]t simply cannot be the law that a premises owner can render an all-encompassing hazard on the property 'effectively unavoidable' by claiming no one should come near the property" the majority drastically expanded the limited exceptions to the open and obvious doctrine.

3. The majority was distracted by Court of Appeals and Michigan Supreme Court precedent that employees are not obligated to encounter open and obvious conditions and instead failed to focus on the many alternatives the Plaintiff had to avoid the icy condition.

Given the errors identified above, reconsideration should be granted in favor of Sage's as this Court's opinion and order should be reversed.

Argument

I. The Court incorrectly limited the alternative locations the Plaintiff could have parked by improperly describing the parking lot.

In its opinion, the Court attached a photograph of the side and rear of the subject parking lot. In doing so, the Court incorrectly referred to the area where the Plaintiff fell as "the right side of, or adjacent to, the front parking area where customers would commonly park." That description of the area where the parking lot is is incorrect insomuch as it misidentifies the layout of the parking lot and the number of places that the Plaintiff could have chosen to park.

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In reality, the photograph that the majority attached to its opinion depicts the side and rear of the parking lot. A distinction such as this would not typically be worthy of discussion in a motion for reconsideration. However, the Court's use of this incorrect information was a significant basis for its opinion where it found that the icy condition was effectively unavoidable. The Court incorrectly limited the options that Plaintiff had to park her car and safely enter the building (as two others had prior to her arrival). As the photograph attached to the opinion shows, there is parking on the "other" side of the overhang depicted in the photograph.[1] The "other" side where the red car is visible is actually the "front" of the shopping plaza, where other tenants leased spaces are located and where their employees/customers also park. Plaintiff could have used that area, but failed to do so. Notably, that is the area where Debra Buck and "Chef Bob" parked and from which they successfully gained access to the restaurant on the day this incident occurred.

Meanwhile, the Court failed to note that the photograph it attached to its opinion shows two entrances through which the Plaintiff could have accessed the premises. Note, one such entrance, located on the side of the building, has an overhang that protects the sidewalk and side door from the elements:

[1] Reviewing the photograph, there is a red car plainly visible in an area the Plaintiff *could have* but chose not to park.

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Note also that this is an area that Plaintiff's employer salted (Exhibit B, deposition of Plaintiff, page 34) and that the Plaintiff, Debra Buck and "Chef Bob" all used without any issue. Thus, not only did the majority fail to properly describe the parking lot area and, as such, greatly reduce the number of places the Plaintiff could have but failed to park, it also completely ignored the Defendant's argument that the Plaintiff could have pulled up to the covered front entrance to effectively avoid the ice in the parking lot.

II. The majority failed to apply and properly distinguish binding "effectively unavoidable" precedent.

This matter must, as must all appeals that do not present an issue of first impression, rise and fall on the basis of the binding precedent of this Court and the Michigan Supreme Court.

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However, the majority opinion seemingly refused to apply binding precedent, where in its comment in footnote 6, it stated, "[i]t simply cannot be the law that a premises owner can render an all-encompassing hazard on the property 'effectively unavoidable' by claiming that no one should come near the property." Certainly, this is a matter of personal opinion, as evidenced by the fact that there is no citation to either precedent within the Court of Appeals or the Michigan Supreme Court.

But, personal opinion is not a proper basis for interpreting and deciding this matter where binding precedent requires a different result. Indeed, as the dissent properly identified, a condition that is all-encompassing has previously been analyzed by the Michigan Supreme Court in *Hoffner* and was determined to be open and obvious **and** effectively unavoidable. *Hoffner v Lanctoe*, 492 Mich 450 (2012).

In *Hoffner*, there was only one point of access into a health facility to which the plaintiff owned a membership. In front of that entry there was ice which prevented the plaintiff from entering unless she traversed same. Therefore, the ice in *Hoffner* was an "all-encompassing hazard" which prohibited the plaintiff from using the health facility. Despite the existence of an "all-encompassing hazard" that the plaintiff demonstrated she had to encounter to enter the health facility, the Michigan Supreme Court found that the "all-encompassing hazard" was avoidable.

If *Hoffner* were the only Michigan Supreme Court decision on this point, the oversight would be understandable. However, the majority also seemingly refused to recognize the binding precedent in *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11 (2002). There, plaintiff was painting the 3rd floor of a new home and was on a roof when he slipped and fell due to the presence of either ice or frost, which presented an "all-encompassing hazard." One question the Michigan Supreme Court was left to resolve was whether the ice or frost was effectively

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unavoidable. The Court found that the roof did not contain special aspects that made it unreasonably dangerous.

Finally, the majority also failed to properly distinguish or apply *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403 (2014) to the facts and circumstances of this case. *Bullard* involved a situation where the plaintiff, who was in the course and scope of his employment, fell after attempting to walk across a frosted wooden plank, the only manner of ingress or egress to equipment he was attempting to maintain. The frost was most certainly an "all-encompassing hazard" as that phase was used by the majority here. The plaintiff argued that the frost was effectively unavoidable because there was no other way to access the equipment and this Court disagreed.

The majority's opinion here does not address, explain or mention in any detail whatsoever why this matter should have a different result than *Hoffner*, *Perkoviq*, or *Bullard*. In fact, the majority opinion does not address the *Bullard* matter, which is a recent published decision of this Court and therefore presents a conflict with the present case. However, there is no need for a conflict panel because the Michigan Supreme Court has already spoke on whether an "all-encompassing hazard" is open and obvious and has opined in binding precedent that it is not. Accordingly, by failing to adhere to established Michigan Supreme Court and Court of Appeals precedent, the majority erred and, consequently, reconsideration must be granted.

III. Employment is irrelevant under most circumstances and is a red herring here.

Implicit in the majority's footnote that it "cannot be the law" that an "all-encompassing hazard on the property" is unavoidable is the suggestion that the Plaintiff was forced to encounter the ice in the first place. While Sage's did not specifically argue that the Plaintiff could have gone home (or literally anywhere else in the world) to avoid the ice, counsel did note that argument

RECEIVED by MCOA 3/18/2019 4:38:36 PM

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existed and stated so on the record. The dissent acknowledges this argument and properly addresses it while once again citing binding precedent that the majority did not address.

Specifically, the dissent focused its opinion on the *Lymon v Freedland*, 314 Mich App 746 (2016) decision. The majority cites that decision, but does not discuss whether it is finding as a matter of law that the Plaintiff's employment was the reason why the condition was effectively unavoidable. In fact, the majority opinion simply assumes that the Plaintiff was somehow forced to get out of her vehicle and walk upon the ice. While not stating it, Sage's believes that the unspoken belief of the majority is that her employment is what is forcing the Plaintiff to encounter the alleged icy condition that caused her fall.

However, the Plaintiff's employment is simply a red herring argument here, one that was cleverly used to distract and divide the Court. The focus in this matter has always been on the options the Plaintiff had to avoid the condition. Sage's has already identified one herein and at oral argument, where the Plaintiff could have pulled up to the covered entrance that was salted by her employer and protected from the elements and walked in, deciding to later move her vehicle. Sage's has provided a number of others as well, including the use of her cell phone, which the Court never addressed. In fact, Sage's presented this option based upon the *Barch v Ryder Transp Services* opinion, which approvingly cites to *Bullard*. *Barch v Ryder Transp Services*, unpublished Michigan Court of Appeals decision decided October 20, 2016 (docket no. 327914). (Exhibit C) By issuing this opinion without providing reason why the Plaintiff had to get out of her car in light of her available cell phone and other options, the majority has taken the opportunity presented by this case to confuse rather than clarify the state of premises liability law when it comes to whether a condition is "effectively unavoidable." Accordingly, Sage's motion for reconsideration should be granted and the opinion and order of this Court reversed.

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RECEIVED by MSC 7/8/2020 5:41:14 PM

Relief Requested

On the basis of the arguments made above, Sage's respectfully requests that this Honorable Court grant its motion for reconsideration and reverse its opinion and order. The majority's opinion in this matter did not follow established and binding precedent, misstated key factual issues, and did not articulate why a condition that the Plaintiff knew was open and obvious was effectively unavoidable before she even got out of her car. For these reasons, Sage's requests that this Honorable Court grant the present motion and reverse its opinion and order dated February 26, 2019.

SEGAL MCCAMBRIDGE SINGER & MAHONEY

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Dated: March 18, 2019

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STATE OF MICHIGAN
COURT OF APPEALS

DONNA LIVINGS,

Appellee,

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

v

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

Appellants.

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PROOF OF SERVICE

The undersigned certifies that a copy of Defendant/Appellant's Motion for Reconsideration was served on the attorneys of record of all parties to the above cause by e-filing through True-Filing on March 18, 2019.

/s/ Kelly Solak
Kelly Solak

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RECEIVED by MSC 7/8/2020 5:41:14 PM

EXHIBIT A

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

DONNA LIVINGS,

Plaintiff-Appellee,

v

SAGE'S INVESTMENT GROUP, LLC,

Defendant-Appellant,

and

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

Defendants.

UNPUBLISHED
February 26, 2019

No. 339152
Macomb Circuit Court
LC No. 2016-001819-NI

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In this premises liability action, defendant Sage's Investment Group, LLC, appeals by leave granted[1] the trial court's order denying its motion for summary disposition. Defendant contends that it did not have possession and control of the premises upon which plaintiff, Donna Livings, slipped and fell, and that regardless, the hazard at issue was not effectively unavoidable; thus, it owed no duty to plaintiff. Upon careful review of the entire record in the light most favorable to plaintiff, we affirm the trial court's ruling and remand for further proceedings.

[1] *Donna Livings v Sage's Investment Group, LLC*, unpublished order of the Court of Appeals, entered October 3, 2017 (Docket No. 339152). Neither of the other defendants is involved in this appeal. Therefore, we will refer to Sage's Investment Group, LLC, as defendant in this opinion.

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case stems from plaintiff's February 21, 2014, slip and fall in defendant's parking lot. Defendant leased a portion of a plaza on the premises at issue to Grand Dimitre's of Eastpointe Family Dining (Dimitre's), which operated a restaurant. Plaintiff worked as a food server at Dimitre's, where she had been employed for approximately ten years before her fall.

According to her deposition testimony, on the day of the incident plaintiff arrived by car at around 5:50 a.m. in order to work the opening shift. She proceeded toward the "rear" parking lot where employees were required to park and where they were let in every morning, as the front door was locked. She observed that fellow server Debra Buck's car was already in the parking lot. Plaintiff parked approximately 70 feet from the back door, which was the closest available spot. The other spots closer to the door were "piled up with snow" because the snowplow had pushed snow onto those spots. She testified that every time it snowed, the snowplow would plow the new snow in the parking lot, but it would not plow down to the cement, causing ongoing concerns:

> Originally, like when the snow first started, they plowed. Everything went up against the wall [there is a brick wall by the back door]. Then the snow would come, but they wouldn't come until, you know, 10:00 o'clock in the morning, so all of the cars and everything coming in would start packing the snow down. So when they would come to plow, they would only plow whatever was brushed up, so the rest was - then the next two days, whenever it snowed again, it would snow and cars are coming in and you kept getting these ruts packing this stuff down. They never scraped to the bottom, so it just kept accumulating over time.

She also testified that the parking lot was never salted after being plowed, which contributed to the problem.[2]

When she arrived on the morning of her fall, plaintiff could not see any pavement in the parking lot due to the accumulation of approximately six inches of "packed" snow that had been "flattened" to the ground by vehicles and the snow plow over the course of two months of snowfall. The result was that the parking lot was "one big block of ice" and "trodden" ground, with no fluffy snow on top. Plaintiff described the resulting appearance of the "whole parking lot" as "[a] sheet of white ice," a "solid block," and as "a solid sheet of white. Whether it be

---

[2] Anthony Caramagno, II, the owner of T & J Landscaping and Snow Removal, Inc., testified at his deposition that the parking lot at issue is one lot that surrounds the whole complex. He plowed the parking lot for free as a favor to his close friend, Jim Sage—defendant's sole owner. Their agreement was that he would provide snowplow services after 1.5 inches of snowfall. Caramagno testified that he would only salt if Sage asked him to do so, and that if a particular person pays for salting, "whatever residual of snow there is after I'm done plowing, it will melt that snow or ice, or whatever seems to be there at that time, down to the surface." According to his records, Sage did not ask him to and he did not salt either the parking lot or the sidewalk on the property in question at any time from January through March of 2014. At his deposition, Sage testified that he expected Caramagno to salt the parking lot whenever it needed salting.

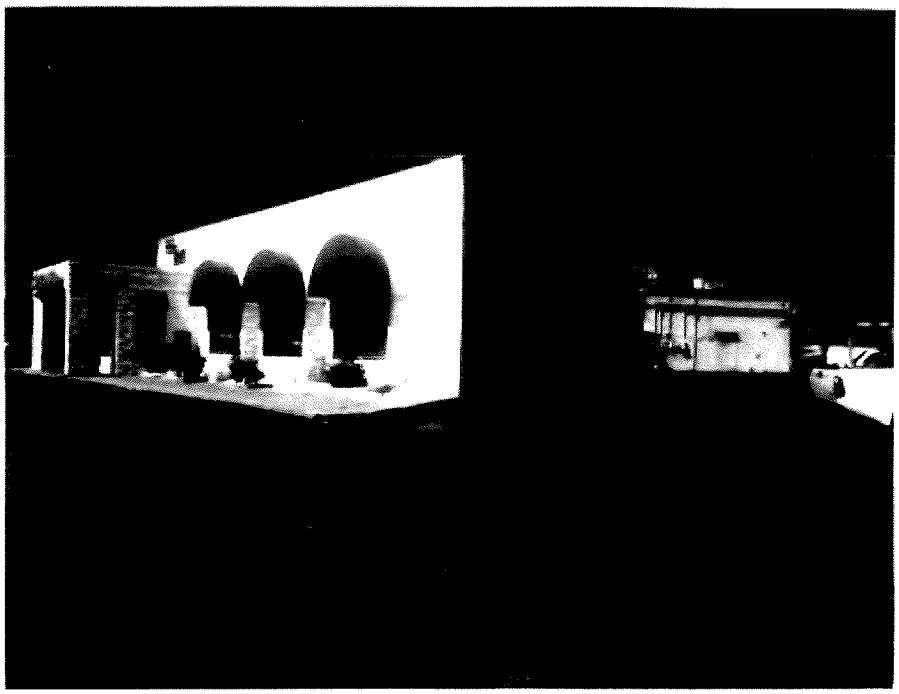
RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

packed snow or ice I have no idea." According to plaintiff, the employees "complained all the time" to Dimitre's owner, saying that "the parking lot needed to be done correctly." Some mornings the customers would complain.

Buck testified at her deposition that on the morning of plaintiff's fall, the parking lot was "a sheet of ice with water on top. Snow, ice, water." From what she remembered, there was "snow, ice and water pretty much through the parking lot." When asked if any part of the parking lot did not have that condition present, she responded, "No, it was covered." And so was the sidewalk. She did not recall seeing any salt on the parking lot. Buck had difficulty walking to the restaurant from her car, so she had to "shimmy" her way to the front entrance, where she entered with "Chef Bob," who possessed the front door key.

A photograph of the parking lot[3] reveals that the "rear" parking lot is essentially to the right side of, or adjacent to, the front parking area where customers would commonly park:



After taking three steps upon exiting her car, plaintiff fell, injuring her lower back. She tried to get up, but she was "slipping everywhere," so she got down on her hands and knees and crawled across the parking area. She tried to get to the back door, but she could not, so she "ended up walking the snow drift, plowed area, whatever you want to call it" around the building to the front entrance. She called the restaurant with her cell phone when she got to the front

[3] The photograph was not taken on the day of plaintiff's fall. Plaintiff provided a copy of the photograph to the trial court in her brief in opposition to defendant's motion for summary disposition, and it was referred to in various depositions.

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

door, and Buck answered the phone and opened up the front door for her. Buck testified that plaintiff was soaking wet from the waist down after her fall.[4]

Plaintiff testified that when the pain caused by the fall did not subside by the following day, she decided to seek evaluation and treatment. She was diagnosed with a lower back injury that ultimately required three surgeries, including an anterior lumbar fusion at L4-5. Plaintiff filed this premises liability action, and discovery ensued.

Defendant moved for summary disposition on the basis that the condition was open and obvious and was not effectively unavoidable because plaintiff knew that the area was snowy or icy, and she could have parked in a different location and entered through the front door. Defendant also argued that it did not exercise the requisite degree of possession and control over the premises to be held liable on a premises liability theory. Defendant contended that only the restaurant's employees and customers used the parking lot, and that the lease agreement required Dimitre's to assume the responsibility of snow removal.

The trial court denied defendant's motion, stating that whether plaintiff was permitted to park in front of the building and use the front door was a question of fact for the jury given plaintiff's testimony that employees were required to park in the back and enter through the back door. The court noted plaintiff's testimony that the snow removal process always left a coating of snow and ice in the parking lot. Regarding possession and control of the property, the court reasoned that defendant, rather than Dimitre's, had contracted with T & J Landscaping & Snow Removal, Inc. ("T & J") for snow removal services and that Dimitre's did not assume the responsibility for snow removal simply by salting the sidewalk in the area where the front entrance was located.

Defendant filed this interlocutory application for leave to appeal, reasserting its arguments made in the trial court, which this Court granted.

II. POSSESSION AND CONTROL OF PREMISES

Defendant first argues that it cannot be held liable for plaintiff's injuries because it was not in possession and control of the parking lot when plaintiff fell. We disagree.

---

[4] According to his deposition testimony, Ayman Shkoukani, an owner of Dimitre's, arrived at 9:00 a.m. on the day of plaintiff's fall. He testified that plaintiff told him she had fallen in the back parking lot on her way in to work. Shkoukani went to the rear parking lot and realized that water was not draining through the sewer grate. The water was up to his ankle, and his foot was "soaked." He testified: "I think like the drain line, the city line, it was like covered with ice, you know, leaf plus ice. . . . I think it was a sheet of ice underneath—underneath the water. He said he used sticks in an effort to unblock the grate, and the water drained through the grate. Plaintiff testified that she does not know if she slipped near the drain because she could not see the drain, and Shkoukani's actions did not clear the entire back lot, just near the drain. Buck similarly testified that when she left at the end of her shift, there was still snow and ice in the back parking lot.

RECEIVED by MCOA 3/18/2019 4:38:36 PM

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This Court reviews the grant or denial of a motion for summary disposition de novo. *Value, Inc v Dep't of Treasury*, 320 Mich App 571, 576; 907 NW2d 872 (2017). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). A genuine issue of material fact " 'exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017) (citation omitted).

In order for a defendant to be liable under a premises liability theory for injuries caused by conditions of the land, the defendant must have legal possession and control of the premises. *Morelli v City of Madison Heights*, 315 Mich App 699, 702; 890 NW2d 878 (2016). " 'Premises liability is conditioned upon the presence of both possession and control over the land because the person in possession is in a position of control and normally best able to prevent any harm to others.' " *Id.* at 702-703 (citation omitted). A "possessor" of land is defined as:

> "(a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." [*Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997), quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting 2 Restatement Torts, 2d, § 328 E, p 170.]

There is no dispute between the parties that defendant owned the plaza, including the parking lot. However, defendant correctly notes that ownership of the plaza is not necessarily determinative of whether it had possession and control of the parking lot. "Possession and control are certainly incidents of title ownership," but where a landlord retains title ownership to the premises and rents the premises to a tenant, the possession and control that the landlord would ordinarily retain "can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id.*

Defendant argues that Grand Dimitre's possessed and controlled the parking lot and that Grand Dimitre's was responsible for all outdoor maintenance, based on a clause in the original lease agreement for the restaurant space in defendant's plaza. The lease agreement that covered the restaurant space was originally executed between the former owner of the plaza and the former owner of the restaurant space. The plaza's former owner sold the plaza to defendant, and as a result, defendant assumed the role of landlord with regard to the lease agreement that belonged to the former owner of Dimitre's restaurant space. The restaurant space was then sold to another individual, who opened Dimitre's. Dimitre's was then sold to Ayman Shkoukani and his brothers. Shkoukani accepted the terms of the lease agreement via assignment from Dimitre's' former owner. In 2004, the lease agreement expired. Defendant permitted Dimitre's to stay in the space, and Dimitre's began paying rent on a month-to-month basis.

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Defendant argues that it cannot be held liable for any injuries to plaintiff because Dimitre's was a holdover tenant, which meant that it was required to adhere to the terms of the lease agreement Shoukani had assumed when he purchased Dimitre's. Defendant specifically points to a clause in the lease agreement regarding maintenance:

> The Tenant shall . . . at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, clean, safe and substantial order and condition, and free from dirt, snow, ice, rubbish, and other obstructions or encumbrances, and to the satisfaction of the Landlord, the driveways, sidewalks, parking areas, yards, plantings, pavement, car stops, gutters and curbs in front of and adjacent to the restaurant and, generally, the property comprising the Premises.

A tenant under a lease agreement becomes a "holdover tenant" by remaining in a leased space after the expiration of the lease agreement. *TCG Detroit v City of Dearborn*, 261 Mich App 69, 88; 680 NW2d 24 (2004). However, regardless of Dimitre's status as a holdover tenant, defendant's potential liability for injuries to plaintiff ultimately depends on whether defendant exercised possession and control over the parking lot where plaintiff fell.

In this context, "possession" is defined as " '[t]he right under which one may exercise control over something to the exclusion of all others.' " *Derbabian v S & C Snow Plowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002) (citation omitted). "Control" is defined as " 'exercis[ing] restraint or direction over' " *Id.* at 704 (citation omitted). In commercial settings, landlords and tenants may both have "a duty of care to keep the premises within their control reasonably safe from physical hazard." *Bailey v Schaaf*, 494 Mich 595, 605; 835 NW2d 413 (2013).

Despite the fact that commercial landlords can exercise possession and control over land rented by tenants (and therefore can be found liable for failing to maintain land in reasonably safe condition), defendant suggests that Dimitre's was required to perform *all* of the exterior maintenance for the restaurant space. Conversely, the record suggests that defendant assumed the responsibility for maintaining the common areas, including the parking lot where plaintiff fell. Shkoukani testified that defendant charged Dimitre's yearly for snow removal services and other expenses, dividing the cost among defendant's tenants based on their square footage of rental space. Jim Sage, the sole owner of defendant, testified that he hired T & J to remove snow and ice from the parking areas for the entire plaza where Dimitre's was located, and he billed his tenants for that service by attaching "common area maintenance" (CAM) charges to the total cost of rent for each space in the plaza.[5] The record further shows that defendant selected T & J as the snow maintenance service for the plaza, and all of the decisions related to the agreement between defendant and T & J were made by defendant and T & J. Dimitre's did not have any

[5] Sage testified that he has been using T & J for approximately 25 to 28 years, and that the terms of the agreement are that other than when there is only a "very minor" amount of snowfall, like a quarter inch, "[w]hen it snows, they plow, when it needs salting, they salt." Sage testified that defendant pays T & J for its services, and his records show that he issued CAM charges for the time frame in question (July 1, 2013 to June 30, 2014) for snow removal and salting in the amount of $6,725.

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ability to give input regarding the agreement, nor could it give input regarding the cost of T & J's services or what defendant charged Dimitre's for those snow removal services. During the approximately ten years during which Shkoukani owned Dimitre's prior to the slip-and-fall at issue here, defendant had always handled the snow removal. Shkoukani was not aware that Dimitre's was supposedly responsible for removing snow from the parking lot, and he relied on T & J and defendant to maintain the outdoor common areas, with the exception of the front sidewalk. Dimitre's never individually contracted with T & J for snow removal services and instead relied on defendant to care for maintenance of the parking lot.

Our Supreme Court has held that both the commercial owner of a parking lot and the lessee of a parking lot may be "held liable for an invitee's injury that arose from a hazard on the parking lot." *Bailey*, 494 Mich at 607; see also *Siegel v Detroit City Ice & Fuel Co*, 324 Mich 205; 36 NW2d 719 (1949) (holding that a landlord and a commercial tenant were both liable for injury to the plaintiff because both had possession and control of the premises where the plaintiff was injured). However, even assuming that Dimitre's had a duty as a holdover tenant to adhere to the terms of the original lease agreement covering the restaurant space, defendant clearly exercised possession and control of the common areas by exclusively choosing to employ T & J and charging the plaza's tenants, including Dimitre's, a CAM fee for snow removal and salting services. The facts herein indicate that defendant possessed and controlled the parking lot to the degree necessary for it to potentially be held liable.

" '[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property.' " *Derbabian*, 249 Mich App at 704, quoting *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998). In plaintiff's case, defendant was "the [entity] . . . in the best position to prevent plaintiff's injury," because it made itself solely responsible for major snow maintenance by hiring T & J. *Id.* at 705. "[E]ven if the [lease] agreement could be construed as granting [Dimitre's] the right to control the restaurant's maintenance, there is no evidence that [it] exercised that right" on the day that plaintiff fell. *Little v Howard Johnson Co*, 183 Mich App 675, 679; 455 NW2d 390 (1990); see also *Derbabian*, 249 Mich App at 704. Here, defendant retained exclusive control over the parking lot's snow removal. Accordingly, there is no question of fact regarding whether defendant exercised "dominion and control" over the parking lot—it did. *Derbabian*, 249 Mich App at 704. Therefore, defendant could be held liable for plaintiff's injuries as a result.

III. OPEN & OBVIOUS DOCTRINE AND SPECIAL ASPECTS EXCEPTION

Defendant next argues that, even if it had possession and control of the parking lot, the trial court erred by denying its motion for summary disposition because the dangerous condition caused by the ice on the surface of the parking lot was open and obvious, and it was not effectively unavoidable. We agree with the former proposition, but not that latter, which we find to be a material question of fact for a jury to resolve.

To establish negligence in a premises liability action, a plaintiff must show " '(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.' " *Mouzon v*

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Achievable Visions, 308 Mich App 415, 418; 864 NW2d 606 (2014) (citations omitted). Plaintiff argues that defendant breached the duty of care owed to her as an invitee by failing to remove the dangerous condition posed by the ice in the parking lot. The parties do not dispute plaintiff's status as a business invitee.

Where a "plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). Landowners have a duty to warn invitees of dangerous conditions that they are not otherwise likely to discover, and to "maintain the premises in a reasonably safe condition." *Bailey*, 494 Mich at 606. However, a landowner is generally not required to protect or warn an invitee if the danger is "known to the invitee or [is] *so obvious* that the invitee might reasonably be expected to discover [it]." *Hoffner v Lanctoe*, 492 Mich 450, 484; 821 NW2d 88 (2012) (quotation marks and citation omitted). A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 363; 780 NW2d 599 (2009).

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007). Plaintiff argues on appeal that the presence of ice in the parking lot was not open and obvious because it was dark outside when she arrived at Dimitre's, and the only light in the parking lot came from a small overhead lamp by the back door of Grand Dimitre's. However, at her deposition, plaintiff specifically stated that she *did* see the snow and ice in the prevailing lighting conditions:

> *Q*. Are there lights on the premises?
>
> *A*. The side of the premises, yes. The front, I have no idea.
>
> *Q*. What about the back?
>
> *A*. The back lighting was—they had a night light over the back door.
>
> *Q*. Nonetheless, you were still able to see the snow and ice, right?
>
> *A*. Well, if you walk into your bathroom and you have a night light, that is how bright that light was. It just [lit] the door. It didn't come out into the parking lot.
>
> *Q*. I see. But again, nonetheless, you were still able to see the ice, right?
>
> *A*. Yes.

Plaintiff further testified that she recognized that the entire parking lot was covered in snow and ice and knew that it could be slippery:

> *Q*. Did you see the snow coming into the parking lot –

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A. Yes.

Q. – on the – let me just finish the question. Did you see the snow coming into the parking lot?

A. Yes.

Q. Did you know it might be slippery in the parking lot?

A. Yes.

* * *

Q. Where were you looking when you fell?

A. On the ground.

Q. Could you see the ice?

A. Yes.

Q. Could you see pavement?

A. No.

Q. How much ice would you say you were able to see?

A. The whole parking lot.

The fact that ice was present on the surface of the parking lot was clearly open and obvious upon casual inspection based on plaintiff's own testimony that she was able to observe that the entire parking lot was covered in a layer of ice and she recognized that such conditions posed a slip hazard, despite the fact that the parking lot was dark. There is nothing in the record to suggest that a reasonable person in plaintiff's position would not have made the same observations. See *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). Further, even if the area near the drain where plaintiff fell was icy, it was no different in character than the rest of the parking lot, which plaintiff could see was covered in a layer of snow and ice. Thus, the trial court erred when it failed to determine that the hazard was open and obvious.

However, an open and obvious condition may nevertheless result in liability if the condition possesses special aspects that make it unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). Special aspects "differentiate [a] risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Id.* at 518. A "special aspect" is a condition that either "impose[s] an unreasonably high risk of severe harm," or that is "effectively unavoidable." *Id.* In attempting to define a situation in which an individual would be exposed to an unreasonably high risk of severe harm, our Supreme Court has postulated that an unguarded, 30-foot-deep hole in a parking lot would constitute one such

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special aspect. A large, deep hole in a parking lot would certainly be open and obvious, but would still contain special aspects that would result in exposure to an unreasonable risk of severe harm because falling in the hole would likely result in severe injury or death. *Id.*

Although the ice may have been slippery enough to be unsafe for plaintiff to walk on, our Supreme Court's standard for determining conditions that pose an unreasonable risk of severe harm is exceptionally high, and generally, the presence of ice and snow do not meet that standard. *Lymon v Freedland*, 314 Mich App 746, 759-760; 887 NW2d 456 (2016). "The risk of slipping and falling on ice is not sufficiently similar to those special aspects discussed in *Lugo* to constitute a *uniquely high* likelihood or severity of harm and remove the condition from the open and obvious danger doctrine." *Royce*, 276 Mich App at 395-396. Similarly, the fact that there was ice on the ground in the parking lot does not, in and of itself, give rise to a special aspect that creates an unreasonable risk of harm as contemplated in *Lugo*.

Regarding whether a condition is "effectively unavoidable," the condition must be "unavoidable or inescapable . . . for all practical purposes." *Hoffner*, 492 Mich at 468. "Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome." *Id.* Thus, the phrase "effectively unavoidable" suggests that plaintiff must have been "required or compelled to confront a dangerous hazard." *Id.* at 468-469. In *Lugo*, our Supreme Court gave the example of "a commercial building with only one exit . . . where the floor is covered with standing water" as a hypothetical illustration of an unavoidable condition because an individual would be required to walk through the standing water in order to exit the building. *Lugo*, 464 Mich at 518.

Plaintiff argues that the icy parking lot was effectively unavoidable because she did not have a means of getting in through the front door, and in any event, the parking area in front of the building was just as slippery and equally as dangerous as the rear area. The other waitress who arrived before plaintiff had to "shimmy" her way in. Defendant argues that plaintiff offers no evidence that she would have faced reprisal or punishment for parking somewhere other than the rear lot and entering through the front door of the restaurant.

Viewed in a light most favorable to plaintiff, the record evidence creates a genuine issue of material fact as to whether any part of the parking lot was in a reasonably safe condition to traverse in order to enter the restaurant and report for work. As noted herein, in her deposition plaintiff testified that the "whole parking lot" was "[a] sheet of white ice," a "solid block," and "a solid sheet of white." Buck, who entered through the front door, testified that the parking lot was "a sheet of ice with water on top. Snow, ice, water." From what she remembered, there was "snow, ice and water pretty much through the parking lot," and when asked if any part of the parking lot did not have that condition present, she responded, "No, it was covered[,]" as was the sidewalk. Buck herself had difficulty entering through the front door and had to "shimmy." The fact that Buck did not also fall does not equate to there being an effectively avoidable hazard, just that she managed to dodge injury caused by the presenting hazard. Photographs of the restaurant reveal that the "back" parking lot is actually on the side of the building and adjacent to the front parking lot; in other words, they are part of the same parking lot. And other than the

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snow pile conditions blocking several spots in the back, the record supports a finding that the entire parking lot presented an effectively unavoidable hazard of packed snow and ice.[6]

We affirm the trial court and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

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[6] We disagree with our dissenting colleague's contention that caselaw in this state requires a different conclusion regarding whether the presenting hazard was effectively unavoidable. As the Supreme Court pointed out in *Hoffner*, "[i]n Michigan, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises, *including snow and ice conditions*." *Hoffner*, 492 Mich at 455 (emphasis added). *Hoffner* rejected the idea that a hazard is effectively unavoidable simply because a plaintiff has a business interest in entering the premises. *Id.* As the Supreme Court pointed out when discussing the implications of its ruling in *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11; 643 NW2d 212 (2002), "it cannot be said that compulsion to confront a hazard by the requirement of employment is any less 'avoidable' than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as a membership in a fitness club. *Id.* at 472. "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 a 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*." *Hoffner*, 492 Mich at 472. Rather, an effectively unavoidable condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. *Id.* at 456. The "touchstone" for permitting recovery under the "special aspects" exception to the open and obvious doctrine is the unreasonableness of the hazard. *Id.* at 472. Thus, we should not define whether a duty exists by the needs of the person seeking to use the property. Rather, we should define whether a duty exists by the unreasonableness of the hazard. Here, record evidence supports a finding that defendant's entire parking lot had become a sheet of white ice, or one big block of ice, due to the chronic accumulation over two months of fresh snow being packed down by cars, arrival of a snowplow after the snow had been packed down, such that the snow could not be fully removed, and the complete failure to salt the parking lot all winter. Put simply, the hazard encompassed the entire premises and it was effectively unavoidable for anyone and everyone, whether coming or going. It simply cannot be the law that a premises owner can render an all-encompassing hazard on the property "effectively unavoidable" by claiming that no one should come near the property.

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STATE OF MICHIGAN

COURT OF APPEALS

DONNA LIVINGS,

Plaintiff-Appellee,

v

SAGE'S INVESTMENT GROUP, LLC,

Defendant-Appellant,

and

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

Defendants.

UNPUBLISHED
February 26, 2019

No. 339152
Macomb Circuit Court
LC No. 2016-001819-NI

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I fully concur in Judge Beckering's well-reasoned opinion. I write separately to address the concerns raised by the dissent.

The dissent does not dispute that, when viewing the record in the light most favorable to plaintiff, the entire parking lot was covered with ice. Nevertheless, the dissent opines that walking across the ice was not "effectively unavoidable" because plaintiff could have skipped work and suffered the consequences to her employment. This result cannot be harmonized with substantive justice. The dissent does not tell us why the need to protect landowners from the "burden" of salting an icy parking lot is so great that it outweighs the dangers faced by an

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employee who chooses to walk from her car to the entrance of her workplace rather than risk termination of her employment.[1]

The dissent's reliance on *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403; 864 NW2d 591 (2014) is unpersuasive. In that case, the injured party, who was not employed at the subject premises, had several means to avoid the icy conditions, *id.* at 412, while in this case plaintiff was an employee and had to report to work on the morning she was injured. The dissent's reliance on *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002) is similarly misplaced. In that case, the defendant was both owner and general contractor of the development under construction and had retained a subcontractor to do the painting. *Id.* at 12. An employee of the subcontractor fell from the roof, which had frosted over. *Id.* The Supreme Court made clear that the duty to make the premises safe was owed by the subcontractor and not the defendant-owner:

> In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site. [*Id.* at 18.]

Here, defendant-landowner, not the restaurant's owner or his employees, was responsible for maintenance of the parking lot. Accordingly, defendant had no basis to conclude that the restaurant would take the "appropriate precautions." And no one—at least not yet—has suggested that plaintiff should have worn a jet pack or come to work hours early and salted the parking lot herself so that when she returned for her shift the dangerous conditions would have abated.

Accordingly, I agree with Judge Beckering that the trial court's ruling should be affirmed.

/s/ Douglas B. Shapiro

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[1] This is not to say that premises owners must insure that no one falls on their property in inclement weather conditions. The duty is limited to taking "reasonable measures . . . within a reasonable time . . . ." *Hoffner v Lanctoe*, 492 Mich 450, 464; 821 NW2d 88 (2012) (quotation marks and citation omitted). If that duty is met, the premises owner bears no liability for injury. Indeed, the purpose of requiring landowners to take reasonable measures to lessen the risk of icy conditions is not to create grounds for a lawsuit. Rather it is to avoid injuries, with their resultant personal and economic costs (including the costs of litigation) that with reasonable maintenance could have been avoided.

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STATE OF MICHIGAN

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Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

TUKEL, P.J. (*concurring in part and dissenting in part*).

I concur with the majority that there is no question of fact regarding whether defendant Sage's Investment Group, LLC (SIG), exercised "dominion and control" over the parking lot. I also concur that the hazard was open and obvious. However, I disagree with the majority that there were special aspects present. For the reasons provided below, I would hold that because there were no special aspects present, the open and obvious doctrine insulates defendant from liability.

As the majority correctly points out, plaintiff was a business invitee. And as a result of that relationship with defendant, defendant had a "duty to use reasonable care to protect [plaintiff] from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). A landowner breaches this duty "when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id.* However, "[t]he possessor of land owes no duty to protect or warn of

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dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id.* at 460-461 (quotation marks and citation omitted). And as the majority correctly determined, the hazard was open and obvious.

However, regardless of a hazard being open and obvious, liability nonetheless may still arise when special aspects of the condition exist. Such special aspects render even an open and obvious risk "unreasonably dangerous" and can manifest in two ways: "(1) the hazard is, in and of itself, unreasonably dangerous or (2) the hazard was rendered unreasonably dangerous because it was effectively unavoidable for the injured party." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410; 864 NW2d 591 (2014).

The majority opines that the hazard, while open and obvious, was unreasonably dangerous because it was effectively unavoidable. Because the caselaw in this state requires a different conclusion, this is where my opinion diverges from that of the majority. Notably, "[t]he 'special aspects' exception to the open and obvious doctrine for hazards that are effectively unavoidable is a *limited* exception . . . ." *Hoffner*, 492 Mich at 468 (emphasis added). Further, "[u]navoidabilty is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome." *Id.* Thus, "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id.* at 469. Moreover, as the caselaw demonstrates, "[t]he mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard*, 308 Mich App at 412, citing *Hoffner*, 492 Mich at 471-472 and *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*, 466 Mich 11, 18; 643 NW2d 212 (2002). It is this aspect of unavoidability that the majority fails to fully address.

In *Bullard*, the plaintiff's work responsibilities included inspecting a generator that was located on top of a roof. *Bullard*, 308 Mich App at 406. There was only one way to approach the generator: the plaintiff had "to climb an indoor ladder to reach the roof, open a hatch, cross a stone walkway, scale another ladder, cross a metal catwalk to the generator, and finally walk across three 2 x 8 planks to reach the generator's control panel." *Id.* The plaintiff slipped and fell on ice that had formed on the 2 x 8 planks, which resulted in him falling 5 or 6 feet onto the roof. *Id.* The *Bullard* Court acknowledged that the hazard was open and obvious, *id.* at 409, and it held that the hazard was not effectively unavoidable, *id.* at 413. The Court explained that the plaintiff's "job duties did not mandate that he encounter an obvious hazard"; instead, the plaintiff "could have made different choices that would have prevented him from encountering the ice," including turning back and declining to perform the inspection. *Id.*

In *Perkoviq*, the plaintiff brought a number of claims, including one for premises liability against the defendant landowner. The plaintiff was working as a painter at a new home construction site. *Perkoviq*, 466 Mich at 12. His job on that particular November day was to climb up onto the roofs of three homes and paint the upper levels of their exteriors. *Id.* at 13. He was working on the roof of one of those homes when he slipped on ice and fell approximately 20 feet to the ground below. *Id.* A unanimous *Perkoviq* Court held that summary disposition was warranted in favor of the defendant because the plaintiff presented no evidence that the icy conditions on the roof, although open and obvious, were "unreasonably dangerous." *Id.* at 19; *id.* at 20 (WEAVER, J., concurring).

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In *Hoffner*, our Supreme Court was asked to decide whether a health club member, who wanted to use the health club facilities at the defendants' property, encountered an effectively unavoidable hazard when there was ice and snow in front of the only entrance to the health club. *Hoffner*, 492 Mich at 457-458, 465. The Court held that, although the plaintiff had a contractual relationship which gave her the right to access to the health club as a paid member, the hazard was nevertheless avoidable because she was not forced to enter the building at that particular time. *Id.* at 473. The *Hoffner* Court at one point noted that if the plaintiff in *Perkoviq* could not sustain his claim of premises liability, then *a fortiori*, the plaintiff in *Hoffner* could not either. The Court explained, "[I]t cannot be said that compulsion to confront a hazard by *the requirement of employment* is any less 'avoidable' than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club." *Id.* at 471-472.

Thus, the requirements of employment to encounter open and obvious dangers generally do not create special aspects under the law because, regardless of one's employment, one still has a personal choice whether to encounter a particular hazard. Cf. *Hoffner*, 492 Mich at 471-472; *Bullard*, 308 Mich App at 413. However, this Court in *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016), created an exception to this general rule. In *Lymon*, the plaintiff was a healthcare aide who provided in-home care for individuals. The plaintiff's employer had an elderly client who suffered from dementia and Parkinson's disease, required constant care, and could not be left alone. *Id.* at 749-750. While attempting to walk up the driveway to the client's home, the plaintiff slipped and fell on the severe snowy and icy conditions,[1] injuring herself. The Court held that the conditions were open and obvious. *Id.* at 758. However, the Court also held that there was a question of fact whether special aspects existed which would obviate the general open and obvious rule. *Id.* at 763. Specifically, the Court stated,

> [T]here was a question of fact as to whether [the] plaintiff was compelled to confront the hazardous risk posed by the snowy and icy conditions at the Freeland home. A reasonable juror could conclude that, unlike the plaintiff in *Hoffner*, [the] plaintiff in this case did not have a choice about whether to confront the icy conditions. *As a home healthcare aide, [the] plaintiff did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease.* [*Id.* at 763-764 (emphasis added).]

Thus, implicit in the *Lymon* Court holding is that employees generally do have the option to decline to report for work when the circumstances are deemed too hazardous.[2] But for public policy reasons, some jobs, due to their importance dealing with the safety and well-being of

[1] There was testimony that the homeowner, the client's daughter, "never cleared or salted the driveway." *Lymon*, 314 Mich App at 751.

[2] This is not to say that an employee has the right to make this decision free from any consequences from his or her employer.

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others, will effectively remove from the employee the "option" of not reporting for work, despite the attendant compulsion of confronting hazardous risks.[3]

Here, after reviewing the applicable caselaw, it is clear that even accepting as true that plaintiff would have had to walk over the hazardous parking lot to report for work, the law of our state dictates that this does not constitute an "effectively unavoidable" hazard. Plaintiff could have simply declined to enter the premises, thereby avoiding the hazard.[4] See *Bullard*, 308 Mich App at 413. The present case is easily distinguishable from *Lymon* because the ramifications of plaintiff not reporting to work at the restaurant are not comparable to those of the home health-care worker in *Lymon* not reporting to work. As the *Lymon* Court stressed, the plaintiff in that case simply "did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease." *Lymon*, 314 Mich App at 763-764. Here, plaintiff was reporting to work at the restaurant as a server. While this type of employment provides a service for others, it does not possess the same necessity or urgency as the healthcare aide position in *Lymon*.[5] See also *Perkoviq*, 466 Mich at 18 (holding that the plaintiff, a house painter, who had to confront snow and ice as part of his job duties, did not prove that the condition was "unreasonably dangerous"). Plaintiff's job duties here did not pertain to the well-being or safety

---

[3] Although *Lymon* is binding, I question whether it was correctly decided in light of our Supreme Court's precedent. Determining whether a particular employee has the option to not report for work necessarily involves a subjective analysis, and the test should be purely objective. See *Hoffner*, 492 Mich at 470-471 (stating that "an invitee's subjective need or desire" to enter a premises does not "affect[] 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*.").

[4] The majority claims that because "the hazard encompassed the entire premises," "it was effectively unavoidable for anyone and everyone, whether coming or going." But *Hoffner*, the case the majority cites, stands for the opposite conclusion. Indeed, although "anyone and everyone" entering and exiting the premises in *Hoffner* would have been forced to encounter the icy hazard, the Supreme Court nonetheless held that the hazard was not effectively unavoidable because the plaintiff, contrary to her personal desires and contractual expectations, *was not forced or compelled to enter the premises at that time*. *Hoffner*, 492 Mich at 473. Thus, it is quite clear that just because a person would have to encounter a hazard in order to enter a premises, it does not mean that the hazard is effectively unavoidable. Instead, the question is whether the person was *forced to enter the premises*. See *id.*; *Lymon*, 314 Mich App at 763-764.

[5] I would also note that this is not a situation where, if plaintiff did not enter the premises, she would have left the restaurant in the lurch without any servers. She knew that at least one other server had already reported to work and was inside the building. Indeed, the evidence presented shows that plaintiff's presence at the restaurant was not absolutely necessary to her employer or the restaurant's patrons. After she fell upon arriving at the restaurant initially, she decided, without any supervisor's input, to go home to change her wet clothes. Additionally, when she left, she was told that she "did not have to come back" because "of the way the weather was . . . ."

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of others. Accordingly, I would decline to extend *Lymon*'s holding to jobs that lack such vital, critical importance or urgency.

In sum, regardless of SIG's potential for liability based on its exercise of possession and control over the premises, the fact remains that the ice that caused plaintiff's injury was open and obvious, and no special aspects were present that would have made encountering the ice unreasonably dangerous or effectively unavoidable. Although SIG was responsible for maintaining the parking lot, it had no duty to warn or protect plaintiff from an open and obvious condition of the land that contained no special aspects.

Accordingly, I would reverse and remand for entry of summary disposition in favor of SIG.

/s/ Jonathan Tukel

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EXHIBIT B

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1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB
3
4 DONNA LIVINGS,
5 Plaintiff,
6 vs. Civil Action
7 No. 2016-1819-NI
8 Hon. Edward A. Servitto
9 SAGE'S INVESTMENT GROUP, L.L.C.,
10 a Michigan Limited Liability
11 Company, T&J LANDSCAPING & SNOW
12 REMOVAL, INC., a Michigan
13 Corporation and GRAND DIMITRE'S
14 OF EASTPOINTE FAMILY DINING, a
15 Michigan Corporation,
16 Defendants.
17 _____/
18 PAGE 1 TO 133
19 The Deposition of DONNA LIVINGS,
20 Taken at 120 Market Street,
21 Mt. Clemens, Michigan,
22 Commencing at 2:45 p.m.,
23 Wednesday, February 22, 2017,
24 Before Gail R. McLeod, RPR, CSR 2901.
25

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Donna Livings
2/22/2017

APPEARANCES:

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* * * * *

TABLE OF CONTENTS

DONNA LIVINGS	Page
EXAMINATION BY MR. STEINER:	5
EXAMINATION BY MR. GABEL:	79
EXAMINATION BY MR. BARATTA:	111
RE-EXAMINATION BY MR. STEINER:	122
RE-EXAMINATION BY MR. GABEL:	128
RE-EXAMINATION BY MR. BARATTA:	130
RE-EXAMINATION BY MR. GABEL:	132

INDEX TO EXHIBITS
(Exhibits attached to transcript)

Exhibit	Page
DEPOSITION EXHIBIT 1	111
- Photographs	
DEPOSITION EXHIBIT 2	130
- Statement of Charges	

Mt. Clemens, Michigan
Wednesday, February 22, 2017
About 2:45 p.m.

DONNA LIVINGS,
having first been duly sworn, was examined and testified on her oath as follows:

MR. STEINER: Could you please state your name for the record?

THE WITNESS: Donna Ann Livings.

MR. STEINER: Let the record reflect that this is the discovery deposition of Donna Livings taken pursuant to Notice and to be used for all purposes under the Michigan Court Rules and Michigan Rules of Evidence.

EXAMINATION BY MR. STEINER:

Q. Ms. Livings, my name is Mark Steiner. We meet briefly before we went on the record here. I represent Sage Investment Group, a company that you sued as a result of an incident that I believe occurred February 21st, 2014. Have you ever had your deposition taken before?

A. No.

Q. Well, I'm sure your attorney has gone over it with you, but I'm just going to go over for the record a couple ground rules with you. First, it's important to keep all of your answers verbal. As you probably are aware,

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Donna Livings
2/22/2017

Page 6

there's a court reporter taking down everything that you and I say. It will be transcribed on a sheet of paper, so it's important that you don't nod your head, shrug your shoulders, things like that. In the same vein, it's important to wait to answer your questions or the questions that I ask you until after I've completed the full question and that's simply to keep the record clear, too.

Another rule is this isn't a game to test your memory. If you don't know something, it's okay. Don't guess. If you don't know something, you can just say, "I don't know." That's a perfectly acceptable answer.

I'm going to assume the questions or I'm going to assume that you understood the questions that I ask you if you respond. I'll assume that you answered them truthfully and accurately to the best of your knowledge. Is that fair?

A. Yes.

Q. Okay. If you need a break at any time, just let us know and again, this isn't an endurance contest, so if you need a break, just let us know. Have you taken any medication today that would affect your ability to answer truthfully or honestly?

A. Yes.

Page 7

Q. And what medication is that?

A. I take Norco.

Q. Does that affect your ability to tell the truth at all?

A. No.

Q. So you would be able to truthfully and honestly answer the questions I ask you?

A. Correct.

MR. GABEL: May I ask you a question? Did you take Norco close to the testimony today so that your perception is a little off right now?

THE WITNESS: No.

MR. BARATTA: Let me ask her a question.

When was the last time you took Norco? This morning?

THE WITNESS: Yes.

MR. BARATTA: What time about?

THE WITNESS: About 9:00 o'clock.

MR. BARATTA: And what strength was it if you know?

THE WITNESS: 10/325.

MR. BARATTA: Okay. Do you take those every day?

THE WITNESS: Yes.

MR. BARATTA: All right. How many a day?

THE WITNESS: Three. Three times.

Page 8

MR. BARATTA: Do you usually take them morning, noon and night?

THE WITNESS: Correct, every eight hours.

MR. BARATTA: But the last time was this morning?

THE WITNESS: Yes.

MR. BARATTA: Thank you.

MR. GABEL: Thank you.

BY MR. STEINER:

Q. What is your present address?

A. 27059 Pinewood Street, Roseville, Michigan, 48066.

Q. And how long have you lived there?

A. Seven years.

Q. Where did you live prior to that?

A. I can't remember the house number, but Raymond, St. Clair Shores, Michigan, 48082.

Q. And do you remember how long you lived at that Raymond Street address?

A. Approximately 10 years.

Q. Do you remember where you lived before that?

A. Detroit.

Q. Do you remember the street --

A. No, actually, I'll correct myself on that. I lived on Little Mack, 28100 Little Mack, St. Clair Shores, 48081.

Page 9

Q. And how long did you live there?

A. Two years.

Q. Did you live in Detroit before that?

A. Yes.

Q. Do you remember the street address for that?

A. The house number, no. Payton, and that was Detroit, Michigan. I don't remember the zip code.

Q. And do you remember how long you lived there?

A. 10 years.

Q. Okay. At that Pinewood Street home, do you own that home?

A. No.

Q. Do you rent that home?

A. Yes.

Q. Who do you rent that from?

A. Fairway Rentals.

Q. Do you know how much your rent payment is?

A. 750.

Q. Do you own any real property?

A. No. My car.

Q. Who do you live with at the Pinewood Street home?

A. Just me.

Q. It's my understanding that you have gone by a couple previous names, Donna Lasko, Donna --

A. Czerniawski.

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Q. And Donna McMillan, is that right?
A. Yes.
Q. Have you gone by any other name?
A. No.
Q. Is your date of birth May 2nd, 1960?
A. It is.
Q. Were you born in London, England?
A. I was.
Q. And when did you move to the United States?
A. February of 1974.
Q. May I ask what brought you to the United States?
A. My parents. My father, his job brought him here.
Q. And what's your Social Security number? I'd ask just that the last four digits appear on the record for your privacy.
MR. BARATTA: Why don't we take it all off. Is that okay?
MR. STEINER: That's fine. I think it's in the Answers to Interrogatories anyway. I probably have it, so I just want to confirm.
MR. BARATTA: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. It's my understanding that you've been married four

times; is that right?
A. Yes.
Q. Was your first husband Mark Lasko?
A. He was.
Q. And was that from 1978 to 1980?
A. Yes.
Q. Was your second husband Ray Czerniawski?
A. Yes.
Q. I'm probably pronouncing that wrong. That was from 1983 to 1986?
A. Yes.
Q. And then were you next married to Mujo --
A. Mujo.
Q. Mujo Buzdoraj?
A. Yeah, Mujo Buzdoraj.
Q. Was that from 1989 to 1990?
A. Yes.
Q. And then Timothy McMillan?
A. Yes.
Q. And is that from 1996 to 1999?
A. Yes.
Q. Do any of your previous husbands owe you any spousal support?
A. No.
Q. What about child support?

A. No.
Q. Do you have children?
A. I do.
Q. How many do you have?
A. Three.
Q. What are their names?
A. Michael is my oldest, Steven is my middle son and Matthew is my youngest.
Q. When was Michael born?
A. 1977.
Q. When was Steven born?
A. 1983.
Q. And when was Matthew born?
A. 1984.
Q. Are they all financially independent?
A. Of me?
Q. Correct.
A. Yes.
Q. Do you have any grandchildren?
A. I do.
Q. How many do you have?
A. Nine.
Q. Do any live in the area?
A. They all live in the area.
Q. Do you see them regularly?

A. I do.
Q. About how often do you see them?
A. My oldest son's family, two, three times a week. My youngest son, I actually baby-sit my youngest grandson, so I see him every day and my middle son, a couple times, you know, like every couple of months I see the twins.
Q. Are you currently financially dependent on anyone?
A. No.
Q. Is anyone currently financially dependent on you?
A. No.
Q. Do you have any social media accounts like Facebook, Twitter, Instagram, anything like that?
A. I have Facebook.
Q. Did you ever post anything regarding this incident on Facebook?
A. I have.
Q. Do you recall what that was?
A. Originally when I fell obviously, something to the effect of fell at work today, you know, my back hurts, having to go to Concentra, probably months later something to the effect of Workmen's Comp dropping me and refusing to pay my medical anymore and whenever I've had my surgeries, I've posted that, surgery on Wednesday, hopefully everything goes well, that kind of

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thing.
Q. You haven't deleted anything off your Facebook, right?
A. No, sir.
Q. So it's all there?
A. Yes, it is.
Q. Have you ever been convicted of any crimes?
A. Yes.
Q. What crimes are those?
A. Retail fraud.
Q. Anything else?
A. I also have a domestic violence.
MR. BARATTA: Just for the record, the retail fraud was in 2000.
MR. GABEL: Was there an incarceration that ended at a certain point in time?
MR. BARATTA: No. It was probation out of St. Clair Shores District Court.
MR. GABEL: Do you know when that was terminated?
MR. BARATTA: Probably within one year following the guilty plea in approximately 2000.
MR. GABEL: Does that sound correct, ma'am?
THE WITNESS: Yes.
MR. GABEL: Thank you very much.
MR. BARATTA: I'll just object to relevance.

BY MR. STEINER:
Q. And when was the domestic violence charge?
A. September, the last week of September of 2010.
Q. Do you know if that was a felony or misdemeanor?
A. I have no idea.
Q. Do you recall what court that was through?
A. St. Clair Shores.
Q. As a result of either of those, did you owe any money?
A. The domestic violence, I was ordered to go to anger management which I had to pay a fee for. I had to pay a monthly amount to my reporting probation officer and I had my court costs for my attorney and I was ordered to drug test whenever my color came up.
Q. With regard to the retail fraud, do you know what company that --
A. It was from Burlington Coat Factory.
MR. BARATTA: If you'll just give me a continuing objection on relevance and also, the fact that it's almost 17 years old at this point and I don't think it's admissible for purposes of trial. You can ask away.
MR. STEINER: That's fine.
MR. GABEL: I have no problem with that.
BY MR. STEINER:
Q. Have you ever treated for alcohol or substance abuse?

A. No.
Q. Did you graduate from high school?
A. I graduated 10 years late.
MR. BARATTA: If you have to get up and stretch, do it.
THE WITNESS: Yeah, I'm just moving around. If I have to sit in one position too long, it gets sticky.
MR. BARATTA: I'm sorry to interrupt. Go ahead.
BY MR. STEINER:
Q. So you mentioned you graduated 10 years late. Did you complete a GED?
A. No, I have a diploma. I went to night school. I actually graduated with honors for that.
Q. All right. My records indicate that you went to East Detroit High School for some period. Is that right?
A. Correct.
Q. When did you start East Detroit High School if you know?
A. '75 I want to say.
Q. And when did you leave?
A. Actually, you know what, it was probably a year later. I was pregnant and they would not allow me to continue school.

Q. What grade were you in if you know?
A. I was in my 11th grade going into my senior year.
Q. Then you mentioned 10 years later, you completed a night program?
A. Yes, 1978, I graduated from Mount Clemens High School Adult Education.
Q. Did you say '78?
A. I'm sorry. '87. Because I was supposed to graduate '77 and I actually graduated '87.
Q. Okay. Did you ever attend college or any secretarial school?
A. No.
Q. Do you have any degrees or certificates in any other area of study?
A. No.
Q. Did you ever serve in the military?
A. No.
Q. Are you currently employed?
A. No.
Q. When was the last time you were employed?
A. February 22nd, 2014.
Q. Are you currently looking for a job?
A. No.
Q. Have you looked for a job since February 22nd, 2014?
A. No.

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Q. Have you applied for Social Security Disability?
A. Yes.
Q. Were you granted Social Security Disability?
A. Yes.
Q. When did you apply?
A. October 2014.
Q. Were you granted Social Security Disability the first time you applied?
A. I was.
Q. Did you hire an attorney?
A. I did.
Q. Do you recall who that attorney was?
A. Randall Mansour.
Q. You mentioned you applied in October 2014. When were those benefits granted if you know?
A. February 2015.
Q. What injury did you claim?
A. My back.
Q. Do you know what physician diagnosed your back problem such that you were able to get Social Security Disability?
A. Martin Komblum.
Q. Did you ever apply for unemployment benefits?
A. Yes.
Q. When have you applied for unemployment benefits?

A. When I was terminated from Burlington Coat Factory.
Q. When was that?
A. 2000.
Q. Oh. I'm sorry. I thought you were – was Grand Dimitre's the last place you worked?
A. Yes.
Q. Do you recall what years you worked at Grand Dimitre's?
A. 10 years.
Q. So 10 years prior to 2014?
A. Yes.
Q. So approximately 2004?
A. Yes. It might even be 11 years.
Q. What was your wage there?
MR. BARATTA: When she left?
MR. STEINER: Right.
THE WITNESS: $2.90 an hour plus tips.
BY MR. STEINER:
Q. Do you know how much you made in 2013? If you need to approximate, you can.
MR. BARATTA: If you don't know, you don't know. They can get your tax returns.
THE WITNESS: Yeah, I – approximately $11,000.
BY MR. STEINER:
Q. What about 2012?

A. The same. I mean my wage stayed the same.
Q. Okay. How many hours per week would you work at Grand Dimitre's?
A. Depended. I did have a set schedule, but because I was an opening server, when the lunch crowd would be done, I got to go home.
Q. Some records indicate that you worked approximately 38 hours per week. Is that about right?
A. Correct.
Q. Were you an opening server for the entire time you worked at Grand Dimitre's?
A. No.
Q. How long were you an opening server?
A. Seven years approximately.
Q. What were you before you were an opening server?
A. Afternoons, nights. It was a seniority thing. I worked my way up the ladder.
Q. So opening server was considered a desirable position?
A. Absolutely.
Q. And what were your general job duties?
A. Server, cashier, busser, janitor, whatever was required.
Q. Did it require a certain amount of ability to lift heavy things?
A. Correct.

Q. Did you ever try to go back to work at Grand Dimitre's?
A. No.
Q. Did any doctor tell you that you could go back?
A. No.
Q. Did any doctor tell you that you could not go back?
A. Yes.
Q. Which doctor is that?
A. The first one was Dr. Valentine I believe his name was. He was the initial doctor at Concentra. The next doctor was Albert Belfi. He was the specialized doctor at Concentra and Martin Kornblum who was my surgeon.
Q. When you were paid by Grand Dimitre's, were you paid in cash or by check?
A. By check.
Q. How far of a drive is it from where you live to Grand Dimitre's?
A. Five minutes.
Q. Before you worked at Grand Dimitre's in approximately 2004, where did you work?
A. I worked at Burlington Coat Factory, Village Market, Grand Dimitre's, but at a different location, different owner.
Q. Okay. From at least 2004 to 2014 when you worked at Grand Dimitre's, was it always the same owner?
A. No.

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Q. Who was the owner when you last worked there?
A. Tom and Jamal Chakani.
Q. Do you know how long they were owners?
MR. BARATTA: I'm just going to object based on foundation, but you can answer if you know.
THE WITNESS: To date? I would say 10 years.
BY MR. STEINER:
Q. So just a couple years after you started, it switched to them?
A. Correct.
Q. Immediately before working for Grand Dimitre's, did you work at Burlington?
MR. BARATTA: That's been answered.
BY MR. STEINER:
Q. I'm just trying to figure out the time line here. Were you unemployed for a period of about three years then?
A. No. I worked at Village Market.
Q. Okay.
A. I worked at Burlington Coat Factory, to Village Market, to Grand Dimitre's.
Q. Okay. When did you leave Village Market?
A. Before I started working for Grand Dimitre's.
Q. So right around 2004?
A. Yes.
Q. When did you start Village Market?

A. 2001 maybe after my unemployment was done.
Q. Okay. And what did you do for Village Market?
A. I was a cashier, stocker, swept the floor, lottery, stocked the liquor shelves, whatever was required.
Q. Did that job require heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim or anything like that as a result of your employment there?
A. No, sir.
Q. Were you ever injured on the job there?
A. No, sir.
Q. What did you do for Burlington Coat Factory?
A. I was a customer service manager.
Q. What kinds of things would you do there?
A. I was responsible for the front end of the store, the cashiers, the money, taking care of lay-aways and putting them upstairs, all of the paperwork from the cash registers.
Q. Did that job require any heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim there?
A. No.
Q. Were you ever injured on the job there?
A. I was.

Q. What did you injure?
A. Actually, my shoulder.
Q. Did you see a doctor?
A. I did, at Concentra.
Q. Do you know what year that happened?
A. '98 I'm guessing, '99 maybe.
Q. Do you know which Concentra clinic you saw?
A. The one in Fraser, 14 and Groesbeck.
Q. What did you do to your shoulder?
A. It was actually like Christmastime and they have the big rolling racks for the clothes that would come out of shipping and we were keeping those up front by the cash register and as people were coming to put their lay-aways in, they would be bagged and the whole thing would be put up on a rolling rack. Then it would be rolled back to the back of the store where we'd put it in lay-away.
All of the hangers that we would use that would come out of receiving was like the plastic kind with the metal hooks, so when you pushed them, they would glide easily down the rack and for whatever reason, the one lay-away that the cashier had did had several plastic hooks on them. So as I put it up on the rack and we're talking coats and jeans and, you know, this kind of thing in the lay-away, as I pushed

it, the plastic just stopped fast on the rod and it just like put my shoulder out.
Q. Did you treat for a period of time?
A. I did at Concentra.
Q. How long?
A. Approximately six weeks maybe.
Q. Were you off work?
A. No. I still worked.
MR. GABEL: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. So you mentioned that you treated for approximately six weeks and you didn't take off work, right?
A. No. I was still working, but I did every day like even if it was my day off, I had to go to Burlington, punch my time card, go to Concentra, then go back to Burlington and punch my time card.
Q. Did that event affect your back at all?
A. No.
Q. I forgot to ask earlier, are you presently married?
A. No.
Q. Earlier, you mentioned that you are currently taking Norco. When was the first time you were prescribed Norco?

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RECEIVED by MSC 7/8/2020 5:41:14 PM

A. September, I believe, of 2014.
Q. Do you know who prescribed that?
A. Dr. Wednesday Hall.
Q. Does he continue to prescribe that?
A. She, and yes, she does.
Q. Where do you get your prescriptions refilled?
A. Wherever I can get them.
Q. Can you give me a list of where you can get them?
A. CVS is my main pharmacy. Norco is one of the hardest medications to get a hold of because it's a narcotic, so when I can't get it at CVS, I will make my way down the street to Walgreens and check there and if they don't have it, I will move on to the next one until I can fill my prescription.
Q. You mentioned there might be a next one. What might that be?
A. I have gotten them at Kroger, CVS, Wal-Mart -- I'm sorry, never Wal-Mart, Walgreens, I don't believe anywhere else.
Q. Okay. Any other medications you're taking?
A. I take Gabapentin.
Q. What's that for?
A. Nerves.
Q. Who prescribes that?
A. Dr. Wednesday Hall.

Q. What do you mean by nerves? Does it help relax you or what is that?
A. No, no, it's nerves for my back.
Q. Nerve pain?
A. Yes.
Q. So that's just another pain medication?
A. Yes. I'm sorry.
Q. That's okay.
A. And I also take Clonidine.
Q. What's that for?
A. It's actually a blood pressure medication, but I take it for hot flashes.
Q. Who prescribes that?
A. Vena Panthanji. She's my primary care doctor.
MR. GABEL: Can you spell that, please?
MR. STEINER: I have the spelling in here somewhere. It's in the interrogatories.
MR. GABEL: Thank you. I'll get it.
MR. BARATTA: You can't spell that, Steve?
MR. GABEL: I'm good, but I'm not that good.
BY MR. STEINER:
Q. How much are you presently receiving in Social Security Disability?
A. My total payment is $734 a month. I actually receive $615 a month.

Q. Do you have any other sources of income?
A. No.
Q. Has that amount stayed the same since you started receiving it in February of 2015?
A. The $734 started then. When I was -- got the Medicare August of 2016, that's when it went to the 615 a month because I have to pay for my Medicare.
Q. I see. I know that you filed a Workers' Compensation lawsuit arising out of this incident. Have you ever filed for Workers' Compensation before?
A. No.
Q. It's my understanding that you redeemed that lawsuit. Is that right?
A. I did.
Q. Do you remember how much that was for?
A. The total amount or my amount?
Q. Total amount.
A. 65,000.
Q. How much did you receive?
A. 28,578 I believe.
Q. And that was for injuries arising out of the incident that we're here to talk about today?
A. Correct.
Q. Have you ever filed a lawsuit for any other injury?
A. No, sir.

Q. Have you ever been a party to any other lawsuit that we haven't discussed already?
A. No, sir.
Q. Did you have health insurance at the time of this incident?
A. No.
Q. Have you ever had health insurance other than the Medicare that we talked about?
A. Ever or just --
Q. Yeah.
A. When I was married to Timothy McMillan, I had Aetna through his employer. When I originally started with Medicaid, that was in I want to say November, approximately, of 2014. Then they gave me the Total Health Care like 30 days after that, so I had the combination of Total Health Care and Medicaid. Then August of 2016 is when the Medicare started, so now I have Medicare with Medicaid as a backup.
Q. May I ask why the Medicare started in August 2016?
A. Because you have to wait I believe it's 30 months or something like that. You have to be on disability for at least two years and a couple of months and then Medicare automatically starts. So mine automatically started August 1st of 2016 and, you know, it was their doing, not mine.

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Q. I see. Okay. It's perfectly okay if you don't know this, but has any medical facility told you that you owe any money to them as a result of the injuries that you sustained in this incident?
A. I owe them nothing.
MR. BARATTA: Did you understand his question? Do you have any patient balances with any doctors? I think that's what he's asking.
THE WITNESS: Nothing. When the redemption was done through Workmen's Comp, they claimed all of the debt that was associated and since then, I've had full coverage, so I've had no bills.
BY MR. STEINER:
Q. Are you aware of a Workers' Compensation lien that's been filed in this lawsuit? If you don't know, that's okay.
A. I believe not, but anything is possible.
Q. Okay. Let's just start generally, how did the incident happen?
A. I was scheduled to work at 6:00 a.m. on the 21st of February. It was a Friday and I got there approximately 5:50, parked my vehicle, went to walk into the door and maybe three steps and I fell straight back.
Q. So you were coming from your Pinewood Street home

address?
A. Correct.
Q. Then you were heading to Grand Dimitre's which I believe is located on Gratiot Road in Eastpointe, right?
A. Correct.
Q. Is this the usual time that you would go to work?
A. That was my usual time Monday, Thursday, Friday.
Q. What other days of the week did you work?
A. I worked Tuesday 9:30 to 2:00 and I worked Saturday 8:00 a.m. until 2:00 and my days off were Wednesday and Sunday.
Q. Do you remember what day of the week this incident occurred?
A. Friday.
Q. Were there other cars in the parking lot at the time of the incident?
A. One.
Q. Do you know whose car that was?
A. Debra Buck's.
Q. Did you say Debra?
A. Yes.
Q. What does she do?
A. She's a server.
Q. Did she open that day?

A. Yes. We opened together.
Q. Was she already in the restaurant at that time?
A. Correct.
Q. When I say at that time, I mean at the time of your fall.
A. Yes.
Q. Are you aware of any witnesses to the actual fall?
A. No.
Q. Did you see the snow coming into the parking lot --
A. Yes.
Q. -- on the -- let me just finish the question. Did you see the snow coming into the parking lot?
A. Yes.
Q. Did you know it might be slippery in the parking lot?
A. Yes.
Q. At the time of the incident, did you own a cell phone?
A. Yes.
Q. Who was the carrier?
A. I know who it is. I can't think of the name.
Q. Sprint? Verizon? T-Mobile? AT&T?
A. Nope. Brain freeze. It's the cheap one.
MR. BARATTA: I don't know.
THE WITNESS: I don't know.
BY MR. STEINER:
Q. That's fine. Did you call anyone before you got out of

your car on your cell phone?
A. No.
Q. Did you call anyone on your cell phone after you fell?
A. Yes.
Q. Who did you call?
A. The restaurant.
Q. The owner?
A. No, the restaurant phone.
Q. Okay. And who answered? Was it Debra that answered?
A. Yes.
Q. Now, where in the actual parking lot did you fall? You mentioned you were about three steps from your vehicle. Are you able to say --
A. I was in the rear of the building in the parking area.
Q. How close to the back door was that?
A. I would have to approximate 75 yards, 70 maybe.
Q. Could you have parked closer to the building?
MR. BARATTA: Hold on a second. I'm not sure that you understood his question. He was asking you, I think, how far your car was parked from the door that you were going into.
Is that correct? And if it's not --
MR. STEINER: Yeah, that's generally -- yes.
THE WITNESS: Yes, it was about 70 yards from my vehicle to the back door.

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RECEIVED by MSC 7/8/2020 5:41:14 PM

MR. BARATTA: Okay.
BY MR. STEINER:
Q. And you fell approximately three feet from your car?
A. Yes.
Q. Could you have parked closer to the door?
A. No.
Q. And why not?
A. Because the parking area was all piled up with snow. That was the first available full parking spot.
Q. How much snow on the ground was there?
A. Approximately six inches, but it was packed snow. It wasn't soft snow.
Q. So it's fair to say that you fell closer to your car than the door that you were going into?
A. Correct.
Q. Was Debra the only one scheduled to arrive at about that time?
A. No. There was a cook, also.
Q. And he just hadn't arrived yet?
A. I have no idea. He parks in the front of the building because that's where his key is.
Q. Okay. What's the cook's name?
A. Robert Spear.
Q. Do you know if he was in the building?
A. I didn't know who was in the building. I just seen

Debra's car.
Q. But do you know now if he was in the building?
A. When I got inside the building, yes, he was.
Q. Where were you looking when you fell?
A. On the ground.
Q. Could you see the ice?
A. Yes.
Q. Could you see pavement?
A. No.
Q. How much ice would you say you were able to see?
A. The whole parking lot.
Q. What did it look like?
A. A sheet of white ice.
Q. Was the snow on top of that?
A. It was trodden. It was flattened to the ground. There was no fluffy snow, no.
Q. Do you know what caused it to flatten?
A. It being plowed over after it snowed.
Q. So it looked like a truck had been through there already?
MR. GABEL: Object to the form and foundation. She didn't even say whether one -- but you can answer what you saw, what you observed.
THE WITNESS: What was the question again?
BY MR. STEINER:

Q. You mentioned it looked like the parking lot had been plowed over. Had there been a plow through there if you know?
A. No. You asked me if I seen snow and I said that there was no snow, except flat where it had been plowed. There was no snow on top.
Q. I guess I'm a little confused. There was no snow on top of where?
A. It was solid. There was no soft stuff. It was solid block. It was just one big block of ice and ground trodden -- it's hard to describe.
MR. BARATTA: Her answer was that the whole lot was a sheet of white ice. Her additional answer was there was no fluffy snow. I think she also described the lot as being trodden. I want to say another word may be packed if that's correct.
THE WITNESS: Packed.
MR. BARATTA: But I don't want to testify for my client.
THE WITNESS: Packed would be a perfect interpretation.
BY MR. STEINER:
Q. All right. Did --
MR. BARATTA: Is trodden the word that you used?

MR. STEINER: I heard flattened to the ground.
THE WITNESS: Yes.
BY MR. STEINER:
Q. Do you know what caused that to flatten?
MR. BARATTA: I'm going to object based on foundation and speculation.
You can answer to the extent that you know.
MR. GABEL: Join. Go ahead.
MR. BARATTA: Do you know -- do you remember his question?
THE WITNESS: Yes.
MR. BARATTA: All right.
BY MR. STEINER:
Q. What caused the snow to flatten to the ground if you know?
MR. GABEL: Same objection. Go ahead.
THE WITNESS: You guys are confusing me.
MR. BARATTA: Don't pay attention to our objections. Unless I instruct you not to answer a question, then don't answer it, but Mr. Gabel will object sometimes. Sometimes I'll object.
THE WITNESS: Okay. Here's the situation. It had been snowing for over a month. Every time it snowed, a snowplow would come and plow the area for

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everybody to walk. The next day, a snowplow would come if it had snowed and plow the area for everybody to walk.

In addition to that, vehicles would be driving through this area for several reasons. One, it was our parking area to park, so that's where we parked; two, it was the alley for the plaza, so trucks and delivery people would be going through the alley to deliver to the plaza. It was a solid sheet of white. Whether it be packed snow or ice I have no idea.

BY MR. STEINER:

Q. So did it look like vehicles had driven through the parking lot?

A. Yes.

Q. Did it look like the parking lot had been plowed?

A. Previous --

MR. GABEL: Asked and answered. You may go ahead.

THE WITNESS: Previously, yes.

BY MR. STEINER:

Q. Do you know about how much snow or ice was on the surface of the parking lot in inches or centimeters?

MR. BARATTA: Are you asking her the depth of the snow and/or ice?

MR. STEINER: Correct, on the surface itself.

MR. BARATTA: That she was walking on the morning of the incident?

MR. STEINER: Right.

THE WITNESS: Approximately six inches.

BY MR. STEINER:

Q. When you arrived at Grand Dimitre's before this incident, had you ever had snow or ice in the parking lot before?

A. Yes.

MR. BARATTA: At what time?

MR. STEINER: I'm just asking before this incident.

MR. BARATTA: Any specific time frame?

MR. STEINER: No specific time.

MR. BARATTA: In the 10 years that she worked there?

MR. STEINER: Right.

MR. BARATTA: Okay. Go ahead.

THE WITNESS: Yes.

BY MR. STEINER:

Q. In those situations, did you ever report that to anyone?

A. Report what, sir?

Q. That there was snow or ice in the parking lot.

A. No.

Q. Do you know if salt is kept on the premises?

A. Yes.

Q. Do you know who buys it?

A. The owners, Tom and Jamal Chakani.

Q. Do you know who applies it?

A. The purpose of the salt at the building was for the customer sidewalks in the front of the building and the side of the building.

Q. But they would apply the salt, the owners?

A. For the sidewalk.

Q. In your experience, was the Grand Dimitre's parking lot generally used for Grand Dimitre's employees and customers?

MR. BARATTA: Which lot? Object. Vague. Which lot?

BY MR. STEINER:

Q. The parking lot that you parked in.

A. We were required to park in the back of the building. The employees parked in the back of the building.

Q. Is that generally what that parking lot is used for?

MR. BARATTA: Objection; foundation. You can answer if you know.

THE WITNESS: That is where the employees parked. Some customers would park there, but the majority of the cars back there were employees.

BY MR. STEINER:

Q. Do you know if that parking lot was used by any other business or anything like that?

MR. BARATTA: Foundation.

MR. STEINER: I asked if she knew.

THE WITNESS: That particular area, no. That area is for Grand Dimitre's.

BY MR. STEINER:

Q. Okay. Grand Dimitre's has a dumpster, right?

A. Yes.

Q. Is it in the back of the building?

A. Yes.

Q. Is it in that parking lot where you were walking?

A. No.

Q. You mentioned you got to the restaurant at approximately 5:50, right?

A. Correct.

Q. Was it light out?

A. It was dark.

Q. Are there lights on the premises?

A. The side of the premises, yes. The front, I have no idea.

Q. What about the back?

A. The back lighting was -- they had a night light over the back door.

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RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Nonetheless, you were still able to see the snow and ice, right?
A. Well, if you walk into your bathroom and you have a night light, that is how bright that light was. It just did the door. It didn't come out into the parking lot.
Q. I see. But again, nonetheless, you were still able to see the ice, right?
A. Yes.
Q. Do you have any personal knowledge how long the snow and ice had been there on the day of the incident?
A. It had been accumulating every day for two months.
Q. But what about on the parking lot surface itself? You did mention that trucks would come by, right?
A. Yes.
Q. And plow the snow, right?
A. Yes.
Q. So at least to some extent, it didn't all accumulate over two months, right?
A. Yes, it did.
Q. So no one had been there in the two months prior?
A. No, every day or whenever it snowed, a plow would come and plow the new snow. Did we ever see cement? No.
Q. Okay. Do you have any idea the last time a truck came by?

A. Probably Thursday.
Q. So the night before?
MR. BARATTA: Do you know?
THE WITNESS: Absolutely not. I couldn't tell you specifically when the last time a truck was there. It's an alley.
MR. BARATTA: Tell Mr. Steiner you don't know.
MR. STEINER: Well, I think she already answered the question.
BY MR. STEINER:
Q. What type of shoes were you wearing on the date of the incident?
A. It's funny you should ask. Here they are. I'll even show them to you because I have to get up anyway. These were the shoes that I was wearing.
MR. BARATTA: You answered in the interrogatories, Ms. Livings, they were Skechers, they were a month old at the time of the incident?
THE WITNESS: These are them, yes.
MR. STEINER: Let the record reflect the witness has shown me her black Skechers that have rubber soles. They look like --
MR. GABEL: I'm sorry. If you'd just stand still for a moment.

MR. BARATTA: Mr. Gabel wants a good peek.
MR. GABEL: Thank you very much.
THE WITNESS: I'll just stand. Go ahead. You can still ask me questions.
MR. GABEL: Chris, would you mind if I got a picture of that?
MR. BARATTA: Her shoes?
MR. GABEL: Yeah.
MR. BARATTA: Not at all. While you guys are snapping photographs, I'm going to get a quick refill on some coffee.
(Short recess.)
BY MR. STEINER:
Q. At the time of the incident, were you holding anything?
A. My purse.
Q. Anything else?
A. I actually brought that, too, just so you could see. No, just my purse.
Q. Do you wear contacts or glasses or anything?
A. Nope.
Q. I want to say that I saw some medical records that indicated that you had some sort of glaucoma or cataracts or something.
A. Cataracts.
Q. Did you have surgery?

A. I've had two surgeries, one for each eye.
Q. When was that?
A. My first one I believe was 2009 I think.
Q. When was your second one?
A. The second one was December 2015.
Q. Did you have any trouble seeing after either one of those surgeries?
A. No.
Q. Did those surgeries correct your vision?
A. Yes.
Q. Why did you have the second surgery in 2015, just the other eye?
A. Yes, it was the other eye. The first surgery was my left. The second surgery was my right.
Q. Did you have trouble with your right eye leading into 2015?
A. No.
Q. All right. I think earlier, you mentioned that you fell straight back; is that right?
A. Correct.
Q. Do you know on what body part you landed on?
A. Like lower back.
Q. And I know you mentioned that you injured your lower back as a result of this incident. Anything else?
A. I don't understand the question.

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Q. Did you injure anything else besides your lower back?
A. No. I mean I was sore. My arm hit, that kind of thing, but nothing permanent.
Q. So the only injury that you relate to this incident is with regard to your lower back at least for purposes of this lawsuit, right?
A. Correct.
Q. How long were you on the ground following this incident?
A. Five seconds.
Q. And then how did you get to the restaurant?
A. I tried to stand up and was slipping everywhere, so I got down on my hands and knees and crawled across the parking area. I tried to get to the back door. I could not, so I ended up walking the snow drift, plowed area, whatever you want to call it to walk around the building.
I called to the restaurant when I got to the front door where Debra Buck answered. She opened up the front door for me. I went inside. I was soaking wet. I then went home, changed my clothes and came back to work.
Q. Did you work that day then?
A. I did.
Q. Did you tell anyone else about the incident besides

Debra Buck?
A. Mr. Spear, Maria Isaac at 9:00 a.m. when she came to work, my boss, Tom Chakani.
Q. Anyone else?
A. My customers. I mean, you know, there was no other employees.
Q. You mentioned Mr. Spear was the cook, right?
A. Correct.
Q. Who was Maria Isaac?
A. She was another server.
Q. And then Tom Chakani is one of the owners at Grand Dimitre's; is that right?
A. Correct.
Q. Did you -- strike that.
Did you tell all of these people the same story of how it happened?
A. Yes.
Q. And is it generally what we said just moments ago at this deposition?
A. Yes.
Q. You didn't tell them anything else?
A. Nope.
Q. What did you talk to your boss, Tom Chakani, about?
A. I believe somebody else had told him in the back when he came in the back door, so he came up to me and asked

me what was going on and I told him that I had fallen on my way into work that morning in the back lot.
Q. Do you know if Mr. Chakani did anything after you told him?
A. He did.
Q. What did he do?
A. He went out the back door, took an ice pick, shovel type thing and went to where the drain was in the back parking lot and started to try to break up the packed driving area.
Q. Did you slip near the drain?
A. I don't know. I couldn't see the drain.
Q. Did he clear the entire back lot?
A. Did he?
Q. Correct.
A. No.
Q. Just near the drain?
A. Correct.
Q. Why did he do it at that location versus another location?
MR. BARATTA: Object to foundation.
THE WITNESS: You'd have to ask him. I don't know.
BY MR. STEINER:
Q. Had he ever done that in the past if you know?

A. I don't know.
Q. You certainly never told him to do in it in the past though, right?
A. No.
Q. Do you believe it was his responsibility to do that?
MR. BARATTA: To do what?
MR. STEINER: Break off the ice like he did.
THE WITNESS: No.
MR. BARATTA: I'll object to form; foundation; also calls for a legal conclusion.
To the extent you can answer, please go ahead.
THE WITNESS: No, I don't believe it was his responsibility to do that.
BY MR. STEINER:
Q. Do you have any idea if he told anyone else about this incident?
A. I don't know.
Q. All right. So after you changed and came back to work, were you able to generally do your everyday duties?
A. Yes.
Q. Did you complete your shift?
A. I did.
Q. Where did you go after?
A. Home.

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Q. What did you do?
A. I took some Motrin and laid down.
Q. Eventually, did you go seek medical attention?
A. I did.
Q. Where was that?
A. Concentra.
Q. Which one is that?
A. 14 and Groesbeck in Fraser.
Q. What did you tell them?
A. That I fell at work.
Q. Was that the following day?
A. Yes.
Q. Do you know what time you went there?
A. Approximately 1:00 o'clock, 1:30.
Q. Were you scheduled to work on that Saturday?
A. I was.
Q. Did you call in?
A. No, I worked.
Q. You worked that Saturday, too?
A. I did.
Q. Did you report this incident to anyone else?
A. Anyone else being who?
Q. Anyone else we haven't talked about or -- we haven't talked about?
MR. BARATTA: Object to form.

THE WITNESS: I mean I told my son and his wife. They came in for breakfast on the Friday morning. "Mom, what's wrong with you?" "I fell this morning." I told my customers. I mean I'm a very efficient waitress and when I'm only moving at 80 percent, people ask, "Oh, what's wrong?" "Oh, I fell this morning. My back is kind of hurting." So of course I spoke to other people.
Q. So would you say at least following the incident, you were at about 80 percent at least for that --
A. Following the incident, my pride was hurt more than myself.
Q. So your injuries really didn't develop for some period of time, at least the extent of them?
MR. BARATTA: I'm going to object based on foundation. She's not a doctor.
MR. STEINER: I know, but she knows what she felt.
MR. BARATTA: If you can answer as to the progression of your injuries, whether or not your body was in shock, anything like that, then provide Mr. Steiner with an answer. If you can't, then tell him you don't know.
BY MR. STEINER:
Q. You can also tell me the extent of your pain level as

well.
A. It hurt. On a scale of one to 10, probably five. I completed my shift. I did my job because that's the kind of employee I am. I went home, took two Motrin and I laid down. As the evening progressed, it got worse. I was unable to sleep all night.
The following day, I went to work because I was scheduled to. When my boss came in, I told him, "I don't know what's going on, but I have been in pain all night. I need to go see a doctor." He told me to go to Concentra, which is what I did.
Q. Okay. So this incident happened on February 21st, 2014. Do you know if it snowed on the night prior?
A. I have no idea. I don't remember.
Q. Do you know if it snowed coming into work that morning?
A. I don't remember. No, I don't believe it was snowing that morning.
Q. Do you have any idea the last time it snowed before this incident?
A. It was snowing every day, Mr. Steiner. It was February.
Q. Well, you just told me you didn't know if it was snowing the day before or if it was snowing that morning so --
A. I have no idea honestly.

Q. Before this lawsuit began, did you know who Jim Sage was?
A. Yes.
Q. How did you know his name?
A. I actually became acquainted with Mr. Sage when I worked at Dimitre's located on 11 Mile and Gratiot in Roseville. I actually worked for Jim Sage for approximately four days and at Grand Dimitre's, Jim Sage was the landlord, so he called often and stopped by a lot.
Q. How often would you say he called?
A. Oh, I don't know. When he needed to call about something.
Q. Did he ever call you directly?
A. No.
Q. Did you ever speak with him directly?
A. Of course. I would have to answer the phone.
Q. And he would just ask for the owner or something like that?
A. Yes.
Q. Do you know what he called about?
A. I have no idea. He was the landlord. He would call about whatever he wants.
Q. Are you aware of any Sage Investment Group employee being on the premises?

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MR. BARATTA: Object to form. At what time?
MR. STEINER: Just in general before the incident.
THE WITNESS: Before the incident? Mr. Spear used to work for Mr. Sage.
BY MR. STEINER:
Q. Well, it's my understanding Mr. Spear was a cook, right?
A. Yes.
Q. So he was a Grand Dimitre's employee, right?
A. Yes.
Q. Are you aware of any Sage Investment Group employee as an employee for Sage Investment Group being on the premises?
MR. BARATTA: Object to form and foundation. You can answer if you know.
THE WITNESS: Like I said, Mr. Spear worked as a cook for Mr. Sage, also.
BY MR. STEINER:
Q. But in the capacity as an employee for Sage Investment Group, are you aware of an employee being on the premises?
MR. BARATTA: Same objections.
THE WITNESS: I don't understand the question and he's --

MR. BARATTA: If you don't understand the question, you let Mr. Steiner know. If you don't know who was working for Sage's Investment Company at the time, you let him know that.
THE WITNESS: But he asked and I answered.
MR. STEINER: I understand.
MR. BARATTA: Talk to Mr. Steiner right now. I've stated my objection. If you don't know, you don't know.
BY MR. STEINER:
Q. Let me see if I can rephrase this. Did you ever see any employee from Sage Investment Group in their capacity as an employee for Sage Investment Group be on the premises at Grand Dimitre's?
MR. BARATTA: Object to form and foundation.
THE WITNESS: I'm going to say I don't know.
BY MR. STEINER:
Q. Did you see an employee other than Mr. Spear --
A. Ever?
Q. Let me finish the question. Did you ever see a Sage Investment Group employee on the premises at Grand Dimitre's other than Mr. Spear?
A. I have seen whoever maintains the property.
Q. And who is that if you know?
A. T&J Landscaping.

Q. But what about a Sage Investment Group employee other than Mr. Spear?
A. I don't even know who works for Sage Investment, so no.
Q. Okay. Do you have any idea if Sage Investment Group knew the condition of the premises on the date of the incident?
A. You would have to ask them. I don't know.
Q. Are you aware of whether Sage would use the parking lot for any purpose other than for Grand Dimitre's business?
MR. BARATTA: Object to foundation.
MR. STEINER: I asked if she was aware.
THE WITNESS: I would assume that Sage Investments allows all of their tenants that are located in that plaza to use the parking lot.
BY MR. STEINER:
Q. Earlier, you mentioned the parking lot was generally used by the customers and employees of Grand Dimitre's, right?
A. Yes, sir.
Q. Were you familiar with T&J before this incident?
A. I am.
Q. Do you have any idea how often they were on the premises? If you don't know, that's fine.
A. Depends on --

MR. BARATTA: Object to form. Go ahead.
MR. GABEL: If she knows. Go ahead.
THE WITNESS: Depends on what time of year. During the summer, they would come and mow the lawns and do the edging for the front curbing around the property. During the winter, I mean they came when it was necessary to plow.
BY MR. STEINER:
Q. But it's fair to say you certainly did not see them every time they came on the premises, right?
A. Not every time, no.
Q. Do you know if Grand Dimitre's would call them?
A. I don't believe so.
Q. Do you know if the owner knew anyone at T&J, of Grand Dimitre's?
A. Which owner?
Q. The owner of Grand Dimitre's.
A. I don't believe so.
MR. BARATTA: Ms. Livings testified there were two owners for the last decade, 10 years or a couple years she worked there, so which owner?
MR. STEINER: Either owner.
THE WITNESS: Personally, no, they did not know those people.
BY MR. STEINER:

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Donna Livings
2/22/2017

Page 58

Q. When you had a workplace safety concern, did you generally report that to Grand Dimitre's?
A. Yes.
Q. In the 24 hours prior to the incident, did you consume any alcohol?
A. No.
Q. What about drugs, either medications or illicit drugs?
A. None.
Q. How soon after the incident did you contact a lawyer?
A. August of 2014.
Q. Okay. Now, your attorney and you provided us with some information in this case, actually a lot of information and I just want to verify that I have all of the medical providers that you've treated with as a result of this incident. So I'm handing you a copy of what is titled Plaintiff's Answers to Defendant T&J Landscaping's Interrogatories. I'm using these simply because they're more recent than the interrogatory answers that I have for Sage Investment Group.
I'm referring to Interrogatory Number 17.
Now, if you could, just take a quick look through these and if you want to look through the whole document, that's fine with me, just to verify that it looks familiar to you, but I'm asking specifically to look at 17 and verify that those are the treaters that you

Page 59

treated with as a result of injuries you sustained as a result of this fall.
A. I don't believe I ever went to St. John Moross.
Q. Okay.
A. That looks like it's about it.
Q. Okay. I'm just going to ask you some questions about some of these providers. Earlier, you mentioned your primary care physician and I'm not even going to try to say it, so I'm just going to say Dr. P. Is that okay?
A. That's fine.
Q. When was the first time you treated with Dr. P?
MR. BARATTA: Object to the form.
THE WITNESS: January of 2015 I believe.
BY MR. STEINER:
Q. Do you still currently treat with her?
A. I do.
Q. Who was your primary care physician before that?
A. I did not have one.
Q. Did you have a primary care physician at all before her?
A. I did during my marriage with Mr. McMillan.
Q. Who was that if you remember?
A. Actually, I'll take that back. It wasn't a primary care doctor. It was an OB/GYN doctor.
Q. Who was that?

Page 60

A. I'm trying to think what his name was. He was out of St. John. I don't remember his name.
MR. BARATTA: Pappas?
THE WITNESS: No, John somebody. I don't remember his name.
BY MR. STEINER:
Q. Okay. What led you to treat with -- start treating with a primary care physician in January 2015?
A. I got medical insurance.
Q. Now, Mendelson Kornblum, it's my understanding that that's the office that handled some of your surgery, right?
A. They handled all of my surgeries.
Q. Had you ever treated with Mendelson Kornblum before this incident?
A. No.
Q. Did anyone refer you to Mendelson Kornblum?
A. Yes.
Q. Who was that?
A. Actually, I ran into a customer at -- from whom I had waited on in Meijer and she asked me where I had been. I told her that I fell and she said, "Oh, you need to call my guy," and she gave me his card.
Q. When did you first start treating with Mendelson Kornblum?

Page 61

A. August I believe it was, my first appointment, of 2014.
Q. Do you know who paid to have you see them?
A. Initially, my Workmen's Comp people had told me that they would pay for his consult, but would not pay for nothing else.
Q. But it's your understanding eventually all of it was paid through your redemption?
A. Yes, after I sued them.
Q. You're still currently treating with them, right?
A. Yes.
Q. When was the last time you saw them?
A. January.
Q. This year?
A. Yes. I seen him in January and I seen my pain management doctor, Dr. Hall, in February.
Q. What day in February?
A. The 6th, I believe.
Q. Do you have any appointments to see them in the future?
A. Yes.
Q. Do you know when those are?
A. I can tell you. March 30th for Dr. Kornblum and Dr. Hall, I am due to see her on March 10th.
Q. Okay. Oakland Imaging Diagnostic Center, did they just do an MRI or something like that?
A. Yes.

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Q. Do you know when that was?
A. April sometime of 2014.
Q. The Concentra in Fraser you mentioned you went to a couple days after the accident or the day after the accident, right?
A. Correct.
Q. How long did you see them?
A. I want to say three weeks.
Q. Did anyone refer you to them?
A. My boss told me to go there.
Q. What about the Concentra in Warren?
A. I have no idea. I've never been there. I'm sorry. The Warren location is Dr. Belfi. He's the Concentra specialist that I was sent to from the 14 Mile location.
Q. And would that time be in the three-week period that you treated with Concentra?
A. No.
Q. How long did you treat with the Warren one?
A. From, I don't know, the first week of March maybe, second week. It was like second week of March and I stayed with them until I went to go see Dr. Kornblum in August.
Q. Since going to see Dr. Kornblum in August, did you see any other physician other than Dr. Kornblum's office?

A. Between Concentra and Dr. Kornblum? No, I don't believe so.
Q. What about after you first saw Dr. Kornblum's office, did you ever see another physician?
A. I've actually seen several. They were like things that --
Q. Through the insurance company?
A. Yes, the insurance, IMEs or whatever they were.
Q. Right. Other than those, did you go visit any other physician?
A. No.
Q. Pure Healthy Back, when did you first start treatment there?
A. That was through Concentra.
Q. So between the time of the incident and seeing Dr. Kornblum, you treated at Pure Healthy Back?
A. Yes, and at Flex Therapy or whatever that place was.
Q. Okay. Do you still do physical therapy through Dr. Kornblum?
A. No.
Q. So since you started seeing Dr. Kornblum, he hasn't had you do any physical therapy?
A. Oh, no, I've had physical therapy. I'm just not doing any right now.
Q. Okay. Who did Dr. Kornblum refer you to for physical

therapy?
A. Mendelson Kornblum Physical Therapy.
Q. Okay. So they handle it all in-house?
A. Yes.
Q. St. John Macomb, is that where your surgery occurred?
A. My surgeries, yes.
MR. BARATTA: I don't know if you're aware, Mr. Steiner. I thought I mentioned that she had a recent fusion.
MR. STEINER: I think you mentioned that, yeah. That sounds familiar.
MR. BARATTA: That's why she's not in PT.
BY MR. STEINER:
Q. Okay. Let's talk about those surgeries. The first one, who performed the first one?
A. Martin Kornblum.
Q. Did he perform the second one, too?
A. Yes, he did.
Q. When did the first one occur?
A. He also did a third one.
Q. Okay.
A. The first one was April 29th, 2015.
Q. So you mentioned you started seeing him in August 2014. What did he do in between August 2014 and April 2015?
MR. BARATTA: What did who do?

BY MR. STEINER:
Q. The doctor and you.
MR. BARATTA: In reference to treatment for her?
MR. STEINER: Right.
THE WITNESS: Not much. I would go see him every couple of months. I was seeing Dr. Hall every month for pain management.
BY MR. STEINER:
Q. What did Dr. Hall do for you in those couple months, every couple months?
A. I see her every month. She's pain management. That's where I have to get my pain medication from.
Q. So she would just prescribe you pain pills like Norco?
A. Yes.
Q. And the other ones that we talked about earlier?
A. Yes, the Gabapentin.
Q. Did she do anything else?
A. No, that's all. She's a pain doctor. Actually, I'll take that back. She did. She gave me injections. I did have injections. The steroid whatever kind of injections, I had three of those with Dr. Hall.
Q. Do you know when those occurred?
A. I don't remember. It was last year.
Q. Was it before or --

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A. It was after my second surgery.
Q. Do you know what Dr. Kornblum did in your first surgery?
A. My first surgery, he went through my back and it was supposed to be a couple of pins and that kind of thing. When he got in there, it was not quite as he anticipated and I ended up getting a couple of titanium rods or whatever put in there.
Q. Do you have any idea if those rods will need to be removed at some point?
MR. BARATTA: Objection; foundation.
THE WITNESS: They'll never be removed.
BY MR. STEINER:
Q. Did you get a second opinion before going through with that surgery?
A. No.
Q. How long were you in the hospital after that first surgery?
A. My surgery was on the Wednesday and I believe I left there Friday, two days.
Q. Following that surgery, how often would you follow up with Dr. Kornblum?
A. Following that surgery, I had another surgery the following week.
Q. Okay. Was that planned?

A. Yes. It was my second surgery.
Q. Okay. And Dr. Kornblum performed that, right?
A. Yes.
Q. And what did he do in that surgery?
A. Actually, I had two surgeons there. I had a general surgeon who was Dr. Harris I believe his name is. They went through my stomach and attached more bars, so Dr. Harris ended up having to move everything out of the way and Dr. Kornblum did his thing on my back.
Q. So that was installing more rods in your back?
A. Yes, more hardware.
Q. How long were you in the hospital following that surgery?
A. I went in on May 6th for the surgery and I believe that was a Wednesday, so I think I didn't get out until Saturday on that one, so that was three days.
Excuse me one second.
(Discussion off the record.)
BY MR. STEINER:
Q. How long did you follow up with Dr. Kornblum after that surgery?
A. I believe it was two weeks. He wanted to see me in two weeks. Since both surgeries were only a week apart from each other, you know, it was like I really went, had the surgery, stayed there a couple days, came home

a couple days, went back for a couple of days, so I believe it was like two weeks after.
Q. And how many appointments have you had with Dr. Kornblum since that second surgery?
A. Approximately 10.
Q. Is it like once every couple months or something like that?
A. Yes. Sometimes him, sometimes his PA. I don't always see him.
Q. And then did he schedule you for physical therapy at that time?
A. My physical therapy was six months after my second surgery is when I started.
Q. How long were you in physical therapy for?
A. I want to say like two months.
Q. Then following that, did you just continue to see Dr. Hall for the pain management?
A. No, I've never been able to stop getting pain management.
Q. I understand. I'm saying after your physical therapy was completed after those couple months, what did you do?
A. We had to stop physical therapy. It was never really completed because of the pain level that I was in.
Q. So from about eight months after your second surgery,

you stopped treatment until your third surgery; is that right?
A. Correct.
Q. When was your third surgery?
A. December 21st of 2016.
Q. And Dr. Kornblum performed that surgery?
A. He did.
Q. What did he do?
A. I call it adding wings. He extended the metal bars to fuse --
Q. To fuse these --
A. The vertebrae, yes.
Q. Did Dr. Kornblum mention whether or not he thought the surgery after the second surgery was successful?
A. He felt that the surgery went well and we would have to wait to see how I recovered.
Q. Okay. Has Dr. Kornblum expressed that he believed this third surgery went well as well?
A. He's very happy with the third surgery, yes.
Q. Has your pain gotten better since you've gone through these surgeries?
A. Eventually, yes.
Q. Are you required to use crutches, a brace, walker, anything like that?
A. I have a brace at home and I also have -- I'm not sure

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what it's called, but it's a bone stimulator that I have to wear every day for 30 minutes. It's like a battery operated unit.
Q. But you don't use any walking aids, right?
A. No.
Q. What is your back brace called, if you know?
A. It's a back brace. It has metal rods in there. It's a black, heavy-duty ortho back brace.
Q. Where did you get it?
A. The supply store. I had to go in there and get measured for it.
MR. BARATTA: Binson's.
THE WITNESS: Binson's.
BY MR. STEINER:
Q. Was that prescribed to you by Dr. Kornblum?
A. Yes.
Q. How often do you wear it?
A. When I need to.
Q. How often is that?
A. Depends on what I'm doing. Sometimes I don't have to wear it at all and if I'm doing my housework, then yes, I do it, you know, to try and keep my back still.
Q. So it's as needed?
A. Yes.
Q. Did Dr. Kornblum prescribe that bone stimulator?

A. Yes.
Q. Where did you get that?
A. His office.
Q. And do you have any idea what that does?
A. It's supposed to stimulate bone growth.
Q. Okay. Do you still use it?
A. Every day for 30 minutes.
Q. When did you first start using it?
A. Three weeks after my third surgery.
Q. So recently?
A. Yes, in January.
Q. Have you ever heard that you've had arthritis in your back before?
A. Yes.
Q. And when is the first time you heard that?
A. Dr. Belfi told me when I had the MRI done.
Q. When was that?
A. April.
MR. BARATTA: Asked and answered. Go ahead.
THE WITNESS: April of 2015. I'm sorry. 2014.
BY MR. STEINER:
Q. Has any doctor told you that you've had degenerative conditions?
A. Yes, Dr. Belfi and Dr. Kornblum.

Q. Being a waitress, you mentioned that you had to bend over and carry heavy objects, right?
A. I didn't mention that I bent over, but yes, I do carry five, six plates on my arm which tends to be heavy.
Q. Did you ever have problems with your back before?
A. Of course. My back ached. I'm on my feet all day for six to eight hours.
Q. How long had that been a problem?
A. I'm 56, so I've had three children, I've had backaches for 20 years, nothing that has kept me from working.
Q. Has any doctor told you that you are permanently disabled from working?
MR. BARATTA: Objection; asked and answered. She testified regarding applying for and being granted first time Social Security Disability.
THE WITNESS: I already answered it so --
BY MR. STEINER:
Q. So it's your understanding that you cannot work?
MR. BARATTA: Asked and answered.
Go ahead. Donna, you can answer.
THE WITNESS: At this time, the doctors have stated that I am unable to work due to my back condition.
BY MR. STEINER:
Q. Do you believe you'll be able to work in the future?

A. That's the future. I have no idea what's going to happen tomorrow. I only know what's happening now, so no.
Q. Are you optimistic that you might be able to work again?
MR. BARATTA: Objection; relevance.
You can answer, Donna.
THE WITNESS: My income is $615 a month. Do you think I would like to go back to work? Yes.
BY MR. STEINER:
Q. Did you ever take any pain medication for any reason before this accident?
A. Nope. Occasional Motrin.
Q. Any prescription?
A. No.
Q. Prior to this incident, did you ever have any problems with your back that required medical treatment?
A. Nope.
Q. Any pain that we haven't already discussed in your back?
A. No.
Q. On the date of this incident, were you treating for any medical conditions?
A. No.
Q. On the date of this incident, were you taking any

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1 medication?
2 A. No.
3 Q. Presently, are you doing anything other than medication
4 to alleviate your pain?
5 MR. BARATTA: Asked and answered. She wears
6 a back brace, she's got a TENS unit and she takes
7 Norco.
8 MR. STEINER: Okay, those are three things
9 that she did mention.
10 BY MR. STEINER:
11 Q. But is there anything other than --
12 A. My doctor doesn't want me to do anything at this time
13 except heal.
14 Q. Okay. So nothing else?
15 A. No.
16 Q. Do you recall any particular incident after this fall
17 that aggravated the pain in your back?
18 A. Everything I do aggravates the pain in my back.
19 Q. Like what type of activity?
20 A. Standing, walking, sitting, sleeping, bending. It's
21 constant pain every day.
22 Q. After this incident, did you ever have a slip and fall?
23 A. Nope.
24 Q. Any automobile accidents after?
25 A. Nope.

1 Q. Any visits to the emergency room other than related to
2 this incident after the accident?
3 A. I've actually been to urgent care since this accident.
4 Q. For what?
5 A. I had an infected tooth that required antibiotics and
6 that was a week ago Friday, so whatever date that was.
7 Q. What urgent care was it?
8 A. Roseville Urgent Care.
9 Q. After this incident, have you done any surgeries
10 unrelated to this incident?
11 A. Nope.
12 Q. Have you ever visited a chiropractor?
13 A. Once.
14 Q. When?
15 A. Let's see. My son is 33, so 33 years ago.
16 Q. Do you remember who that was through?
17 A. A chiropractor that was on Ten Mile and I-94 in
18 Eastpointe.
19 MR. BARATTA: Lupo.
20 THE WITNESS: No. Nowicki or something like
21 that in the strip mall right there.
22 BY MR. STEINER:
23 Q. Before this incident, had you had a slip and fall?
24 A. No.
25 Q. Before this incident, had you had an automobile

1 accident?
2 A. No.
3 Q. Before this incident, had you been hospitalized for any
4 reason other than for your children?
5 A. Yes, I had a laparoscopy and I had a partial
6 hysterectomy.
7 Q. What's a laparoscopy?
8 A. It's where they go through your naval with a scope and
9 check it out to see what needs to be done.
10 Q. What was that in relation to?
11 A. I had endometriosis.
12 Q. When was that?
13 A. It actually started in like '96, '97, the pains all
14 started.
15 Q. What hospital?
16 A. St. John Moross. So actually, you know what, that's
17 when I went to St. John Moross.
18 Q. Before this incident, did you ever see a physical
19 therapist?
20 A. Yes, when I injured my shoulder in 2000, I seen the
21 Concentra physical --
22 Q. Any other incident?
23 A. Not that I can recall.
24 Q. Before this incident, did you ever have an MRI, CT
25 scan, anything like that?

1 A. No.
2 Q. Have we pretty much covered all your treatment for
3 after the accident?
4 A. I believe so. Everything was pretty much done and
5 ordered through Concentra or through Mendelson Komblum
6 and a couple of visits to Dr. Panthanji.
7 MR. STEINER: Let me just go through my notes
8 real quick off the record. I think I'm just about
9 done.
10 (Short recess.)
11 BY MR. STEINER:
12 Q. Before the incident, did you have any hobbies,
13 activities, stuff you liked to enjoy?
14 A. Of course.
15 Q. What types of stuff would you do?
16 A. I was actually on a bowling team with a couple of the
17 girls from work. It hadn't been for a couple of years
18 because everybody just kind of stopped wanting to go.
19 I used to go dancing. My grandsons -- I have nine
20 grandchildren. So three of my grandsons play soccer,
21 so I mean we always used to screw around with the
22 soccer ball.
23 At the time of the incident, I had twin
24 granddaughters that were a year old that I was
25 responsible to take care of them that I couldn't even

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do that because I couldn't lift up anything. It was like I couldn't do nothing. All the time, "Nana, come" -- "I can't come." "Nana, come" -- "No, I can't do that either."
Q. With respect to the bowling, had it been a couple years before this incident that you --
A. Yes.
Q. So with respect to the dancing, how often did you go dancing before this incident?
A. I actually hadn't been for probably a couple of years either, you know. But it's all things that I can't do anymore. I can't wear high heels. I wore three, four-inch high heels all the time, so now if I dress to go anywhere, I have to wear flats because I can't even dress correctly.
Q. Earlier, you mentioned that you do baby-sit one of your grandchildren at least every day, right?
A. Yes. Well, three, four times a week depending on what the mom and dad's schedule is.
Q. Okay. Is that to accommodate a work schedule or something like that?
A. Yes. My son and his fiance work.
Q. Do they pay you or anything?
A. No. It's my grandson. Do they pay me? No.
MR. BARATTA: She should pay them.

THE WITNESS: Correct. Because I go to their house.
BY MR. STEINER:
Q. Okay. And you still see the other grandchildren as well?
A. Yeah, all the time. I have a great-grandchild coming next month.
Q. Congratulations.
A. So we'll have another baby in the family.
MR. STEINER: Congratulations. Thank you. That is all I have.
EXAMINATION BY MR. GABEL:
Q. My name is Steve Gabel. I represent T&J Landscaping and I'm going to ask you some questions about the incident we're here for today. Same ground rules apply. Okay? You have to answer out loud which I'm going to ask you to answer out loud. Okay?
A. Okay.
Q. All the other ground rules Mr. Steiner discussed with you apply to me as well. Okay?
A. Okay.
Q. We just took a break for a second. Do you need to take another break before we go ahead?
A. I actually do.
(Short recess.)

MR. GABEL: We're back on the record.
BY MR. GABEL:
Q. Ma'am, I'm going to jump around a little bit because Mr. Steiner asked a lot of questions and I'm going to do my best not to go over those questions. I may, but I'm going to do my best not to do that. Okay? What is your weight currently?
A. Right now?
Q. Yes.
A. 163.
Q. And as I understand it, it was around the 140s or so around the time of the incident, right?
A. Correct.
Q. For whatever you posted on social media, we're going to ask you please do not delete that and we may follow up with your attorney, but whatever it was, commentary you mentioned, those photos, just leave it there.
A. No photos just --
Q. Thank you. Do you do Twitter?
A. No.
Q. Do you do Instagram?
A. No. I can barely do Facebook.
Q. All right. So you mentioned this chiropractor who was in Eastpointe. Is that the only chiropractor you would have seen in the last 20, 25, 30 years?

A. In the last 34 years and that was the only time. It was 34 years ago.
Q. Was it one visit or a series of visits?
A. I believe I went about five times.
Q. You tell us, what was the condition you went there for?
A. When I had my middle son, I had an epidural and it was just to the point when I came out of the hospital, my friend, because my back was aching and --
Q. So you're pointing to your low back?
A. Yes.
Q. Was that what you complained about for the five visits?
A. Yes.
Q. So epidural is typically an injection into the low back area to decrease pain, so you have your hand on the low back?
A. Correct.
Q. And that's the area you complained about?
A. I'm just standing here.
Q. I understand. But that's the area you complained about, correct?
A. Yes.
Q. To the chiropractor?
A. Yes.
Q. What did he do, manipulate the back in some way?
A. Yes.

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Q. How did he do that?
A. He had taken x-rays and then he put me on the bed thing and adjusted my spine I guess.
Q. Did he give you a diagnosis?
A. No.
Q. What were the pharmacies you went to prior to this incident? I know you mentioned a few, but I'm going back in time in the five years before this incident.
A. Five years before the incident?
Q. Correct.
A. I really was never sick. I can recall one visit where I had an upper respiratory infection.
Q. Just tell me the name of the pharmacy, the name of the place you went to, the establishment.
A. I would have to say Walgreens at 12 Mile and Harper because that was closest to my home.
Q. On 12 Mile?
A. Yes. It sits right on the corner.
Q. Near Harper?
A. On Harper.
Q. I identify these by street and cross street and city, so that's what I'm going to do. On 12 Mile, correct?
A. Yes.
Q. Near Harper?
A. Sir, it's on Harper. It sits right on the corner.

Q. At the corner. What's the city?
A. St. Clair Shores.
Q. Is there another one you went to besides that location?
A. I would have to say CVS that sits on -- it's on Harper by 13 Mile Road.
Q. Again, what city is that, St. Clair Shores?
A. Yes.
Q. Was there another one besides those two locations you just mentioned?
A. Prior to the incident?
Q. Yes, in the five years or so.
A. I don't believe so.
Q. You mentioned you would go to Kroger I think after this incident. Did you ever go to a Kroger pharmacy before this incident?
A. No.
(Discussion off the record.)
BY MR. GABEL:
Q. So were there any other pharmacies other than the two you told me about in the five years before the incident?
A. I don't believe so, no.
Q. Did you have an existing standing prescription, refillable prescription at these two places?
A. Prior to the incident?

Q. Correct, in the five years before.
A. No.
Q. Any pain medications you filled at these two locations --
A. No.
Q. -- you have to let me finish the question -- in the five years before?
A. No.
Q. Are you right or left-handed?
A. Right, but I do use my left.
Q. But you're right-hand dominant?
A. Yes.
Q. Prior to this incident, had you seen a psychologist, psychiatrist or social worker?
A. No.
Q. As I understand from your records, you smoke cigarettes.
A. I do.
Q. And one record said you smoked 20 cigarettes. Is that per day?
A. Yes.
Q. And you tell me. I don't know. Is that equivalent to one pack per day or more?
A. Yes.
Q. One pack per day?

A. Yes.
Q. Has any doctor told you that you should not do that because it's generally not good for you, reduces the amount of oxygen in your bloodstream?
A. Yes.
Q. Did a doctor tell you that it reduces the amount of oxygen in your bloodstream that could inhibit healing?
A. Yes. But --
Q. Hold on. So do you today still smoke cigarettes?
A. I do.
Q. Is it the same amount, one pack per day?
A. Depends on what I'm doing.
Q. How often do you smoke one pack per day?
MR. BARATTA: Since when?
BY MR. GABEL:
Q. Currently, how often do you smoke one pack per day?
A. Probably every day.
Q. Okay. Are you under any -- strike that.
Before this incident, in the five years before, were you under any written medical restrictions?
A. No.
Q. Did you have any medical restrictions on your driver's license?
A. No.

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Q. Did you have corrective lenses stated on your driver's license?
A. I don't believe so.
Q. Before this incident, you were telling us about some of the hobbies and I know they were prior. You told us about the bowling within five years prior. You told us about dancing in the five years prior and obviously caring for your grandchildren. Is there anything else in the five years prior in addition to working that you would do?
A. I sew. I have a sewing machine, so I'm always making things. In fact right now, I've just -- we have my great-grandson's baby shower on this coming Sunday, so I've done like the flower arrangements, but it takes me double the time. You know, if I want to paint my toes, it takes me two hours because I have to do a little bit, then stop.
Q. So other than the sewing, do you think you kind of covered what your general hobbies were?
A. Yeah. I'm just a crafty kind of person, always have been, making curtains and --
Q. I'm going to move toward the incident now and again, Mr. Steiner has asked you a lot of questions, so I'm going to jump around a little on that topic. Actually, prior to the incident, approximately one year before

the incident, did you have a slip and fall in the parking lot that we have been talking about here?
A. It wasn't a slip and fall per se. It was I slipped.
Q. You slipped, but you did not fall?
A. Right.
Q. Was this in the parking lot we have been talking about?
A. Correct.
Q. Were you exiting a vehicle?
A. Yes.
Q. Were you out of the vehicle?
A. Yes.
Q. Was it in the wintertime?
A. Yes.
Q. Did you catch yourself on something so that you didn't need to fall?
A. My door, the car door.
Q. Did you hurt anything as a result of that?
A. My ankle.
Q. As I understand, the ankle hurt for a couple of days or a couple of weeks was it?
A. I didn't work for about three days.
Q. Did you continue to have an ankle problem after that?
A. No. I wore an air brace to work for several days because my ankle and my whole foot was just black where I had hit it on my car.

Q. Did anybody give you a diagnosis as to what happened in that incident?
A. I didn't even go to the doctor.
Q. How did you get the air brace?
A. I had it. I have three sons that played football, soccer, wrestling. I have lots of stuff like that.
Q. So you didn't get a diagnosis because you didn't go to a medical doctor?
A. Correct.
Q. You didn't get any medical treatment for that; is that true?
A. No.
Q. That's true?
A. Yes.
Q. Did you have any -- was it the right or the left ankle?
A. My left.
Q. Did you have any instability of the left ankle continuing on over the course of the year after that occurred?
A. No, it did nothing, just unbruised and I was good to go.
Q. So it healed after several days because you used the air cast --
A. Yep.
Q. You have to let me finish my question -- and then you

were okay in your opinion?
A. Yes. It took a week to 10 days for the swelling, the black and blue to go down.
Q. When that happened, did you feel any problems in your back at all?
A. No.
Q. Do you recall when you had the last name McMillan having an incident at Meijer?
A. An incident at Meijer?
Q. Did you ever fall at a Meijer location?
A. No.
Q. You did not fall and hurt your arm or fall or hurt yourself in any way at a Meijer?
A. No.
Q. Okay. When was it you were married to Mr. McMillan?
A. We got married February 14th of '97.
Q. And then you gave us the end date. I apologize. When was that?
A. September 2000 I think.
Q. You told us about a domestic violence incident and so I'm not going to particularly ask about that, but what I want to know is were you hurt as a result of the incident?
A. No.
Q. You did not fall as a result of that incident?

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A. No.
Q. Did you hurt your back at all as a result of that incident?
A. No.
Q. What was the date of that again?
A. The first week of October of 2010.
Q. Did you have to seek any medical care and treatment as a result of that matter we just described?
A. No.
Q. Prior to this incident, did you ever seek care and treatment for drug or alcohol abuse?
A. No.
Q. So you said you arrived at the parking lot 5:50 a.m., correct?
A. Yes.
Q. Now, had you ever spoken to anyone from T&J's Landscaping prior to this incident?
A. Yes.
Q. When did you speak to anyone from T&J's?
A. They would come into the restaurant, so we'd give them drinks or they would order food sometimes.
Q. Now, when you talked to them, would this just be social talk?
A. Yes.
Q. You would not discuss the ins and outs of their work

activities, would you?
A. No.
Q. So is it fair to say that you do not know the scope of any work they were to do, if any, at this location?
A. No.
Q. Is that true, you would not know?
A. I would not know.
Q. If we were to ask you whether you knew when they did any work at all in the winter of 2013 to 2014, would you know that exactly without guessing?
A. No.
Q. If we were to ask the means and methods of the work and exactly how they did it and what they did and who was there, would you know anything about those details without guessing?
A. No.
Q. You did not have any agreement with T&J's, did you?
A. No. Could I talk to my attorney for one second?
MR. BARATTA: Sure. There's no question.
(Short recess.)
MR. GABEL: We're back on the record.
BY MR. GABEL:
Q. You do not know exactly when T&J's would have last been on the premises, would you?
A. I do not know.

MR. BARATTA: You mean last before the date of incident?
MR. GABEL: Correct.
BY MR. GABEL:
Q. That was the question, last before the moment of the incident. You do not know that, do you?
A. No.
Q. I want to ask you about the lighting. So at 5:50 a.m., was the sun still below the horizon?
A. Yes, it was dark.
Q. It was not twilight yet, correct?
A. No.
Q. That's correct?
A. Correct.
Q. But you described some lights. Were there any other lights? Was there light from any other source, ambient light, light from light posts at all?
A. Just the --
MR. BARATTA: Other than the door light she described?
MR. GABEL: Correct. She stated that already. I understand.
BY MR. GABEL:
Q. Anything in addition to what you have said? Were there any car lights, ambient light from light posts you

haven't mentioned?
A. The back window that is in the rear of the building, some form of night light came through that, but it didn't go past the window if that makes any sense. It was just illuminating the window on the inside of the building.
Q. Did you carry a flashlight with you or a little personal light?
A. No.
Q. So there was enough light for you to navigate from your car if you wanted to to the building? It wasn't totally black?
A. No, it wasn't pitch black.
Q. I want to ask you about the conditions there at the time of the incident right before you fell. Okay?
A. Yeah.
Q. You told us what you said about snow and its condition. I heard that. I'm going to ask you a few other things. Do you know exactly what the temperature was at that time?
A. It was in the negative numbers.
Q. Do you know whether it was above freezing in the 24 hours before the incident?
A. It was not.
Q. Do you know whether it had rained at all in the three

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days before the incident?
A. I don't recall.
Q. Do you know the exact amount of accumulation, if any, of water, not snow, but water in the three days before?
MR. BARATTA: Foundation.
MR. GABEL: Only if she knows of course.
THE WITNESS: I don't know.
BY MR. GABEL:
Q. Do you know the exact amount of accumulation of snow without guessing within the three days before?
A. No.
Q. If we were to ask you the minimum and maximum within the three days before, would you know that?
A. No.
Q. You provided some photos at some point during the course of the litigation. Mr. Baratta was kind enough to provide those. They're really dark. Do you know the source where they are sitting? Are they on a phone? A digital camera?
A. The reason why they are --
MR. BARATTA: Answer his question.
THE WITNESS: I thought the question was -- okay.
BY MR. GABEL:
Q. Do you know the source? Are they on a digital camera,

on a phone or something else?
A. They were on my phone.
Q. Are they on the phone you currently have?
A. Not anymore.
Q. Have you stored them on a computer, the cloud or E-mail anywhere?
A. No, I copied them, gave them to my attorney and then deleted them from my phone.
Q. So you copied them. How would you copy them?
A. I sent it to I believe Walgreens and I had copies made.
Q. Did you E-mail them to Walgreens?
A. I must have. I believe -- I didn't do it. I'm not like really tech savvy on that kind of stuff.
Q. So who did that for you to get it to Walgreens?
A. I think my daughter-in-law I believe.
Q. Who is that? What's her name?
A. Jessica.
Q. Last name?
A. Livings.
Q. Now, why would they appear dark? Do you know without guessing? If you're going to guess, don't tell me. They seem really dark.
A. Because it was dark.
Q. Were they taken the morning of the incident, 5:50 a.m. and slightly beyond?

A. No.
Q. Were they taken days later?
A. They were taken months later.
Q. So months later. Okay. What was the purpose of taking the photos if they were taken months later?
A. Mr. Baratta asked me if I had any pictures of the time of the incident which I did not and rather than trying to explain this wall, that wall, this window, I went there at 5:50 in the morning and tried to shoot the whole area with a different shot.
Q. So you were using it just for the general description of the area, correct?
A. Correct.
Q. And then you had a list which described things. Was the list -- what was the list about? Can you describe that?
A. The list was showing where exactly each picture was located on the building and where my car was parked at the time of the incident.
Q. Okay. It did not depict the condition at the time of the incident? It was just to give some description to Mr. Baratta and perhaps anybody else interested at a later point in time?
A. Correct.
Q. All right.

MR. BARATTA: I believe the list was an index provided.
MR. GABEL: That's correct. We have that. I get that.
BY MR. GABEL:
Q. I'm just asking what it was and you've answered that. So this incident was 2-21-14, correct?
A. Correct.
Q. Do you recall at all whether the temperature actually got up into the forties within the day of and the two days before the incident?
A. I don't believe so. It may have, but I don't believe so.
Q. All right. Do you even know whether it rose up as high as 50 within the time frame I described?
A. Absolutely not.
Q. And when you said that your interactions with T&J's would be about more social things and not the work they did, my question is after the incident, is that also true, you did not talk to T&J's about the work they did after the incident?
A. Correct. I've never seen them.
MR. BARATTA: Since?
THE WITNESS: Yes, since the incident, I've never seen any of them.

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RECEIVED by MSC 7/8/2020 5:41:14 PM

Page 98

BY MR. GABEL:
Q. And you haven't spoken to them either, right?
A. Correct.
Q. Does the name Tom Caramagno sound familiar?
A. I think he might have been one of the delivery guys.
Q. So you say delivery. What's the delivery, delivery for what?
A. Food. I mean Caramagno's, I really don't know what they delivered, but they were delivery people.
MR. BARATTA: Do you know who Mr. Caramagno is?
THE WITNESS: No.
BY MR. GABEL:
Q. If I was to ask you whether or not you know whether he's with T&J's, would you know that?
A. No.
Q. If I was to ask you what Mr. Caramagno did or did not do relative to this premises around February of 2014, would you have any idea?
A. No.
Q. Did you go to a gym before this incident?
A. I had signed up at Planet Fitness.
Q. When did you sign up there?
A. 2011 January.
Q. Were you still going there as of 2014?

Page 99

A. No.
Q. When did you stop?
A. It was a year membership and I really didn't even go.
Q. So you stopped somewhere around January of 2012 perhaps at the latest?
A. Correct.
Q. Did you go to any other gyms other than what was talked about in the five years prior to the incident?
A. No.
Q. So the Planet Fitness was in what location?
A. You can go to any location.
Q. But the one you signed up at?
A. 11 Mile and Schoenherr. It's Warren I guess.
Q. You told us about the cataract surgeries, one on each eye, I guess, two surgeries. Did you have any problems with your vision prior to the incident?
A. No. You know, I should probably backtrack on that. It wasn't that I had a problem. I did wear contacts, but at some point in time, my optometrist said I needed my cataract done.
Q. Where did you get the contacts from?
A. I was getting them at Sam's Club in the optometry area.
Q. What location?
A. 13 Mile, Roseville.
Q. Okay. After that incident you told me about the year

Page 100

before this incident we're here for today and what we're here for today, did you have any discussions with anyone at Grand Dimitre's or with anyone else about the condition of the premises?
A. We complained all the time to Tom.
Q. Tom Chakani?
A. Yes.
Q. That's the owner of the restaurant?
A. Yes, that the parking lot needed to be done correctly, you know.
Q. And you don't know what he did or didn't do --
A. I have no idea.
Q. -- with those comments you made, do you?
A. Some mornings our customers would do it for us.
Q. But you don't know what Mr. Chakani did with that information you gave him?
A. No.
Q. And you don't know whether anyone was a recipient of any of that commentary you made?
A. No.
MR. BARATTA: I don't understand the question.
BY MR. GABEL:
Q. Meaning if you told Mr. Chakani what you thought about the premises, you don't know whether he gave that

Page 101

information to anyone to do anything?
A. I don't know.
Q. Okay. Was it actively snowing at the time of the incident?
A. No, I don't believe so.
Q. If I was to ask you the temperature at the time of the incident, would you know?
A. No.
Q. Were you on time to start work that day?
A. I was early.
Q. You were early. Okay. Which foot slipped if you remember?
A. Which --
Q. So for the incident we're here for today, which foot slipped; do you know?
A. I don't recall.
Q. How did you come down on the ground? Do you recall that?
A. Straight on my lower back.
Q. And was the ground as you described packed down type snow?
A. Correct.
Q. When you called in to Ms. Buck, what did she do?
A. Opened up the front door to let me in.
Q. Did you get up under your own power?

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A. I tried to get up and it was just too slippery, so I ended up going on my hands and knees across the parking lot.
Q. So you crawled to what exactly?
A. The snowbank, the building.
Q. Where you fell, there was no snowbank, was there?
A. No.
Q. It was flat as you described, correct?
A. Correct.
Q. So there was no EMS that day, was there?
A. No.
Q. And you did your shift, correct?
A. Yes. You have glasses. Why don't you wear them?
Q. They're actually not for reading.
MR. BARATTA: You can't ask him any questions.
MR. GABEL: No, you know what? The lighting is low in here. I'm -- no complaints. I'm not complaining.
THE WITNESS: They're sitting right there. Why isn't he wearing them?
MR. GABEL: That's okay. I'm not complaining. I'm doing great.
(Discussion off the record.)
BY MR. GABEL:

Q. So, ma'am, after the incident, did you see any psychologist, psychiatrist or social worker?
A. No.
Q. And did you see any chiropractors after the incident?
A. No.
Q. Do you remember filling out the Social Security Disability form? The application you fill out, do you remember filling that thing out?
A. For disability?
Q. Yes, your Social Security Disability.
A. Actually, I believe my attorney filled that stuff out. I just went and signed it.
Q. One of the first questions is why, you know, why are you applying. Do you know what you said?
A. I referred to the slip and fall, what had transpired that day.
Q. Since the incident, have you been diagnosed with any new illnesses or diseases that we haven't talked about?
A. No.
Q. Since the incident, have you had any new injuries that we haven't talked about?
A. No.
Q. Since the incident, have you done -- I'm going to go over a couple things you told us -- any bowling at all?
A. No.

Q. Dance?
A. No.
Q. Sew?
A. Yes.
Q. You still deal with your grandchildren, right?
A. Yes. My kids, too.
Q. Have you been on any vacations at all since the incident?
A. No.
Q. Have you gone up north at all since the incident or to the west side of the state?
A. No.
Q. Have you been to any major family events, any weddings, anything like that since the incident?
A. No, I don't think so.
Q. Now, you said earlier under questioning from Mr. Steiner that you thought a truck might have come by on a Thursday, but then I think you said you were guessing. So were you guessing with that answer?
A. Actually, no. Thursday was delivery day. We had trucks there every day.
Q. So that may have been a delivery truck?
A. I'm sure it was.
Q. Now, you don't know without guessing whether that was a T&J's vehicle, do you?

A. No.
Q. You told Mr. Steiner about some of your conditions prior to the incident. Did anyone ever use the word to you "stenosis" prior?
A. No.
Q. But they did use the word "degenerative"? I think you talked to Mr. Steiner about that, right?
A. Not prior.
MR. BARATTA: I think that's what you testified to.
BY MR. GABEL:
Q. Do you remember somebody telling you that?
A. The first person to tell me that was Dr. Belfi.
Q. He told you he thought you had a degenerative type condition, correct?
A. Correct.
Q. That's fine. So at the parking lot where the incident occurred, you said the snow was flattened. How big of an area was that if you can tell us?
MR. BARATTA: The snow?
BY MR. GABEL:
Q. Let me be more specific. You said that, several times, that the snow was flattened, pushed down I think was your word.
A. Yes.

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Q. How big of an area? Could you say in terms of yards, feet, portions of a football field? Could you describe that at all to us how big an area that was around you?
A. The area that I was walking in?
Q. Right, from the point where you fell where you described it as flattened, how big an area was that?
A. If you look out that window, it was at least to that house.
Q. Can you describe that in feet perhaps?
A. Like I said, it was like 70 feet to where I had to walk --
MR. BARATTA: You said 70 yards.
THE WITNESS: Did I say 70 yards?
MR. BARATTA: You did.
THE WITNESS: Okay.
MR. BARATTA: Do you want to change that?
THE WITNESS: Yes. It was like 70 feet from --
BY MR. GABEL:
Q. In any direction from you?
A. No, from where -- where I got out of my car to where I had to enter, it was about 70 feet.
Q. So let me ask my question. From where your body ended up, if you were to look around you, 70 feet in all directions, is that what the condition was, flattened

type snow?
A. Not 70 feet all around because there was a brick wall behind me.
Q. Right. Other than that?
A. Yes, I mean the whole complete area from the driveway coming in which was another 70, 80 feet to the 70 feet that I had to go to the 190 feet going along the building, everything was white, packed snow.
Q. Other than where there was a wall, correct?
A. Correct. There was a wall this way and the building walls, but that's where the snow plows were all -- snowplowed the snow up.
Q. Well, when you say snowplows plowed the snow up, that was beyond 70 feet, correct?
A. That was above the 70 feet against the buildings.
Q. But not where you fell?
A. Correct.
Q. So can you tell me, were there any other medical care providers other than what you told Mr. Steiner since the incident?
A. Everything that I've had done since the incident was either through Concentra or through Mendelson Komblum. I have nothing outside of that other than my primary care.
Q. But there's nothing else, right? There's no other

place you went that we haven't discussed for care and treatment?
A. I don't believe so other than the urgent care that I went to 10 days ago.
Q. Tell us that. What's that urgent care?
A. I had an infection.
Q. Is that your --
A. My tooth, yes.
Q. Okay. Other than that, as it relates to this incident, anything related to the back, were there any other medical care providers that you haven't told us about, anything else?
A. No.
Q. Any other pharmacies that we haven't discussed?
A. I don't believe so.
Q. So the CVS that you told Mr. Steiner about after this incident, can you tell me the street that one is on?
A. It's 11 Mile and Harper.
Q. City?
A. St. Clair Shores.
Q. And the Walgreens you told him about, what street is it on?
A. There's one at 12 Mile and Harper.
Q. What city?
A. St. Clair Shores.

Q. Is there another one?
A. I've gotten them at the Walgreens down here on Gratiot.
Q. On Gratiot?
A. I think that's --
MR. BARATTA: Probably Clinton Township.
THE WITNESS: Clinton Township.
BY MR. GABEL:
Q. On Gratiot. What's the closest cross street?
MR. BARATTA: Metro Parkway.
BY MR. GABEL:
Q. Is that correct?
A. No.
MR. BARATTA: Or 15 Mile Road?
THE WITNESS: No, it's right here by the hospital.
MR. BARATTA: So the hospital is up on Groesbeck and Harrington.
THE WITNESS: So just like north of Harrington. That's like the only street that I know.
BY MR. GABEL:
Q. Is it on Gratiot near Harrington?
A. Yes.
Q. Is that here in Mount Clemens?
A. I believe it's Clinton Township.
MR. BARATTA: Is it Gratiot or Groesbeck?

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THE WITNESS: No, it's Gratiot right here.
MR. BARATTA: Gratiot and Harrington, that is probably Clinton Township.
BY MR. GABEL:
Q. Any other Walgreens?
A. I don't think so.
Q. How about the Kroger, can you tell me the street that's on?
A. Kroger, I've had two locations, one in Eastgate shopping center.
Q. What street is that, Gratiot?
A. Frazho and Gratiot, yes.
Q. On Frazho?
A. No, just north of Frazho.
Q. So Gratiot north of -- Gratiot near Frazho?
A. Correct.
Q. City?
A. I believe it's Roseville.
Q. Are there any other pharmacies other than the ones we've gone over all together?
A. I've gotten Norco at the Kroger in Farmington Hills on 11 Mile and Middlebelt.
Q. 11 Mile and Middlebelt in Farmington Hills?
A. Yes, Kroger.
Q. Where else?

A. I think that's it.
Q. Today, are you under any written medical restrictions?
A. Not written. Verbal.
Q. Tell me what the verbal commentary is from your doctors.
A. Not to lift more than five pounds.
MR. BARATTA: Are you all right?
MR. GABEL: Yeah. I don't have anything else.
MR. BARATTA: Can we mark this? I have a few questions.
DEPOSITION EXHIBIT 1
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
EXAMINATION BY MR. BARATTA:
Q. Mrs. Livings, I'm going to show you what's been marked as Deposition Exhibit 1 and I think I'm going to concentrate on the bottom photograph on this page. Do you see that photograph?
A. I do.
Q. Do you recognize what's contained in that?
A. Yes.
Q. What is it?
A. The back wall of the property.
Q. Okay.

A. And the building at the back of the restaurant.
Q. Is that where you fell?
A. In this area here, yes.
Q. Does this picture generally depict the area where you fell on February 21st?
A. Yes.
Q. Okay. We see some blacktop or asphalt?
A. Yes.
Q. If we go back to February 21st, 2014, looking at all the area of the asphalt in this bottom photograph, do you recall whether it was snow covered as you described the snow?
A. Completely snow covered.
Q. So all the asphalt we see in this bottom photograph and I guess the top for that matter because they're from virtually identical places, that would have been covered in snow, correct?
A. Correct.
Q. You mentioned very early in the deposition when Mr. Steiner talked about the incident that you parked in the first available spot. Can you describe what you mean by that?
A. On a normal day?
Q. No. On this day, this morning at 5:50 a.m., you indicated you parked your car in the first available

spot. Do you recall that?
A. Correct.
Q. All right. Can you tell me what you meant by that?
A. From the wall here where the dumpster is, the dumpster is behind this wall, so from that wall there, it was one, two, three, I believe the fifth parking area was where I parked because one through four was a solid snow mound up to the wall.
Q. Now, when you say snow mound, are you talking about stock piles of snow that a snowplow would push in the back of a lot somewhere?
A. Yes.
Q. Okay. I want you to draw or delineate for me -- let's do it this way so it's nice and easy.
A. Delineate?
Q. Bad choice of words. I'm sorry. I want you to draw for me a little rectangle about this big where you parked your car in the top photograph that morning.
A. It would be right here.
Q. Okay. Now, can you see the employee entrance door that you were heading into that morning in looking at either of these photographs?
A. No.
Q. Can you give me an approximate idea of where it is? Just point with your finger.

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A. Back in here.
Q. Would it be closer to this light-colored truck we see?
A. It's behind that truck.
Q. Okay. So the entrance would be somewhere behind this light-colored truck we see in the photograph, the vehicle that's on the left of the two that we can see?
A. Yes.
Q. All right. So then when you said 70 yards and you changed it to 70 feet, the distance from your car approximately to this door you're estimating is about 70 feet?
A. Yes, I think maybe 70 feet.
Q. You were on your way to work for your scheduled shift that morning?
A. Yes.
Q. Is this the only entrance that was available and open for you to use that morning?
A. Yes, the employee entrance.
Q. Now, you described I think one of these gentlemen were asking you to estimate the depth of the hard packed snow that you described in your deposition. I think you said -- refresh me.
A. About six inches.
Q. About six inches. Okay. But you also said that you had seen or knew that T&J had been on the premises and

plowed this lot we see in Exhibit 1, correct?
A. Yes.
Q. So if you know --
MR. GABEL: Let me just object. I think she said she didn't know exactly when they were last there.
MR. BARATTA: Right. I didn't mean to imply she did in my question.
BY MR. BARATTA:
Q. Just the fact that they had plowed let's say sometime prior to your incident in February of 2014, were you aware of that?
A. Yes.
Q. The guys would come in and ask for a drink, maybe get something to eat?
A. Yes.
Q. And in the front of 2014, do you remember the snowplow guys coming in on more than one occasion?
A. No.
Q. Do you have any idea how there could be six inches deep worth of snow in the lot if they had plowed?
A. Okay. Prior to the incident?
Q. That's a bad question. I'm trying to figure out how to ask it.
The snow is covering the lot?
A. Yes.

Q. The snow is six inches deep and it's hard packed. My question is if you know and only if you know, if someone had been in there to plow the lot, how come the snow was that deep?
A. When the lot was plowed, it was never plowed to the ground and salted.
Q. I'm going to stop you there. When you say it was never plowed down to the ground, are you talking about February of 2014 or are we talking about a different time period?
A. It was an accumulation over a time period.
Q. It was a bad winter, right?
A. Correct.
Q. Record snow?
A. Yes.
Q. So go ahead.
A. Originally, like when the snow first started, they plowed. Everything went up against the wall. Then the snow would come, but they wouldn't come until, you know, 10:00 o'clock in the morning, so all of the cars and everything coming in would start packing the snow down. So when they would come to plow, they would only plow whatever was brushed up, so the rest was -- then the next two days, whenever it snowed again, it would snow and cars are coming in and you kept getting these

ruts packing this stuff down. They never scraped to the bottom, so it just kept accumulating over time.
Q. So you're describing a gradual process over a course of the winter?
A. Correct.
Q. Thank you. Prior to your incident, are you aware of anyone else slipping and falling in this lot that we see here in Exhibit 1?
A. Yes.
Q. Who?
A. On February 20th, Thursday.
Q. The day before?
A. Yes.
Q. Who?
A. Dave, the owner's brother-in-law who is a cook.
Q. Okay.
A. He fell as he was entering the building.
Q. Do you know if Dave was hurt?
A. He hurt his elbow.
Q. Do you know if he sought medical treatment for that?
A. I have no idea.
Q. Did you talk to Dave about his slip and fall?
A. Yes.
Q. What did Dave say to you?
A. He was pissed. He was trying to open up the door and

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there was so much piles of mounds of snow around the door, as he stepped on it to go in the door, he ended up going down.
Q. Are you aware of anyone else who slipped and fell in this lot prior to your incident during the winter of 2014?
A. Not prior.
Q. What about after your incident?
A. After, on the 23rd, Sunday.
Q. Of February?
A. Yes.
Q. Okay.
A. Tom Chakani fell in the back parking lot on his way to his vehicle.
Q. Do you know if Tom was injured?
A. I have no idea because I didn't work anymore. I didn't see him.
Q. How did you hear about it then?
A. Debra Buck told me.
Q. Do you know if Tom -- did I ask you if you know if Tom was hurt?
A. Yes, you did, but I have no idea. She said he hurt his arm.
Q. So brother and brother-in-law both hurt their arm or elbow you pointed to?

A. Yes.
Q. Do you know any of the facts surrounding Tom's fall?
A. Just that he slipped on the ice when he was going to his car. There's more.
Q. There are more people who fell?
A. The same week.
Q. Go ahead.
A. I'm not sure if it's Tuesday or Wednesday --
Q. Of the next week?
A. Yep.
Q. Go ahead.
A. Maria Isaac.
Q. Who is that?
A. A server. She fell in the parking lot, bruised up all her knees, black and blue where she went straight down on her knees.
Q. How did you find out about that?
A. Debra Buck.
Q. Did Debra indicate whether or not this woman sought medical treatment?
A. I don't think so, but she did show Debra the bruises where she fell outside and Tom was again told he needed salt out there because Maria was actually on the sidewalk walking to her car when she fell. She like slipped off the sidewalk into the street.

Q. Are you aware of anyone else who slipped in this lot?
A. That Friday, a customer fell.
Q. Was it in this lot we see here in Exhibit 1?
A. She actually slipped -- they both slipped down in this area here.
Q. You're pointing to the left of the photos we see in Exhibit 1?
A. Yes.
Q. Can you say that again?
A. Yes.
Q. No, your answer again. You were. We were talking over each other. I just want it clear on the record. Tell me about the circumstances of this lady falling to the left of the photo.
A. She was walking to her vehicle and she slipped on the pavement and ended up going into the road.
Q. And you heard about this from?
A. Debra Buck.
Q. Any other slip and falls you're aware of on the property during this winter?
A. A customer.
Q. Another customer?
A. Yes, on that Friday.
Q. And how did you obtain this information?
A. Debra Buck.

Q. Tell me what you understand about that.
A. That she had fell in the parking lot on her way to her car in the actual parking lot.
Q. Are we talking about two customers who fell to the left of the photograph?
A. One is the server. Maria works there. There was a customer who fell, also, and it's my understanding that there was an incident report on that for the customer on the Friday.
Q. Did you ever discuss with any of the Chakani brothers whether or not it was their obligation to remove snow or de-ice the parking lot on these premises?
A. He discussed with me.
Q. He being?
A. Tom.
Q. Okay.
A. The way that the property works is it's broke up into square footage. Each business has their own square feet. Mr. Sage's company takes care of everything in the property. They do any repairs. If there's a sewer problem, they bring in the contractors. It's their company that does the snow, the grass, all of that. He pays for all of that --
Q. Mr. Sage or Mr. Sage's company?
A. Yes, Mr. Sage's company.

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Q. Okay. What else did Mr. Chakani say about that?
A. They receive, I believe, quarterly billing, maybe six-month billing on whatever their square footage is that they are responsible for and they pay that accordingly.
Q. And what was the reason that you were discussing this with Mr. Chakani?
A. He shows us his business all the time. He showed us the actual bill and for that particular one that I had seen, the whole parking lot was blacktopped. So he got his billing for that portion of his square footage which was the whole around the building and in fact the store next door to Grand Dimitre's is also part of our square footage. So he has to pay for that little area, also, but we don't have access to it. It's rented out.
MR. BARATTA: I don't have anything else. Thank you.
RE-EXAMINATION BY MR. STEINER:
Q. Just a real quick follow-up. When was this discussion with Tom Chakani regarding the business model that he had with Jim Sage?
A. I'm sorry. I don't understand the question.
Q. When was your discussion with Tom regarding this business model where certain businesses are responsible for a certain square footage?

A. All the time. I worked there for 10 years. There really wasn't a bill that I didn't see or the girls didn't see. They were always left out on the bar area.
Q. Okay. But that's you looking at bills. When was this conversation that you had with Tom?
A. Whenever he had the blacktop put in.
Q. When was that?
A. A couple years before I wasn't working there.
Q. So it was prior to your fall by a couple years?
A. Yes.
Q. It's your understanding that Grand Dimitre's would pay for these services?
A. It was part of their lease agreement.
Q. And do you have any idea the contents of that lease agreement?
A. As far as I understand, it was a 20-year lease that they have.
Q. But do you know the terms of who may be responsible for what?
A. No. I just -- no, not specifically.
MR. BARATTA: Was your question does she know what the specific pro-rata allocation is for this tenant?
MR. STEINER: The terms of the lease agreement with this tenant.

BY MR. STEINER:
Q. Do you have any idea of the specific contents of that agreement?
A. My understanding is if the hot water heater goes, if there's a hole in the roof, if there's anything to do with this specific building, Tom and Jamal Chakani took care of that inside the building. Anything that was outside of the building, they paid whatever Jim Sage told them they owed.
Q. Did you ever see that agreement?
A. Yes, I said I seen the bill.
Q. Not the bill, the agreement.
A. No. It's not my business.
Q. Okay. So when you say that's your understanding, it's based on secondhand knowledge through Tom?
A. It was based on the bill that he received in the mail from Sage Industries or whatever -- Investments.
Q. Right, that Tom paid?
A. Yes, when he received the bill.
Q. Do you know whether Tom ever talked with T&J, any employees?
A. If he happened to be at the cash register whenever they came in, of course. He would take their order and, you know, social conversation.
Q. Do you know if he ever talked business with them? If

you don't know, that's fine.
A. I don't know.
Q. I know we discussed following your complaint to Tom that you didn't know what Tom did with that information, but what about with regard to any of these other incidents that Jessica Buck relayed to you, do you know what Tom did with that information?
A. Her name is Debra.
Q. I'm sorry. Debra Buck.
A. I just don't want you to get mixed up. I have no idea because I was not working at that time.
Q. Do you know if Debra Buck reported that to Tom?
A. You would have to ask her. No, I don't know.
Q. And you certainly wouldn't know if Sage Investment Group would ever have notice of any of these incidents?
A. Absolutely not.
Q. Okay. Did you ever go back to Grand Dimitre's, I know not as a waitress, but to go visit the premises following your injury?
A. Yes.
Q. How many times?
A. Every time I went to Concentra, I would have to take my do-not-work slip back to Dimitre's because I was day-to-day. Originally, when I went on the Saturday the 22nd, they told me to come back Wednesday the 25th

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RECEIVED by MSC 7/8/2020 5:41:14 PM

Page 126

or whatever. I'm just guessing on the dates. So I had to take my initial report and give it to my employer, no work until Wednesday, then I'd go back on Wednesday and they'd say no work until Saturday and then I'd go back on Saturday. So I mean I was a day-to-day they said, you know, so that's what we went with.

Q. Was it not until Dr. Kornblum that he recommended Social Security Disability?

A. Dr. Kornblum did not recommend --

Q. Was it through Concentra then? I'm sorry. I don't recall.

MR. BARATTA: What's your question, who recommended that she file for Social Security Disability?

MR. STEINER: Right.

THE WITNESS: My -- I'm trying to think of his name. Jason.

BY MR. STEINER:

Q. Jason who? I'm sorry.

A. I'm trying to think. In August when I contacted Concentra and I told them I wanted a second opinion. The information that I was receiving from Concentra was not going along with the pain. They kept saying muscular, muscular and I'm like this is not muscular.

In August, I was threatened by Workmen's

Page 127

Comp. They told me, "If you go see this other doctor, your case could change as far as what we are willing to pay anymore." I said, "Do what you got to do because I have to get a second opinion." So at that point is when I contacted an attorney, Jay Trucks & Associates out of Clare, Michigan, and how I got their name was I just went on the computer, that name popped up and that's who I talked to.

After talking to my attorney, Jason, I can't remember his last name, but he said, "What's going on?" I told him. He said, "Why have you waited this long?" I said, "I didn't even know I had a 28-day" -- I could have went to another doctor 28 days after my incident. I did not know that. So he was the one who suggested I file.

Q. You also mentioned that you started visiting Dr. Kornblum in August 2014, right?

A. Yes.

Q. Was he the one that made the recommendation to the Social Security Disability that you were disabled?

MR. BARATTA: You mean was he the physician who testified?

MR. STEINER: Right.

THE WITNESS: Ultimately, his reports is what was turned over to Social Security that led to that

Page 128

going through I believe.

BY MR. STEINER:

Q. Okay. And none of your prior physicians?

A. I don't believe Concentra had anything to do with it.

MR. STEINER: I think that's all I have. Thanks.

RE-EXAMINATION BY MR. GABEL:

Q. Ma'am, on Exhibit 1 that you were talking about, could you put an X and a circle in the spot that you fell?

MR. BARATTA: That's one of my two questions.

BY MR. GABEL:

Q. Could you do that?

A. Yeah. I would have to say it was like -- like right here.

Q. And circle it. Okay. Thank you. Good. So you were walking in the rectangle over to that spot, correct?

A. Yes.

Q. Okay. We talked before about T&J's and whether you knew or didn't know when they were to come out. So you don't know what would trigger them to come out, do you?

A. No.

Q. We talked about you thought that the snow was not scraped down. You don't know whether or not T&J's could have scraped down to this asphalt, do you, without guessing?

Page 129

A. Can you repeat the question, please?

Q. Yes. You don't know whether T&J's could have scraped down to the ground the snow, correct, without guessing?

A. The day of the incident, no, they would not.

MR. BARATTA: No, do you know whether or not -- listen to his question.

THE WITNESS: I know. It's like --

BY MR. GABEL:

Q. I'm talking about the snow season of 2013 to 2014 and in the weeks leading up to your incident, do you know whether T&J's could have scraped down to the ground without guessing?

A. They could have, yes.

Q. You're not a snowplow operator, are you?

A. No.

Q. You don't know whether the blade would have been able to get under the packed snow that you described, do you?

A. It would not have been able to, no.

Q. It would not have. Okay.

A. No.

Q. And you don't know whether or not the fact that cars had driven over the snow would have impeded the blade, right, from going down to asphalt level, correct?

A. Correct.

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Q. And even assuming for the sake of discussion that the blade got down to asphalt level, you recognize that every bit of snow cannot be removed, correct?
A. Correct.
Q. Because in Michigan there's always residue of snow, correct?
A. Correct.
Q. And even if there's residue of snow, it can become packed again and become slippery? You understand that?
A. Correct.
Q. And you understand the temperature fluctuation in Michigan, even if the blade gets down to asphalt level, there can be a refreeze and a slippery condition? You know that, correct?
A. Correct.
Q. And again, as it relates to exactly what they did or did not do in the winter of 2013-2014, you do not know what T&J's did, correct?
A. Correct.
MR. GABEL: Okay. No further questions.
MR. BARATTA: Mark this, please, Exhibit 2.
DEPOSITION EXHIBIT 2
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
RE-EXAMINATION BY MR. BARATTA:

Q. We've marked Deposition Exhibit 2. I'm going to try and make it as quick as I can. The letters that you said, the correspondence you said you saw from Mr. Sage to the Chakani brothers where you described that they would owe certain things that were done on the property and they would owe their share of it, do you recall that testimony?
A. Yes.
Q. I'm going to show you what's been marked as Exhibit 2. Do you recognize that?
A. I do. Well --
Q. Have you ever seen that letter, that specific letter before?
A. Not this specific letter.
Q. Okay. Have you ever seen a letter from Sage Investment Group, LLC similar to that letter?
A. Yes, many of them.
Q. Okay. That letter indicates that there are some charges it looks like from Detroit Edison, T&J Landscaping, general maintenance, B.F. Domzalski it looks like insurance and then taxes.
A. Correct.
Q. Do you see that?
A. Yes.
Q. And then you see there's a Dimitre's restaurant with

the square footage indicated, pro rata square feet, how much they owed and what they prepaid?
A. Yes.
Q. Did Mr. Chakani ever indicate that he prepaid for some common area maintenance on the property?
A. No.
Q. But you've seen letters like this before --
A. Yes.
Q. -- wherein Mr. Sage or his company demanded money for expenses related to maintenance of the subject property?
A. Yes.
MR. BARATTA: I don't have anything else.
MR. STEINER: I think I'm all set.
RE-EXAMINATION BY MR. GABEL:
Q. You haven't seen any documentation from T&J's, have you?
A. No.
MR. GABEL: Nothing further.
(The deposition was concluded at 6:10 p.m.; signature of the witness was not requested by counsel for the respective parties hereto.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Gail R. McLeod, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth, that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party nor interested in the event of this cause.

Gail R. McLeod, CSR 2901
Notary Public,
Macomb County, Michigan

My Commission expires: September 23, 2017

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RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MCOA 3/18/2019 4:38:36 PM

Donna Livings
2/22/2017

A

a.m 30:20 31:11 47:2 90:13 92:8 95:24 112:24
ability 6:23 7:3 20:23
able 7:5 18:20 33:13 35:10 42:1,7 49:20 68:18 72:25 73:4 129:16,19
Absolutely 20:19 43:4 97:16 125:16
abuse 15:25 90:11
acceptable 6:12
access 122:15
accident 62:4,5 73:12 75:2,3 76:1 77:3
accidents 74:24
accommodate 78:20
accounts 13:12
accumulate 42:18
accumulating 42:12 117:2
accumulation 94:3,9 116:11
accurately 6:17
ached 72:6
aching 81:8
acquainted 53:5
Action 1:6
actively 101:3
activities 77:13 91:1
activity 74:19
actual 32:7 33:11 121:3 122:9
adding 69:9
addition 38:4 86:9 92:24
additional 36:13
address 8:10,18 9:5 31:1
adjusted 82:3
admissible 15:20
Adult 17:6
Aetna 29:11
affect 6:23 7:3 25:19
Afternoons 20:16
aggravated 74:17
aggravates 74:18
ago 47:18 75:6 75:15 81:2 108:4
agreement 91:17 123:13,15,25 124:3,10,12
ahead 16:10 37:9 37:17 38:18 39:18 44:3 49:12 57:1,2 71:19 72:20 79:23 116:16 119:7,11
aids 70:4
air 87:23 88:4 88:23
Albert 21:10
alcohol 15:25 58:5 90:11
alleviate 74:4
alley 38:7,8 43:6
allocation 123:22
allow 16:24
allows 56:14
ambient 92:16,25
amount 15:11 20:23 28:3,16 28:16,17 85:4 85:6,11 94:3,9
and/or 38:24
anger 15:9
ankle 87:18,19 87:22,24 88:15 88:17
Ann 5:9
answer 6:5,13,24 7:5 22:5 35:23 36:12,13 37:8 37:20,21 40:22 49:11 51:19,22 53:17 54:16 72:20 73:7 79:16,17 94:21 104:19 120:11
answered 6:17 22:13 33:9,9 38:17 43:10,17 46:19 55:5 71:19 72:13,16 72:19 74:5 97:6
answers 5:25 10:19 58:16,19 133:12
antibiotics 75:5
anticipated 66:7
anybody 88:1 96:22
anymore 13:23 78:12 95:4 118:16 127:3
anyway 10:19 43:15
apart 67:23
apologize 89:17
appear 10:14 95:20
APPEARANCES 2:1 3:1
Appearing 2:9,18 3:9
application 103:7
applied 18:1,8 18:14,25
applies 40:5
apply 18:5,23 40:9 79:16,20
applying 72:14 103:14
appointment 61:1
appointments 61:18 68:3
approximate 19:19 33:16 113:24
approximately 8:19 14:21 19:11,22 20:7 20:14 21:18 25:6,13 29:14 30:22 34:3,11 39:4 41:16 50:14 53:8 68:5 86:25 114:10
April 62:2 64:22 64:24 71:18,20
area 12:23,24 17:14 33:14 34:8 37:25 38:2,5,6 41:6 41:7 46:14,16 48:10 81:14,17 81:19 96:10,12 99:22 105:19 106:1,3,4,6 107:5 112:3,4 112:10 113:6 120:5 122:14 123:3 132:5
arising 28:9,21
arm 46:2 72:4 89:12 118:23 118:24
arrangements 86:14
arrive 34:16
arrived 34:19 39:6 90:13
arthritis 71:12
asked 36:4 38:17 41:5 47:25 55:5 56:12 60:21 71:19 72:13,19 74:5 80:4 86:23 96:6 133:11
asking 30:8 33:19 38:23 39:11 58:24 97:6 114:20
asphalt 112:7,10 112:14 128:24 129:24 130:2 130:12
associated 30:11
Associates 127:5
assume 6:14,15 6:16 56:13
assuming 130:1
AT&T 32:20
attached 4:13

RECEIVED by MSC 7/8/2020 5:41:14 PM

67:7
attend 17:10
attention 37:19 50:3
attorney 5:22 15:12 18:10,12 58:11 80:16 91:18 95:7 103:11 127:5,9
August 28:6 29:17,19,24 58:10 61:1 62:23,24 64:23 64:24 126:20 126:25 127:17
automatically 29:23,23
automobile 74:24 75:25
available 34:9 112:21,25 114:16
aware 5:25 30:14 32:7 53:24 54:12,21 56:8 56:12 64:7 115:11 117:6 118:4 120:1,19

B

B.F 131:20
baby 79:9 86:13
baby-sit 13:4 78:16
back 10:23 13:20 18:18,19 21:1 21:3,5 24:16 24:16 25:11,17 25:19 27:3 30:24 33:15,25 40:18,19,25 41:11,23,24,25 45:19,22,24 46:1,5,14,22 47:24,25 48:2 48:7,8,13 49:19 51:7 59:23 63:12,16 65:20 66:4 67:9,10 68:1 70:6,7,8,22 71:13 72:5,6 72:22 73:9,17 73:20 74:6,17 74:18 80:1 81:8,9,13,15 81:24 82:8 89:5 90:2 91:21 93:2 101:19 108:10 111:24 112:1,9 113:11 114:1 118:13 125:17 125:23,25 126:3,5
backaches 72:9
backtrack 99:17
backup 29:18
bad 113:16 115:22 116:12
bagged 24:14
balances 30:7
ball 77:22
bar 123:3
Baratta 2:3,4,4 4:5,8 7:12,16 7:18,21,24 8:1 8:4,7 10:16,21 14:12,16,20,25 15:17 16:4,9 19:14,20 22:4 22:13 27:19 30:6 32:22 33:18 34:1 36:12,18,24 37:6,10,13,19 38:23 39:1,10 39:13,15,18 40:14,21 41:4 43:3,7,17 44:1 44:7,9 48:21 49:6,9 50:25 51:15,19 54:1 54:15,23 55:1 55:7,15 56:11 57:1,19 59:12 60:3 64:7,12 64:25 65:3 66:11 70:12 71:19 72:13,19 73:6 74:5 75:19 78:25 85:14 91:19 92:1,19 94:5 94:16,21 96:6 96:22 97:1,23 98:10 100:21 102:15 105:9 105:20 106:12 106:14,16 109:5,9,13,16 109:25 110:2 111:7,10,15 115:6,8 122:16 123:21 126:12 127:21 128:10 129:5 130:21 130:25 132:13
barely 80:22
bars 67:7 69:9
based 22:4 37:6 51:15 124:15 124:16
bathroom 42:3
battery 70:3
bed 82:2
began 53:1
behalf 2:9,18 3:9
Belfi 21:10 62:13 71:16,25 105:13
believe 5:19 21:8 26:1,18 28:20 29:20 30:17 31:4 45:3 47:24 49:5,13 52:16 57:13,18 59:3 59:13 61:1,17 63:2 66:19 67:6,14,22 68:2 72:25 77:4 81:4 83:12,22 86:3 95:10,12,15 97:1,12,12 101:5 103:11 108:3,15 109:24 110:18 113:6 122:2 128:1,4
believed 69:17
bend 72:1
bending 74:20
benefits 18:15 18:23,25
bent 72:3
best 6:17 80:5,6
better 69:20
beyond 95:25 107:14
big 24:11 36:10 105:18 106:1,3 106:6 113:17
bill 122:9 123:2 124:11,12,16 124:19
billing 122:2,3 122:11
bills 30:12 123:4
Binson's 70:12 70:13
birth 10:5
bit 80:3 86:17 130:3
black 43:22 70:8 87:24 89:3 93:12,13 119:15
blacktop 112:7 123:6
blacktopped 122:10
blade 129:16,23 130:2,12
block 36:10,10
blood 27:11
bloodstream 85:4 85:7
blue 89:3 119:15
body 45:21 51:20 106:23
bone 70:1,25 71:5
born 10:7 12:9 12:11,13
boss 47:3,23 52:8 62:10
bottom 111:18 112:10,14 117:2
bowling 77:16

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

78:5 86:6 103:24
brace 69:23,25 70:6,7,8 74:6 87:23 88:4
Brain 32:21
break 6:20,22 48:9 49:7 79:22,23
breakfast 51:2
brick 107:2
briefly 5:16
bright 42:4
bring 121:21
broke 121:17
brother 118:24
brother-in-law 117:15 118:24
brothers 121:10 131:4
brought 10:11,12 44:17
bruised 119:14
bruises 119:21
brushed 116:23
Buck 46:19 47:1 101:23 118:19 119:18 120:18 120:25 125:6,9 125:12
Buck's 31:20
building 33:14 33:17 34:20,24 34:25 35:2,3 40:6,7,8,18,19 41:11 46:17 93:2,6,11 96:18 102:5 107:8,10 112:1 117:17 122:12 124:6,7,8
buildings 107:15
Burlington 15:16 19:1 21:20 22:12,19 23:13 25:16,18
business 41:3 56:10 121:18 122:8,20,24 124:13,25
businesses 122:24
busser 20:21
buys 40:3
Buzdoraj 11:14 11:15

C

call 32:25 33:3 33:5 46:16 50:17 53:12,14 53:22 57:12 60:23 69:9
called 46:18 53:9,11,21 70:1,6 101:23
calls 49:10
camera 94:19,25
capacity 54:20 55:13
car 9:20 31:19 33:1,20 34:3 34:13 35:1 87:16,25 92:25 93:11 96:18 106:21 112:25 113:18 114:9 119:4,24 121:3
Caramagno 98:4 98:10,17
Caramagno's 98:8
card 25:17,18 60:23
care 23:17 27:14 29:15,16 59:8 59:17,19,24 60:8 75:3,7,8 77:25 90:7,10 107:18,24 108:1,3,5,11 121:19 124:7
caring 86:8
carrier 32:18
carry 72:2,3 93:7
cars 31:16 40:25 116:20,25 129:22
case 58:12 127:2
cash 21:13 23:19 24:13 124:22
cashier 20:21 23:3 24:22
cashiers 23:17
cast 88:23
cataract 99:14 99:20
cataracts 44:23 44:24
catch 87:14
cause 133:17
caused 35:17 37:5,15
cell 32:16 33:1 33:3
cement 42:23
center 61:23 110:10
centimeters 38:22
certain 14:15 20:23 122:24 122:25 131:5
certainly 49:2 57:9 125:14
CERTIFICATE 133:1
certificates 17:13
Certified 133:6
certify 133:8
Chakani 22:2 40:4 47:3,11 47:23 48:3 100:6,15,24 118:13 121:10 122:1,7,20 124:6 131:4 132:4
change 106:16 127:2
changed 46:21 49:19 114:9
charge 15:2
charges 4:19 131:19
cheap 32:21
check 21:13,14 26:12 76:9
child 11:25
children 12:2 72:9 76:4
chiropractor 75:12,17 80:23 80:24 81:22
chiropractors 103:4
choice 113:16
Chris 44:5
chris@baratta... 2:8
Christmastime 24:10
CHRISTOPHER 2:3
cigarettes 84:17 84:19 85:9
circle 128:9,15
CIRCUIT 1:2
circumstances 120:13
city 82:21 83:1 83:6 108:19,24 110:17
Civil 1:6
claim 18:17 23:7 23:22
claimed 30:10
Clair 8:16,24 14:17 15:7 83:2,6 108:20 108:25
Clare 127:6
clear 6:8 48:13 120:12
Clemens 1:21 2:6 5:1 17:5 109:23
client 36:19
clinic 24:7
Clinton 109:5,6 109:24 110:3
Clonidine 27:9
close 7:9 33:15
closer 33:17 34:5,13 114:2
closest 82:16 109:8
clothes 24:11 46:21
cloud 95:5
Club 99:22
Coat 15:16 19:1 21:20 22:19 23:13

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

coats 24:24
code 9:7
coffee 44:11
college 17:10
color 15:13
combination 29:16
come 24:11,19 37:25 38:1 42:5,14,22 57:4 78:3,3,3 90:20 101:17 104:17 115:13 116:3,19,19,22 125:25 128:19 128:20
coming 24:13 30:25 32:9,12 52:15 79:6 86:13 107:6 115:17 116:21 116:25
Commencing 1:22
commentary 80:16 100:19 111:4
comments 100:13
Commission 133:24
common 132:5
Comp 13:22 30:10 61:3 127:1
company 1:11 5:18 15:15 55:3 63:7 121:19,22,24 121:25 132:9
Compensation 23:7,22 28:8 28:10 30:14
complained 81:11 81:17,19 100:5
complaining 102:19,23
complaint 125:3
complaints 102:18
complete 16:13 49:22 107:5
completed 6:7 17:3 52:3 68:21,24
Completely 112:13
computer 95:5 127:7 133:13
Concentra 13:21 21:9,11 24:4,7 25:4,17 50:6 52:11 62:3,11 62:13,17 63:1 63:14 76:21 77:5 107:22 125:22 126:10 126:21,22 128:4
concentrate 111:18
concern 58:1
concluded 132:20
conclusion 49:10
condition 56:5 72:23 81:5 93:17 96:20 100:4 105:15 106:25 130:13
conditions 71:24 73:23 93:14 105:2
confirm 10:20
confused 36:7
confusing 37:18
Congratulations 79:8,10
considered 20:18
constant 74:21
consult 61:4
consume 58:4
contact 58:9
contacted 126:20 127:5
contacts 44:19 99:18,21
contained 111:21
contents 4:1 123:14 124:2
contest 6:21
continue 16:24 26:4 68:16 87:22
Continued 3:1
continuing 15:18 88:18
contractors 121:21
conversation 123:5 124:24
convicted 14:6
cook 34:18 47:7 54:7,18 117:15
cook's 34:22
copied 95:7,9
copies 95:10
copy 58:15 95:9
corner 82:18,25 83:1
Corporation 1:13 1:15
correct 7:7 8:3 8:23 12:17 14:22 16:18 20:9,25 22:10 28:23 31:2,6 32:3 33:22 34:15 36:16 38:25 41:17 45:9,20 46:7 47:8,13 48:15 48:18 62:6 69:3 79:1 80:13 81:16,20 82:10,22 84:1 87:7 88:9 90:14 92:3,11 92:13,14,21 96:12,13,24 97:3,7,8,22 98:3 99:6 101:22 102:8,9 102:12 105:15 105:16 107:9 107:10,14,17 109:11 110:16 112:17,18 113:2 115:1 116:13 117:5 128:16 129:3 129:24,25 130:3,4,6,7,10 130:14,15,18 130:19 131:22 133:14
corrective 86:1
correctly 78:15 100:9
correspondence 131:3
costs 15:12
counsel 132:21 133:16
county 1:2 133:5 133:7,22
couple 5:23 9:23 13:5,6 22:8 29:22 57:21 62:4 65:7,10 65:11 66:5,7 67:25 68:1,1,6 68:21 77:6,16 77:17 78:5,10 87:19,20 103:24 123:8,9
course 51:8 53:17 72:6 77:14 88:18 94:6,16 117:3 124:23
court 1:2 5:13 6:1 14:17 15:6 15:12
coverage 30:12
covered 77:2 86:19 112:11 112:13,17
covering 115:24
crafty 86:20
crawled 46:13 102:4
crimes 14:6,8
cross 82:21 109:8
crowd 20:5
crutches 69:23
CSR 1:24 133:20
CT 76:24
curbing 57:5
currently 13:8 13:10 17:18,22 25:23 59:15 61:9 80:7 85:16 95:3
curtains 86:21
customer 23:14 40:7 60:20 120:2,21,22

RECEIVED by MCOA 3/18/2019 4:38:36 PM

121:7,8
customers 40:13 40:24 47:5 51:4 56:18 100:14 121:4
CVS 26:9,11,17 83:4 108:16
Czerniawski 9:25 11:7

D

dad's 78:19
Dance 104:1
dancing 77:19 78:8,9 86:7
dark 41:19 92:10 94:17 95:20,22 95:23
date 10:5 22:6 43:12 56:5 73:22,25 75:6 89:17 90:5 92:1
dates 126:1
daughter-in-law 95:15
Dave 117:15,18 117:22,24
day 7:22,24 13:5 25:15,16 31:13 31:25 38:1 42:11,12,22 46:23 50:11 52:7,20,23 61:16 62:4 70:2 71:7 72:6 74:21 78:17 84:20,23,25 85:11,13,16,17 97:10 101:9 102:10 103:16 104:20,21 112:23,24 117:12 129:4
day-to-day 125:24 126:5
days 29:15 31:9 31:11 53:8 62:4 66:20 67:16,25 68:1 68:1 87:19,21 87:23 88:22 89:2 94:1,4,10 94:13 96:2 97:11 108:4 116:24 127:13
de-ice 121:12
deal 104:5
Debra 31:20,21 33:9 34:16 46:19 47:1 118:19 119:18 119:19,21 120:18,25 125:8,9,12
Debra's 35:1
debt 30:11
decade 57:20
December 45:5 69:5
decrease 81:14
deep 115:19 116:1,4
Defendant 2:18 3:9 58:16
Defendants 1:16
degenerative 71:23 105:6,14
degrees 17:13
delete 80:15
deleted 14:2 95:8
delineate 113:13 113:15
deliver 38:9
delivered 98:9
delivery 38:8 98:5,6,6,6,9 104:20,22
demanded 132:9
Depended 20:4
dependent 13:8 13:10
depending 78:18
Depends 56:25 57:3 70:20 85:12
depict 96:20 112:4
deposition 1:19 4:16,18 5:11 5:20 47:19 111:12,17 112:19 114:21 130:22 131:1 132:20 133:8
depth 38:23 114:20
describe 36:11 96:15 106:2,9 112:21
described 36:15 90:8 92:15,20 96:14 97:15 101:20 102:8 106:6 112:11 114:19,21 129:17 131:4
describing 117:3
description 96:11,21
desirable 20:18
details 91:14
Detroit 8:21 9:3 9:6 16:17,19 131:19
develop 51:13
diagnosed 18:19 103:17
diagnosis 82:4 88:1,7
Diagnostic 61:23
different 21:21 21:21 96:10 116:9
digital 94:19,25
digits 10:14
Dimitre's 1:13 19:5,7 20:3,11 21:1,12,16,18 21:21,24 22:11 22:20,22 31:3 39:6 40:11,12 41:7,9 47:12 53:6,8 54:10 55:14,22 56:9 56:18 57:12,15 57:17 58:2 100:3 122:13 123:11 125:17 125:23 131:25
DINING 1:14
diploma 16:14
direction 106:20
directions 106:25
directly 53:14 53:16
disability 18:1 18:3,7,21 27:23 29:21 72:15 103:7,9 103:10 126:8 126:14 127:20
disabled 72:12 127:20
discovery 5:11
discuss 90:25 121:10
discussed 29:2 73:19 79:19 108:1,14 121:13 125:3
discussing 122:6
discussion 10:22 25:10 67:18 83:17 102:24 122:19,23 130:1
discussions 100:2
diseases 103:18
distance 114:9
District 14:17
do-not-work 125:23
doctor 21:3,5,7 21:9,10,10 24:3 27:14 51:16 52:10 59:24,24 61:15 65:2,19 71:23 72:11 74:12 85:2,6 88:3,8 127:1,13
doctors 30:8 72:21 111:5
document 58:22
documentation 132:16
doing 29:25 63:23 70:20,21 74:3 85:12 102:23

RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

domestic 14:11 15:2,9 89:20
dominant 84:11
Domzalski 131:20
Donna 1:4,19 4:2 5:4,9,11 9:24 9:24 10:1 72:20 73:7
door 30:23 33:15 33:20,25 34:5 34:14 41:25 42:5 46:14,19 46:20 47:25 48:7 87:16,16 92:19 101:24 113:20 114:10 117:25 118:2,2 122:13
double 86:15
Dr 21:8 26:3,25 59:9,11 61:15 61:21,21 62:13 62:22,24,25 63:1,3,15,18 63:21,25 65:7 65:10,22 66:2 66:22 67:2,6,7 67:9,20 68:3 68:16 69:6,13 69:17 70:15,25 71:16,25,25 77:6 105:13 126:7,9 127:16
drain 48:8,11,12 48:17
draw 113:13,16
dress 78:13,15
drift 46:15
drink 115:13
drinks 90:21
drive 21:15
driven 38:12 129:23
driver's 85:23 86:1
driveway 107:5
driving 38:5 48:10
dropping 13:22
drug 15:13 90:11
drugs 58:7,7
due 61:22 72:22
duly 5:5 133:10 133:12
dumpster 41:9 113:4,4
duties 20:20 49:20

E

E-mail 95:5,11
earlier 25:21,23 45:18 56:17 59:7 65:16 78:16 104:16
early 101:10,11 112:19
easily 24:21
East 16:16,19
Eastgate 110:9
Eastpointe 1:14 31:4 75:18 80:24
easy 113:14
eat 115:14
edging 57:5
Edison 131:19
Education 17:6
Edward 1:8
effect 13:20,22
efficient 51:5
eight 8:3 68:25 72:7
either 15:8 45:6 57:22 58:7 78:4,11 98:2 107:22 113:21 133:16
elbow 117:19 118:25
emergency 75:1
employed 17:18 17:20
employee 52:4 53:24 54:10,12 54:13,20,21 55:12,13,18,21 56:1 113:20 114:18
employees 40:12 40:19,23,25 47:6 56:18 124:21
employer 29:12 126:2
employment 23:8
EMS 102:10
ended 14:15 46:15 66:7 67:8 102:2 106:23 118:2 120:16
endometriosis 76:11
endurance 6:21
England 10:7
enjoy 77:13
enter 106:22
entering 117:17
entire 20:10 48:13
entrance 113:20 114:4,16,18
epidural 81:6,13
equivalent 84:22
establishment 82:14
estimate 114:20
estimating 114:10
evening 52:5
event 25:19 133:16
events 104:13
eventually 50:3 61:6 69:22
everybody 38:1,2 77:18
everyday 49:20
Evidence 5:14
exact 94:3,9
exactly 91:10,13 91:23 93:19 96:17 102:4 115:5 130:16
EXAMINATION 4:3 4:4,5 5:15 79:12 111:15
examined 5:5
Excuse 67:17
Exhibit 4:15,16 4:18 111:12,17 115:1 117:8 120:3,7 128:8 130:21,22 131:1,9
Exhibits 4:12,13
existing 83:23
exiting 87:8
expenses 132:10
experience 40:11
expires 133:24
explain 96:8
expressed 69:17
extended 69:9
extent 37:8 42:18 49:11 51:14,25
eye 45:1,12,13 45:15 99:15

F

Facebook 13:12 13:14,16 14:2 80:22
facility 30:2
fact 15:18 86:12 115:9 122:12 129:22
Factory 15:16 19:1 21:20 22:19 23:13
facts 119:2
fair 6:18 34:13 57:9 91:3
Fairway 9:16
fall 32:5,7 33:11 59:2 74:16,22 75:23 87:1,3,4,15 89:10,12,12,25 103:15 117:22 119:2 123:9
fallen 48:1
falling 117:7 120:13
falls 120:19
familiar 56:21 58:24 64:11 98:4
family 1:14 13:3 79:9 104:13
far 21:15 33:20 123:16 127:2

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

Farmington 110:21,23
fast 25:1
father 10:12
February 1:23 5:2,19 10:10 17:21,24 18:16 28:4 30:21 52:12,21 61:15 61:16 89:16 98:18 112:5,9 115:10 116:9 117:11 118:10
fee 15:10
feel 89:4
feet 34:3 72:6 106:2,9,10,17 106:22,24 107:2,6,6,7,14 107:15 114:9 114:11,12 121:19 132:1
fell 13:19,20 30:23 33:3 34:3,13 35:4 45:19 50:10 51:3,6 60:22 93:15 102:6 106:5 107:16 112:2,5 117:17 118:4,13 119:5 119:14,22,24 120:2 121:2,4 121:7 128:9
felony 15:4
felt 51:18 69:15
fiance 78:22
field 106:2
fifth 113:6
figure 22:15 115:22
file 23:7,22 126:13 127:15
filed 28:8,10,24 30:15
fill 26:14 103:7
filled 84:3 103:11
filling 103:6,8
financially 12:15 13:8,10
find 119:17
fine 10:18 15:22 32:25 56:24 58:23 59:10 105:17 125:1
finger 113:25
finish 32:11 55:20 84:6 88:25
first 5:5,24 11:3 18:7 21:8 25:24 34:9 45:3,13 59:11 60:24 61:1 62:20 63:3,12 64:14,15,19,22 66:2,4,17 71:8 71:15 72:15 90:6 103:13 105:13 112:21 112:25 116:17 133:10
Fitness 98:22 99:10
five 21:17 46:10 52:2 72:4 81:4 81:11 82:8,9 83:11,20 84:1 84:7 85:19 86:6,7,9 99:8 111:6
flashes 27:12
flashlight 93:7
flat 36:5 102:8
flats 78:14
flatten 35:17 37:5,15
flattened 35:15 37:1 105:18,23 106:6,25
Flex 63:17
floor 23:3
flower 86:14
fluctuation 130:11
fluffy 35:16 36:14
follow 66:21 67:20 80:15
follow-up 122:19
following 14:21 46:8 50:11 51:9,11 52:7 66:21,23,24 67:12 68:16 125:3,19
follows 5:6
food 90:21 98:8
foot 87:24 101:11,14
footage 121:18 122:3,11,14,25 132:1
football 88:5 106:2
foregoing 133:11
forgot 25:21
form 35:21 49:9 50:25 54:1,15 55:15 57:1 59:12 93:3 103:7
forth 133:9
forties 97:10
foundation 22:5 35:22 37:7 40:21 41:4 48:21 49:10 51:16 54:15 55:15 56:11 66:11 94:5
four 10:14,25 53:8 78:18 113:7
four-inch 78:13
frame 39:13 97:15
Fraser 24:8 50:8 62:3
fraud 14:9,13 15:14
Frazho 110:12,13 110:14,15
freeze 32:21
freezing 93:22
Friday 30:21 31:8,15 51:2 66:20 75:6 120:2,23 121:9
friend 81:8
front 23:16 24:12 34:20 40:7 41:21 46:19,20 57:5 101:24 115:16
full 6:7 30:12 34:9 133:14
funny 43:14
further 130:20 132:19
fuse 69:10,11
fusion 64:9
future 61:18 72:25 73:1

G

Gabapentin 26:21 65:17
Gabel 3:3 4:4,7 4:9 7:8 8:8 14:14,18,22,24 15:23 25:9 27:15,18,20 35:21 37:9,17 37:21 38:17 43:24 44:1,2,5 44:8 57:2 79:12,13 80:1 80:2 83:18 85:15 91:21,22 92:3,4,21,23 94:6,8,24 97:3 97:5 98:1,13 100:23 102:17 102:22,25 105:11,21 106:19 109:7 109:10,20 110:4 111:8 115:4 128:7,11 129:8 130:20 132:15,19
Gail 1:24 133:6 133:20
game 6:9
GED 16:13
general 20:20 54:2 67:5 86:19 96:11 131:20
generally 30:18 33:23 40:12,20 47:18 49:20

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

56:17 58:2 85:3 112:4
gentlemen 114:19
getting 66:7 68:18 99:22 116:25
girls 77:17 123:2
give 15:17 26:8 82:4 88:1 90:20 96:21 113:24 126:2
glasses 44:19 102:13
glaucoma 44:22
glide 24:21
go 5:23 10:21,23 13:21 15:9 16:9 20:6 21:1 21:3,5 25:9,11 25:16,17,17 31:7 37:9,17 38:17 39:18 44:3 49:11,24 50:3 52:10,10 57:1,2 62:10 62:22 63:9 65:6 70:10 71:19 72:20 73:9 76:8 77:7 77:18,19 78:8 78:14 79:1,23 80:5 83:13,14 88:3,7,21 89:3 93:4 98:21 99:3,7,11 103:23 107:7 112:9 116:16 118:2 119:7,11 125:17,18 126:3,4 127:1
goes 13:25 124:4
going 5:23 6:14 6:15 17:2 22:4 33:21 34:14 37:6 38:8 44:10 48:1 51:15 52:9 55:16 59:6,8,9 62:24 66:14 73:1 79:14,17 80:3,4,6,14 82:7,22 86:22 86:24 89:21 93:18 95:21 98:25 102:2 103:23 107:7 111:16,17 116:7 118:3 119:3 120:16 126:23 127:10 128:1 129:24 131:1,9
good 27:20,20 44:1 85:3 88:20 128:15
gotten 26:17 69:20 109:2 110:21
grade 17:1,2
gradual 117:3
graduate 16:2 17:8
graduated 16:3 16:12,15 17:5 17:9
Grand 1:13 19:4 19:7 20:2,11 21:1,12,15,18 21:21,24 22:11 22:20,22 31:3 39:6 40:11,12 41:7,9 47:11 53:8 54:10 55:14,21 56:9 56:18 57:12,14 57:17 58:2 100:3 122:13 123:11 125:17
grandchildren 12:19 77:20 78:17 79:4 86:8 104:5
granddaughters 77:24
grandson 13:4 78:24
grandsons 77:19 77:20
granted 18:3,7 18:15 72:14
grass 121:22
Gratiot 31:4 53:6 109:2,3,8 109:21,25 110:1,2,11,12 110:15,15
great 102:23
great-grandchild 79:6
great-grandson's 86:13
Groesbeck 24:8 50:8 109:17,25
ground 5:24 34:10 35:5,15 36:10 37:2,15 46:8 79:15,19 101:17,20 116:6,8 129:3 129:11
Group 1:9 2:19 3:4 5:18 53:24 54:12,13,21 55:12,13,21 56:1,4 58:19 125:15 131:16
growth 71:5
guess 6:11 36:7 82:3 95:21 99:13,15 112:15
guessing 24:6 91:10,15 94:10 95:21 104:19 104:19,24 126:1 128:25 129:3,12
guilty 14:21
guy 60:23
guys 37:18 44:9 98:5 115:13,17
gym 98:21
gyms 99:7

H

Hall 26:3,25 61:15,22 65:7 65:10,22 68:17
hand 81:14
handing 58:15
handle 64:3
handled 60:11,13
hands 46:13 102:2
hangers 24:18
Hanover 3:4
happen 30:19 73:2
happened 24:5 47:16 52:12 88:1 89:4 124:22
happening 73:2
happy 69:19
hard 36:11 114:20 116:1
hardest 26:9
hardware 67:11
Harper 82:15,19 82:20,24,25 83:4 108:18,23
Harrington 109:17,19,21 110:2
Harris 67:6,8
head 6:3
heading 31:3 113:21
heal 74:13
healed 88:22
healing 85:7
health 29:4,7,15 29:16
Healthy 63:12,16
hear 118:18
heard 37:1 71:12 71:15 93:18 120:17
heater 124:4
heavy 20:24 23:5 23:20 72:2,4
heavy-duty 70:8
heels 78:12,13
help 27:1
hereinbefore 133:9
hereto 132:22
high 16:2,17,19 17:5 78:12,13 97:14
Highway 3:5
Hills 110:21,23
hire 18:10

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

hit 46:2 87:25
hobbies 77:12 86:5,19
hold 26:10 33:18 85:9
holding 44:14
hole 124:5
home 9:10,11,13 9:21 20:6 30:25 46:21 49:25 52:4 67:25 69:25 82:16
Hon 1:8
honestly 6:24 7:5 52:25
honors 16:15
hooks 24:20,23
hopefully 13:25
horizon 92:9
hospital 66:17 67:12 76:15 81:7 109:15,16
hospitalized 76:3
hot 27:12 124:4
hour 19:16
hours 8:3 20:2,8 58:4 72:7 86:16 93:23
house 8:15 9:6 79:2 106:8
housework 70:21
hurt 51:11 52:2 87:17,19 89:12 89:12,22 90:2 117:18,19 118:21,22,24
hurting 51:7
hurts 13:20
husband 11:3,7
husbands 11:22
hysterectomy 76:6

I

I-94 75:17
ice 35:6,10,13 36:10,13 38:10 38:21,24 39:7 39:24 42:2,8 42:11 48:7 49:7 119:3
idea 15:5 34:20 38:10 41:22 42:24 49:16 52:14,18,25 53:22 56:4,23 62:12 66:9 71:4 73:1 98:19 100:12 113:24 115:19 117:21 118:16 118:22 123:14 124:2 125:10
identical 112:16
IDENTIFICATION 111:14 130:24
identify 82:21
illicit 58:7
illnesses 103:18
illuminating 93:5
Imaging 61:23
IMEs 63:8
Immediately 22:11
impeded 129:23
imply 115:6
important 5:24 6:3,5
in-house 64:3
incarceration 14:14
inches 34:11 38:22 39:4 114:23,24 115:19 116:1
incident 5:19 13:15 28:9,21 29:5 30:4,18 31:13,17 32:16 39:2,7,12 42:11 43:13,19 44:14 45:24 46:4,9,25 49:17 50:21 51:9,11 52:12 52:19 54:3,4 56:6,21 58:4,9 58:15 60:15 63:15 73:16,22 73:25 74:16,22 75:2,9,10,23 75:25 76:3,18 76:22,24 77:12 77:23 78:6,9 79:15 80:12 82:7,8,9 83:10 83:14,15,21,25 84:13 85:19 86:4,22,25 87:1 88:2 89:8 89:9,20,23,25 90:3,10,17 92:2,6 93:15 93:23 94:1 95:24 96:7,19 96:21 97:7,11 97:19,21,24 98:21 99:8,16 99:25 100:1 101:4,7,14 103:1,4,17,20 103:23 104:8 104:10,14 105:3,17 107:20,21 108:9,17 112:20 115:10 115:21 117:6 118:5,8 121:8 127:13 129:4 129:10
incidents 125:6 125:15
income 28:1 73:8
independent 12:15
index 4:12 97:1
indicate 16:16 20:7 119:19 132:4
indicated 44:22 112:25 132:1
indicates 131:18
Industries 124:17
infected 75:5
infection 82:12 108:6
information 58:12,12 100:16 101:1 120:24 125:5,7 126:22
inhibit 85:7
initial 21:9 126:2
Initially 61:3
injection 81:13
injections 65:20 65:21,22
injure 24:1 46:1
injured 23:11,24 45:23 76:20 118:15
injuries 28:21 30:3 51:13,20 59:1 103:20
injury 18:17 28:24 46:4 125:19
ins 90:25
inside 35:3 46:20 93:5 124:7
instability 88:17
Instagram 13:13 80:21
installing 67:10
instruct 37:20
insurance 29:4,7 60:9 63:7,8 131:21
interactions 97:17
interested 96:22 133:16
interpretation 36:21
interrogatories 10:19 27:17 43:18 58:17
interrogatory 58:18,20
interrupt 16:9
Investment 1:9 2:18 5:18 53:24 54:12,13 54:20 55:3,12 55:13,21 56:1 56:3,4 58:19

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

125:14 131:15
Investments 56:14 124:17
Isaac 47:2,9 119:12

J

Jamal 22:2 40:4 124:6
janitor 20:21
January 59:13 60:8 61:12,14 71:11 98:24 99:4
Jason 126:17,19 127:9
Jay 127:5
jeans 24:24
Jessica 95:17 125:6
Jim 53:1,7,8 122:21 124:8
job 10:12 17:22 17:24 20:20 23:5,11,20,24 52:3
John 59:3 60:2,4 64:5 76:16,17
Join 37:9
jump 80:3 86:24

K

keep 5:24 6:7 70:22
keeping 24:12
kept 40:1 72:10 116:25 117:2 126:23
key 34:21
kids 104:6
kind 13:25 24:19 24:25 46:2 51:7 52:4 65:21 66:5 77:18 86:18,20 94:16 95:13
kinds 23:15
knees 46:13 102:2 119:15 119:16
knew 41:5 56:5 57:14 91:8 114:25 128:19
know 6:10,11,12 6:21,22 7:19 9:17 13:6,20 14:18 15:4,14 16:20,23 17:1 18:15,19 19:18 19:20,21 22:3 22:5 24:5,7,25 26:2 28:8 29:24 30:1,15 31:19 32:14,19 32:22,23 34:24 34:25 35:2,17 36:3 37:5,8,10 37:16 38:21 40:1,3,5,22 41:2 43:3,8 45:21,23 47:5 48:3,12,23,25 49:1,18 50:13 51:17,23 52:9 52:13,15,22 53:1,4,12,21 54:16 55:2,2,4 55:8,9,16,24 56:3,7,24 57:12,14,24 61:2,20 62:1 62:20 64:7 65:23 66:2 67:24 70:6,22 73:2 76:16 78:11 82:7 84:22 86:5,15 89:22 91:3,6,7 91:10,14,23,25 92:6 93:19,22 93:25 94:3,7,9 94:13,17,25 95:20 97:14 98:8,10,14,15 99:17 100:10 100:11,15,18 100:25 101:2,7 101:15 102:17 103:13,14 104:24 109:19 115:3,5 116:2 116:2,20 117:18,20 118:15,20,20 119:2 123:18 123:21 124:20 124:24,25 125:1,2,3,4,7 125:12,13,14 125:17 126:6 127:12,14 128:19,20,23 129:2,5,7,10 129:16,22 130:14,17
knowledge 6:18 42:10 124:15
knows 51:17 57:2 94:6
Kornblum 18:22 21:11 60:10,14 60:17,25 61:21 62:22,24 63:1 63:16,19,21,25 64:2,16 66:2 66:22 67:2,9 67:20 68:4 69:6,13,17 70:15,25 71:25 77:5 107:22 126:7,9 127:17
Kornblum's 62:25 63:3
Kroger 26:17 83:13,14 110:7 110:9,21,24

L

L.L.C 1:9
ladder 20:17
lady 120:13
laid 50:2 52:5
landed 45:21
landlord 53:9,22
Landscaping 1:11 3:9 55:25 79:13 90:17 131:20
Landscaping's 58:17
laparoscopy 76:5 76:7
Lasko 9:24 11:3
late 16:3,12
latest 99:5
Law 3:4
lawns 57:4
lawsuit 28:9,12 28:24 29:1 30:15 46:6 53:1
lawyer 58:9
lay-away 24:17 24:22,25
lay-aways 23:17 24:14
leading 45:15 129:10
lease 123:13,14 123:16,24
leave 16:22 22:21 80:17
led 60:7 127:25
left 19:14 45:14 66:19 84:10 88:15,16,17 114:6 120:6,14 121:4 123:3
left-handed 84:9
legal 49:10
lenses 86:1
let's 10:21 25:9 30:18 64:14 75:15 113:13 115:9
letter 131:12,12 131:14,15,16 131:18
letters 131:2 132:7
level 51:25 68:24 129:24 130:2,12
Liability 1:10
license 85:24 86:2
lien 30:14
lift 20:23 78:1 111:6
lifting 23:5,20
light 41:18,24 42:4,4 92:16 92:17,17,17,19 92:25,25 93:3

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

93:8,10
light-colored 114:2,5
lighting 41:24 92:8 102:17
lights 41:20 92:15,16,25
liked 77:13
Limited 1:10
line 22:15
liquor 23:4
list 26:8 96:14 96:15,15,17 97:1
listen 129:6
litigation 94:16
little 7:10 8:24 8:24 36:7 80:3 86:16,24 93:7 113:17 122:14
live 8:14 9:1,3 9:21 12:23,24 21:15
lived 8:12,17,20 8:23 9:8
Livings 1:4,19 4:2 5:4,9,11 5:16 43:18 57:19 95:19 111:16
LLC 131:16
located 31:4 53:6 56:15 96:18
location 21:21 48:19,20 62:13 62:15 83:3 89:10 91:4 99:10,11,23
locations 83:8 84:3 110:9
London 10:7
long 8:12,17 9:1 9:8 16:7 20:13 22:3 25:5 42:10 46:8 62:7,19 66:17 67:12,20 68:14 72:8 127:11
look 35:12 38:12 38:15 43:23 58:21,22,24 106:7,24
looked 17:24 35:19 36:1
looking 17:22 35:4 112:9 113:21 123:4
looks 58:23 59:5 131:19,21
lot 31:16 32:9 32:12,14 33:11 35:11 36:1,13 36:15 38:13,15 38:22 39:8,24 40:11,14,15,17 40:20 41:2,13 42:6,13 48:2,9 48:13 53:10 56:8,15,17 58:12 80:4 86:23 87:2,6 90:13 100:9 102:3 105:17 113:11 115:1 115:20,24 116:3,5 117:7 118:5,13 119:14 120:1,3 121:2,3,12 122:10
lots 88:6
lottery 23:3
loud 79:16,17
low 81:9,13,14 102:18
lower 45:22,23 46:1,5 101:19
lunch 20:5
Lupo 75:19

M

ma'am 14:22 80:3 103:1 128:8
machine 86:11
Mack 8:24,24
Macomb 1:2 64:5 133:5,22
Mahoney 2:13
mail 124:16
main 26:9
maintains 55:23
maintenance 131:20 132:5 132:10
major 104:13
majority 40:25
making 86:11,21
mall 75:21
management 15:10 61:15 65:8,12 68:17,19
manager 23:14
manipulate 81:24
Mansour 18:13
March 61:21,22 62:20,21
Maria 47:2,9 119:12,23 121:6
mark 2:12 5:16 11:3 111:10 130:21
marked 111:13,16 130:23 131:1,9
Market 1:20 2:5 21:20 22:17,19 22:21,25 23:2
marriage 59:21
married 10:25 11:12 25:21 29:11 89:15,16
Martin 18:22 21:11 64:16
matter 90:8 112:15
Matthew 12:8,13
maximum 94:12
McCambridge 2:13
McLeod 1:24 133:6,20
McMillan 10:1 11:18 29:11 59:21 89:7,15
mean 20:1 27:1 32:4 46:2 47:5 51:1,4 57:6 77:21 92:1 98:8 107:5 112:22 115:6 126:5 127:21
Meaning 100:24
means 91:12
meant 113:3
measured 70:11
media 13:12 80:14
Medicaid 29:13 29:16,18
medical 13:23 30:2 44:21 50:3 58:14 60:9 73:17,23 85:20,23 88:8 88:10 90:7 107:18 108:11 111:2 117:20 119:20
Medicare 28:5,7 29:8,17,18,19 29:23
medication 6:23 7:1 27:6,11 65:13 73:11 74:1,3
medications 26:10,20 58:7 84:3
meet 5:16
Meijer 60:21 89:8,9,10,13
membership 99:3
memory 6:10
Mendelson 60:10 60:14,17,24 64:2 77:5 107:22
mention 42:14 69:13 72:3 74:9
mentioned 16:12 17:3 18:14 25:13,23 26:15 33:12 36:1 41:15 45:18,23 47:7 56:17 59:7 62:3 64:8 64:10,23 72:1 78:16 80:17,23 82:7 83:9,13 93:1 112:19 127:16
metal 24:20 69:9 70:7

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

methods 91:12
Metro 109:9
Michael 12:7,9
Michigan 1:1,10 1:12,15,21 2:6 2:15 3:6 5:1 5:13,13 8:11 8:16 9:7 127:6 130:5,12 133:3 133:22
middle 12:7 13:5 81:6
Middlebelt 110:22,23
Mile 2:14 53:6 62:14 75:17 82:15,17,22 83:5 99:13,24 108:18,23 109:13 110:22 110:23
military 17:16
mind 44:5
mine 29:23,25
minimum 94:12
minutes 21:17 70:2 71:7
misdemeanor 15:4
mixed 125:10
model 122:20,24
mom 51:3 78:19
moment 43:25 92:5
moments 47:18
Monday 31:8
money 15:8 23:17 30:3 132:9
month 27:24,25 28:6 37:24 43:19 65:8,12 73:8 79:7
monthly 15:11
months 13:6,21 29:20,22 42:12 42:19,21 65:7 65:10,11 68:6 68:12,15,21,25 96:3,4,5
morning 7:14 8:2 8:5 39:2 48:2 51:3,4,7 52:15 52:17,24 95:24 96:9 112:24 113:18,21 114:14,17 116:20
mornings 100:14
Moross 59:3 76:16,17
Motrin 50:2 52:4 73:13
mound 113:8,9
mounds 118:1
Mount 17:5 109:23
move 10:9 26:13 67:8 86:22
moving 16:6 51:5
mow 57:4
MRI 61:24 71:16 76:24
msteiner@smsm... 2:17
Mt 1:21 2:6 5:1
Mujo 11:12,13,14 11:15
muscular 126:24 126:24,24

N

name 5:8,16 10:3 21:8 32:19 34:22 53:4 60:1,2,5 67:6 79:13 82:13,13 89:7 95:16,18 98:4 125:8 126:17 127:6,7 127:10
names 9:24 12:6
Nana 78:2,3
narcotic 26:10
naval 76:8
navigate 93:10
near 48:11,17 82:19,24 109:21 110:15
necessary 57:7
need 6:20,22 19:18 52:10 60:22 66:9 70:18 79:22 87:15
needed 53:12 70:23 99:19 100:9 119:22
needs 76:9
negative 93:21
Nerve 27:4
nerves 26:23 27:1,3
never 26:18 49:2 62:12 66:12 68:18,23 82:11 97:22,25 116:5 116:7 117:1
new 42:23 103:18 103:20
nice 113:14
night 8:2 16:14 17:4 41:24 42:4 43:2 52:6 52:10,13 93:3
nights 20:16
nine 12:22 77:19
nod 6:3
noon 8:2
Nope 32:21 44:20 47:22 73:13,18 74:23,25 75:11
Norco 7:2,9,13 25:24,25 26:9 65:14 74:7 110:21
normal 112:23
north 104:10 109:18 110:14 110:15
Northwestern 3:5
Notary 133:1,7 133:21
notes 77:7 133:15
notice 5:12 125:15
November 29:13
Novi 2:15
Nowicki 75:20
number 8:15 9:6 10:13 58:20
numbers 93:21

O

o'clock 7:17 50:14 116:20
Oakland 61:23
oath 5:6
OB/GYN 59:24
object 14:25 22:4 35:21 37:6,22,22 40:14 48:21 49:9 50:25 51:15 54:1,15 55:15 56:11 57:1 59:12 115:4
objection 15:18 37:17 40:21 55:8 66:11 72:13 73:6
objections 37:20 54:23
objects 72:2
obligation 121:11
observed 35:23
obtain 120:24
obviously 13:19 86:7
occasion 115:17
Occasional 73:13
occur 64:19
occurred 5:19 31:14 64:5 65:23 88:19 105:18
October 18:6,14 90:6
office 60:11 62:25 63:3 71:3
officer 15:11
Oh 19:4 51:6,6 53:12 60:22 63:23
okay 6:10,20 7:21 9:10 10:17 17:10 20:2 21:23 22:18,21 23:2 26:20 27:8 30:1,1,16,18 33:9 34:1,22

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

37:23 39:18 41:9 42:24 52:12 56:4 58:11 59:4,6,9 60:7 61:23 63:18,25 64:3 64:14,21 66:25 67:2 69:17 71:6 74:8,14 78:20 79:4,16 79:17,18,20,21 80:6 85:18 89:1,15 93:15 94:23 96:4,20 99:25 101:3,11 102:22 106:15 108:9 111:25 112:7 113:13 113:20 114:4 114:24 115:21 117:16 118:12 121:16 122:1 123:4 124:14 125:17 128:3 128:15,18 129:20 130:20 131:15,18
old 15:19 43:19 77:24
oldest 12:7 13:3
once 68:6 75:13
ones 65:16 110:19
open 31:25 114:16 117:25
opened 32:1 46:19 101:24
opening 20:5,10 20:13,15,18
operated 70:3
operator 129:14
opinion 66:14 89:1 126:21 127:4
optimistic 73:4
optometrist 99:19
optometry 99:22
order 90:21 124:23
ordered 15:9,12 77:5
originally 13:19 29:12 116:17 125:24
ortho 70:8
outs 90:25
outside 107:23 119:22 124:8
owe 11:22 15:8 30:3,5 131:5,6
owed 124:9 132:2
owner 21:22,24 22:1 33:7 53:18 57:14,16 57:17,21,22 100:8
owner's 117:15
owners 22:3 40:4 40:9 47:11 57:20
oxygen 85:4,7

P

P 59:9,11
P.C 2:4
p.m 1:22 5:3 132:20
P40617 3:3
P51293 2:3
P78817 2:12
PA 68:8
pack 84:23,25 85:11,13,16
packed 34:11 36:16,17,20 38:10 48:9 101:20 107:8 114:20 116:1 129:17 130:9
packing 116:21 117:1
page 1:18 4:2,15 111:18
paid 21:12,12 61:2,7 124:8 124:18
pain 27:4,6 51:25 52:9 61:14 65:8,12 65:13,14,19 68:17,18,24 69:20 73:11,19 74:4,17,18,21 81:14 84:3 126:23
pains 76:13
paint 86:15
Panthanji 27:14 77:6
paper 6:3
paperwork 23:18
Pappas 60:3
parents 10:12
park 38:6 40:18 40:24
parked 30:22 33:17,20 34:5 38:7 40:17,19 40:24 96:18 112:20,25 113:7,18
parking 31:16 32:9,12,14 33:11,14 34:8 34:9 35:11 36:1 38:6,13 38:15,22 39:7 39:24 40:11,17 40:20 41:2,13 42:5,13 46:14 48:9 56:8,15 56:17 87:2,6 90:13 100:9 102:2 105:17 113:6 118:13 119:14 121:2,3 121:12 122:10
parks 34:20
Parkway 109:9
part 45:21 122:13 123:13
partial 76:5
particular 41:6 74:16 122:9
particularly 89:21
parties 132:22
party 29:1 133:16
patient 30:7
pavement 35:8 120:16
pay 13:23 15:10 15:10 28:7 37:19 61:4,4 78:23,24,25 122:4,14 123:11 127:3
payment 9:17 27:24
pays 121:23
Payton 9:6
peek 44:1
people 24:13 38:8 47:15 51:6,8 57:24 61:3 98:9 119:5
percent 51:6,10
perception 7:10
perfect 36:20
perfectly 6:12 30:1
perform 64:17
performed 64:15 67:2 69:6
period 16:17 22:16 25:3 51:13 62:16 116:10,11
permanent 46:3
permanently 72:11
person 86:20 105:13
personal 42:10 93:8
Personally 57:23
pharmacies 82:6 83:19 108:14 110:19
pharmacy 26:9 82:13 83:14
phone 32:16 33:1 33:3,8 53:17 94:19 95:1,2,3 95:8
photo 120:14
photograph 111:18,19 112:10,14 113:18 114:5 121:5

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

photographs 4:17 44:10 113:22
photos 80:17,18 94:15 96:5 120:6
physical 63:18 63:22,23,25 64:2 68:10,12 68:14,20,23 76:18,21
physician 18:19 59:8,17,19 60:8 62:25 63:4,10 127:21
physicians 128:3
pick 48:7
picture 44:6 96:17 112:4
pictures 96:6
piled 34:8
piles 113:10 118:1
pills 65:14
Pinewood 8:11 9:10,21 30:25
pins 66:5
pissed 117:25
pitch 93:13
place 19:5 63:17 82:14 108:1 133:9
places 83:24 112:16
Plaintiff 1:5 2:9
Plaintiff's 58:16
Planet 98:22 99:10
planned 66:25
plastic 24:19,23 25:1
plates 72:4
play 77:20
played 88:5
plaza 38:7,9 56:15
plea 14:21
please 5:7 27:15 49:11 80:15 129:1 130:21
plow 36:2 37:25 38:2 42:16,22 42:23 57:7 116:3,22,23
plowed 35:18 36:2,5 38:15 46:15 107:13 115:1,9,20 116:5,5,8,18
plows 107:11
plus 19:16
point 14:15 15:19 66:10 81:7 94:15 96:23 99:19 106:5 113:25 127:4
pointed 118:25
pointing 81:9 120:6
popped 127:7
portion 122:11
portions 106:2
position 16:7 20:18
possible 30:17
post 13:15
posted 13:24 80:14
posts 92:17,25
pounds 111:6
power 101:25
pregnant 16:24
premises 40:1 41:20,21 53:25 54:14,22 55:14 55:21 56:5,24 57:10 91:24 98:18 100:4,25 114:25 121:12 125:18
prepaid 132:2,4
prescribe 26:4 65:14 70:25
prescribed 25:24 26:2 70:15
prescribes 26:24 27:13
prescription 26:14 73:14 83:23,24
prescriptions 26:6
present 8:10
presently 25:21 27:22 74:3
pressure 27:11
pretty 77:2,4
previous 9:24 11:22 38:16
Previously 38:19
pride 51:11
primary 27:14 59:8,17,19,23 60:8 107:23
prior 8:14 19:9 42:21 52:13 58:4 73:16 82:6 83:10,25 84:13 86:5,6,7 86:9,25 90:10 90:17 99:8,16 105:3,4,8 115:10,21 117:6 118:5,7 123:9 128:3
privacy 10:15
pro 132:1
pro-rata 123:22
probably 5:25 10:19 11:9 13:21 14:20 16:23 43:1 52:2 78:10 85:17 99:17 109:5 110:3
probation 14:16 15:11
problem 15:23 18:19 72:8 87:22 99:18 121:21
problems 72:5 73:16 89:4 99:15
process 117:3
program 17:4
progressed 52:5
progression 51:20
pronouncing 11:9
property 9:19 55:23 57:6 111:24 120:20 121:17,20 131:5 132:5,11
provide 51:21 94:17
provided 58:11 94:15 97:2
providers 58:14 59:7 107:19 108:11
psychiatrist 84:14 103:2
psychologist 84:13 103:2
PT 64:12
Public 133:7,21
punch 25:16,18
Pure 63:12,16
purpose 40:6 56:9 96:4
purposes 5:12 15:20 46:5
purse 44:15,18
pursuant 5:12
push 113:10
pushed 24:20,25 105:23
put 24:13,15,16 24:23 25:2 66:8 82:2 123:6 128:9
putting 23:18

Q

quarterly 122:2
question 6:7 7:8 7:12 30:7 32:11 33:19 35:24 37:11,21 43:10 45:25 54:24 55:2,20 84:6 88:25 91:19 92:5 94:21,22 97:19 100:22 106:23 115:7,22 116:2 122:22 123:21 126:12 129:1,6
questioning 104:16

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

questions 6:5,6 6:14,15 7:6 44:4 59:6 79:14 80:4,5 86:23 102:16 103:13 111:11 128:10 130:20 133:11
quick 44:10 58:21 77:8 122:19 131:2
quite 66:6

R

R 1:24 2:3 3:3 133:6,20
rack 24:15,21,24
racks 24:11
rained 93:25
ran 60:20
Randall 18:13
rata 132:1
Ray 11:7
Raymond 8:15,17
RE-EXAMINATION 4:6,7,8,9 122:18 128:7 130:25 132:15
reading 102:14
real 9:19 77:8 122:19
really 51:13 67:24 68:23 82:11 94:17 95:13,22 98:8 99:3 123:2
rear 33:14 93:2
reason 24:22 73:11 76:4 94:20 122:6
reasons 38:5
recall 13:18 15:6 18:12 19:7 74:16 76:23 82:11 89:7 94:2 97:9 101:16,17 112:11 113:1 126:11 131:6
receive 27:24 28:19 122:2
received 124:16 124:19
receiving 24:19 27:22 28:4 126:22
recess 44:12 77:10 79:25 91:20
recipient 100:18
recognize 111:21 130:2 131:10
recommend 126:9
recommendation 127:19
recommended 126:7,13
record 5:8,10,17 5:23 6:8 10:14 10:21,22,23 14:12 25:9,10 25:11 43:21 67:18 77:8 80:1 83:17 84:19 91:21 102:24 116:14 120:12
recorded 133:12
records 16:16 20:7 44:21 84:16
recovered 69:16
rectangle 113:17 128:16
redeemed 28:12
redemption 30:9 61:7
reduced 133:13
reduces 85:3,6
refer 60:17 62:9 63:25
reference 65:3
referred 103:15
referring 58:20
refill 44:10
refillable 83:24
refilled 26:6
reflect 5:10 43:21
refreeze 130:13
refresh 114:22
refusing 13:23
regard 15:14 46:5 125:5
regarding 13:15 72:14 122:20 122:23
register 24:13 124:22
registers 23:19
regularly 12:25
relate 46:4
related 75:1 108:10 132:10 133:15
relates 108:9 130:16
relation 76:10
relative 98:18
relax 27:1
relayed 125:6
relevance 14:25 15:18 73:6
remember 8:15,17 8:20,22 9:5,7 9:8 28:15 31:13 37:10 52:14,16 59:22 60:2,5 65:24 75:16 101:12 103:6,8 105:12 115:16 127:10
REMOVAL 1:12
remove 121:11
removed 66:10,12 130:3
rent 9:13,15,17
Rentals 9:16
rented 122:15
repairs 121:20
repeat 129:1
rephrase 55:11
report 39:21,23 50:21 58:2 121:8 126:2
reported 125:12
reporter 6:1 111:13 130:23 133:6
reporting 15:11
reports 127:24
represent 5:17 79:13
requested 132:21
require 20:23 23:5,20
required 20:22 23:4 40:18 69:23 73:17 75:5
residue 130:5,8
respect 78:5,8
respective 132:22
respiratory 82:12
respond 6:16
responsibility 49:5,14
responsible 23:16 77:25 122:4,24 123:18
rest 116:23
restaurant 32:2 33:6,8 41:15 46:11,18 90:20 100:8 112:1 131:25
restrictions 85:21,23 111:2
result 5:18 15:8 23:8 30:3 45:24 58:14 59:1,2 87:17 89:22,25 90:2 90:8
retail 14:9,12 15:14
returns 19:21
right 7:10,24 10:1 11:1 14:2 16:16,17 19:15 20:8 22:23 25:14 28:13 31:5 36:23 37:13 39:3,17 41:9,16 42:2,8 42:14,16,19 45:14,15,18,19 46:6 47:7,12 49:3,19 54:8 54:10 55:7 56:19 57:10

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

60:12 61:9 62:5 63:9,24 65:5 67:2 69:2 70:4 72:2 75:21 78:17 80:8,12,23 82:18,25 84:9 84:10 86:12 87:5 88:15 93:15 96:25 97:14 98:2 102:20 104:5 105:7 106:5 107:4,25 109:14 110:1 111:7 113:3,19 114:8 115:6 116:12 124:18 126:15 127:17 127:23 128:13 129:24
right-hand 84:11
road 2:14 31:4 83:5 109:13 120:16
Robert 34:23
rod 25:1
rods 66:8,9 67:10 70:7
rolled 24:16
rolling 24:11,15
roof 124:5
room 75:1
rose 97:14
Roseville 8:11 53:7 75:8 99:24 110:18
RPR 1:24
rubber 43:23
rule 6:9
rules 5:13,13,24 79:15,19
ruts 117:1

S

safety 58:1
Sage 5:17 53:1,5 53:7,9,24 54:5 54:12,13,18,20 55:12,13,20 56:1,3,4,8,13 58:19 121:24 122:21 124:8 124:17 125:14 131:3,15 132:9
Sage's 1:9 2:18 55:3 121:19,24 121:25
sake 130:1
salt 40:1,6,9 119:23
salted 116:6
Sam's 99:22
Saturday 31:10 50:15,19 67:16 125:24 126:4,5
savvy 95:13
saw 24:7 35:23 44:21 61:11 63:3 131:3
saying 68:20 126:23
scale 52:2
scan 76:25
schedule 20:4 68:10 78:19,20
scheduled 30:20 34:16 50:15 52:8 114:13
Schoenherr 99:13
school 16:2,14 16:17,19,25 17:5,11
scope 76:8 91:3
scraped 117:1 128:23,24 129:2,11
screw 77:21
se 87:3
season 129:9
second 11:7 33:18 45:4,5 45:11,14 62:21 62:21 64:17 66:1,14 67:1 67:17 68:4,12 68:25 69:14 79:22 91:18 126:21 127:4
secondhand 124:15
seconds 46:10
secretarial 17:10
Security 10:13 18:1,3,7,20 27:22 72:15 103:6,10 126:8 126:13 127:20 127:25
see 12:25 13:2,5 13:6 24:3 28:8 30:1 32:9,12 35:6,8,10 42:1 42:7,8,23 44:17 48:12 52:10 55:11,11 55:18,20 57:9 61:2,18,22 62:7,22,24,24 63:4 65:6,12 67:22 68:9,16 69:16 75:15 76:9,18 79:4 103:1,4 111:19 112:7,14 113:20 114:2,5 114:6 115:1 117:8 118:17 120:3,6 123:2 123:3 124:10 127:1 131:23 131:25
seeing 45:6 63:15,21 64:23 65:7
seek 50:3 90:7 90:10
seen 34:25 36:4 55:23 61:14,14 63:5 76:20 80:25 84:13 97:22,25 114:25 122:10 124:11 131:12 131:15 132:7 132:16
Segal 2:13
senior 17:2
seniority 20:16
sense 93:4
sent 62:14 95:10
September 15:3,3 26:1 89:19 133:24
series 81:3
serve 17:16
server 20:5,10 20:13,15,18,21 31:24 47:10 119:14 121:6
service 23:14
services 123:12
Servitto 1:8
set 20:4 132:14 133:9
Seven 8:13 20:14
sew 86:11 104:3
sewer 121:20
sewing 86:11,18
sgabel@hanove... 3:8
share 131:6
sheet 6:2 35:13 36:13 38:9
shelves 23:4
shift 49:22 52:3 102:12 114:13
shipping 24:12
shock 51:21
shoes 43:12,16 44:7
shoot 96:9
shopping 110:10
Shores 8:16,24 14:17 15:7 83:2,6 108:20 108:25
Short 44:12 77:10 79:25 91:20
Shorthand 133:6
shot 96:10
shoulder 24:2,9 25:2 76:20
shoulders 6:4
shovel 48:7
show 43:15 111:16 119:21 131:9
showed 122:8
shower 86:13
showing 96:17
shown 43:22

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

shows 122:8
shrug 6:4
sick 82:11
side 40:8 41:21 104:11
sidewalk 40:10 119:24,25
sidewalks 40:7
sign 98:23
signature 132:21
signed 98:22 99:12 103:12
similar 131:16
simply 6:7 58:17
Singer 2:13
sir 14:3 23:10 23:12 28:25 29:3 39:23 56:20 82:25
sit 16:7
sits 82:18,25 83:4
sitting 74:20 94:18 102:20
situation 37:23
situations 39:21
six 25:6,13 34:11 39:4 68:12 72:4,7 114:23,24 115:19 116:1
six-month 122:3
Skechers 43:18 43:22
sleep 52:6
sleeping 74:20
slightly 95:25
slip 48:11 74:22 75:23 87:1,3 103:15 117:22 120:19 125:23
slipped 87:3,4 101:11,15 118:4 119:3,25 120:1,4,4,15
slippery 32:14 102:1 130:9,13
slipping 46:12 117:7
smoke 84:16 85:9 85:13,16
smoked 84:19
snapping 44:10
snow 1:11 32:9 32:12 34:8,10 34:11,12 35:14 35:16 36:4,5,6 36:7,14 37:15 38:10,21,24 39:7,24 42:1 42:10,16,23 46:15 93:17 94:4,9 101:21 105:18,20,23 107:1,8,11,12 107:13 112:11 112:12,13,17 113:8,9,10 114:21 115:20 115:24 116:1,4 116:14,17,19 116:21,25 118:1 121:11 121:22 128:22 129:3,9,17,23 130:3,5,8
snowbank 102:5,6
snowed 35:18 37:25 38:2 42:22 52:13,15 52:18 116:24
snowing 37:24 52:16,20,23,23 101:3
snowplow 37:25 38:1 113:10 115:16 129:14
snowplowed 107:12
snowplows 107:13
soaking 46:20
soccer 77:20,22 88:6
social 10:13 13:12 18:1,3,7 18:20 27:22 72:15 80:14 84:14 90:22 97:18 103:2,6 103:10 124:24 126:8,13 127:20,25
soft 34:12 36:9
soles 43:23
solid 36:9,9 38:9 113:7
somebody 47:24 60:4 105:12
son 12:7 13:4,5 51:1 75:15 78:22 81:6
son's 13:3
sons 88:5
soon 58:9
sore 46:2
sorry 16:9 17:8 19:4 26:18 27:7 43:24 62:12 71:20 113:16 122:22 125:9 126:10 126:19
sort 44:22
sought 117:20 119:19
sound 14:22 98:4
sounds 64:11
source 92:16 94:18,25
sources 28:1
Southfield 3:6
speak 53:16 90:19
Spear 34:23 47:2 47:7 54:4,7,17 55:18,22 56:2
specialist 62:14
specialized 21:10
specific 39:13 39:14 105:22 123:22 124:2,6 131:12,14
specifically 43:5 58:24 123:20
speculation 37:7
spell 27:15,19
spelling 27:16
spine 82:3
spoke 51:8
spoken 90:16 98:2
spot 34:9 112:21 113:1 128:9,16
spousal 11:22
Sprint 32:20
square 121:18,18 122:3,11,14,25 132:1,1
SS 133:4
St 8:15,24 14:17 15:7 59:3 60:2 64:5 76:16,17 83:2,6 108:20 108:25
stand 43:24 44:3 46:12
standing 74:20 81:18 83:23
start 16:19 22:25 30:18 60:7,24 63:12 71:8 101:9 116:21
started 22:8,22 28:3,5 29:12 29:17,19,24 48:9 63:21 64:23 68:13 76:13,14 116:17 127:16
starts 29:23
state 1:1 5:7 104:11 133:3,7
stated 55:8 72:22 86:1 92:21
Statement 4:19
States 10:9,11
stayed 20:1 28:3 62:22 67:25
Steiner 2:12 4:3 4:6 5:7,10,15 5:16 8:9 10:18 10:23,24 15:1 15:22,24 16:11 19:15,17,24 22:7,14 25:11 25:12 27:16,21 30:13 32:24 33:23 34:2 35:25 36:22 37:1,4,14

RECEIVED by MCOA 3/18/2019 4:38:36 PM

38:11,20,25 39:3,5,11,14 39:17,20 40:16 41:1,5,8 43:7 43:9,11,21 44:13 48:24 49:7,15 51:17 51:22,24 52:20 54:2,6,19 55:2 55:6,7,10,17 56:12,16 57:8 57:22,25 59:14 60:6 64:8,10 64:13 65:1,5,9 66:13 67:19 70:14 71:22 72:17,24 73:10 74:8,10 75:22 77:7,11 79:3 79:10,19 80:4 86:23 104:17 105:2,7 107:19 108:16 112:20 122:18 123:24 124:1 126:15 126:18 127:23 128:2,5 132:14
stenographic 133:15
stenographically 133:13
stenosis 105:4
stepped 118:2
steps 30:23 33:12
steroid 65:21
Steve 27:19 79:13
Steven 3:3 12:7 12:11
sticky 16:8
stimulate 71:5
stimulator 70:1 70:25
stock 113:10
stocked 23:4
stocker 23:3
stomach 67:7
stop 68:18,23 86:17 99:2 116:7
stopped 25:1 53:9 69:1 77:18 99:4
store 23:16 24:16 70:10 122:13
stored 95:5
story 47:16
straight 30:23 45:19 101:19 119:15
street 1:20 2:5 8:11,18,22 9:5 9:10,21 26:12 30:25 82:21,21 108:17,21 109:8,19 110:7 110:11 119:25
strength 7:18
stretch 16:5
strike 47:14 85:18
strip 75:21
study 17:14
stuff 36:9 77:13 77:15 88:6 95:13 103:11 117:1
subject 132:10
substance 15:25
successful 69:14
sued 5:18 61:8
suggested 127:14
Suite 2:14 3:5
summer 57:4
sun 92:9
Sunday 31:12 86:13 118:9
supply 70:10
support 11:23,25
supposed 17:8 66:5 71:5
sure 5:22 33:18 69:25 91:19 104:23 119:8
surface 38:22,25 42:13
surgeon 21:11 67:6
surgeons 67:5
surgeries 13:24 45:1,7,9 60:13 64:6,14 67:23 69:21 75:9 99:14,15
surgery 13:24 44:25 45:11,13 45:14 60:11 64:5 66:1,3,4 66:15,18,19,21 66:23,23 67:1 67:4,13,14,21 67:25 68:4,13 68:25 69:1,4,6 69:14,14,15,18 69:19 71:9
surrounding 119:2
sustained 30:4 59:1
swelling 89:2
swept 23:3
switched 22:8
sworn 5:5 133:10

T

T-Mobile 32:20
T&J 1:11 3:9 55:25 56:21 57:14 58:16 79:13 114:25 124:20 131:19
T&J's 90:16,19 91:17,23 97:17 97:20 98:15 104:25 128:18 128:23 129:2 129:11 130:18 132:16
TABLE 4:1
take 7:2,9,21 8:1 10:16 25:14 26:21 27:9,11 58:21 59:23 65:20 73:11 77:25 79:22 124:23 125:22 126:2
taken 1:20 5:11 5:20 6:22 82:2 95:24 96:2,3,5 133:8,15
takes 74:6 86:14 86:16 121:19
talk 28:22 47:23 55:7 64:14 90:23 91:18 97:20 117:22
talked 29:8 50:23,24 65:16 90:22 99:7 103:18,21 105:7 112:20 124:20,25 127:8 128:18 128:22
talking 24:24 87:2,6 113:9 116:8,9 120:11 121:4 127:9 128:8 129:9
tax 19:21
taxes 131:21
team 77:16
tech 95:13
tell 7:3 21:3,5 43:5,7 46:25 47:15,21 50:9 51:22,25 61:21 81:5 82:13 84:22 85:6 95:21 105:13 105:19 107:18 108:5,17 110:7 111:4 113:3 120:12 121:1
telling 86:4 105:12
temperature 93:19 97:9 101:6 130:11
Ten 75:17
tenant 123:23,25
tenants 56:14
tends 72:4
TENS 74:6
terminated 14:19 19:1
terms 106:1 123:18,24
test 6:9 15:13
testified 5:5 57:19 72:14

RECEIVED by MSC 7/8/2020 5:41:14 PM

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

105:10 127:22
testify 36:18 133:10
testimony 7:9 131:7
Thank 8:7,8 14:24 27:18 44:2 79:10 80:19 117:6 122:17 128:15
Thanks 128:6
therapist 76:19
therapy 63:17,18 63:22,23 64:1 64:2 68:10,12 68:14,20,23
they'd 126:4
thing 14:1 20:16 24:14,25 46:3 48:8 66:5 67:9 82:2 103:8
things 6:4 20:24 23:15 63:5 74:8 78:11 86:12 93:18 96:14 97:18 103:24 131:5
think 10:18 15:20 30:8 32:19 33:20 36:14 43:9 45:3,18 60:1 64:10 67:15 73:9 77:8 83:13 86:18 89:19 95:15 98:5 104:15,18 105:6,9,23 109:4 110:6 111:1,17 114:12,19,21 115:4 119:21 126:16,20 128:5 132:14
third 64:20 69:1 69:4,18,19 71:9
Thirteen 2:14
thought 19:4 64:8 69:13 94:22 100:24 104:17 105:14 128:22
threatened 126:25
three 7:25,25 12:5 13:3 22:16 30:23 33:12 34:3 62:8 65:22 67:16 71:9 72:9 74:8 77:20 78:12,18 87:21 88:5 93:25 94:4,10 94:13 113:6
three-week 62:16
Thursday 31:8 43:1 104:18,20 117:11
time 6:20 7:13 7:16 8:4 14:15 17:20 18:8 20:10 22:15 25:3,17,18,24 29:4 31:7,8,16 32:2,4,4,16 34:17 37:24 39:10,13,14 42:24 43:5,19 44:14 50:13 51:14 52:18 54:1 55:4 57:3 57:10,11 59:11 61:11 62:16 63:15 68:11 71:15 72:15,21 74:12 77:23 78:2,13 79:6 80:12 81:1 82:8 86:15 93:15,20 96:6 96:19,20,23 97:15 99:19 100:5 101:3,6 101:9 116:10 116:11 117:2 122:8 123:1 125:11,22 133:9
times 7:25 11:1 13:3,6 78:18 81:4 105:22 125:21
Timothy 11:18 29:11
tips 19:16
titanium 66:7
titled 58:16
today 6:23 7:9 13:20 28:22 79:15 85:9 100:1,2 101:14 111:2
toes 86:15
told 30:2 47:24 48:1,3 49:2,16 51:1,4 52:8,10 52:22 60:22 61:3 62:10 71:16,23 72:11 83:20 85:2 86:5,6 89:20 93:17 99:14,25 100:24 103:24 105:2,14 107:19 108:11 108:16,21 118:19 119:22 124:9 125:25 126:21 127:1 127:11
Tom 22:2 40:4 47:3,11,23 98:4 100:5,6 118:13,15,20 118:20 119:22 121:15 122:20 122:23 123:5 124:6,15,18,20 125:3,4,7,12
Tom's 119:2
tomorrow 73:2
tooth 75:5 108:8
top 35:14 36:6,8 112:15 113:18
topic 86:24
total 27:24 28:16,17 29:14 29:16
totally 93:12
Township 109:5,6 109:24 110:3
transcribed 6:2
transcript 4:13 133:14
transcription 133:13
transpired 103:15
treat 25:3 59:15 60:7 62:19
treated 15:25 25:13 58:14 59:1,11 60:14 62:17 63:16
treaters 58:25
treating 60:7,24 61:9 73:22
treatment 63:12 65:3 69:1 73:17 77:2 88:10 90:7,11 108:2 117:20 119:20
trial 15:20
tried 46:12,14 96:9 102:1
trigger 128:20
trodden 35:15 36:11,15,24
trouble 45:6,15
truck 35:19 42:24 43:5 104:17,22 114:2,3,5
trucks 38:7 42:14 104:21 127:5
true 88:11,13 91:6 97:20 133:14
truth 7:3 133:10 133:11
truthfully 6:17 6:24 7:5
try 21:1 48:9 59:8 70:22 131:1
trying 22:15 60:1 96:7 115:22 117:25 126:16,20
Tuesday 31:10

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

119:8
turned 127:25
twilight 92:11
twin 77:23
twins 13:7
Twitter 13:13 80:19
two 9:2 13:3 29:22 38:7 42:12,19,21 45:1 52:4 57:20 66:20 67:5,22,22 68:2,15 83:8 83:19,24 84:3 86:16 97:10 99:15 110:9 113:6 114:6 116:24 121:4 128:10
type 43:12 48:8 74:19 101:20 105:14 107:1
types 77:15
typically 81:13

U

Ultimately 127:24
unable 52:6 72:22
unbruised 88:20
understand 30:6 45:25 54:24 55:1,6 68:20 80:11 81:19 84:16 87:19 92:22 100:21 121:1 122:22 123:16 130:9 130:11
understanding 9:23 10:25 28:12 54:7 60:10 61:6 72:18 121:7 123:11 124:4 124:14
understood 6:15 33:19
unemployed 22:16
unemployment 18:23,25 23:1
unit 70:3 74:6
United 10:9,11
unrelated 75:10
upper 82:12
upstairs 23:18
urgent 75:3,7,8 108:3,5
use 24:18 56:8 56:15 69:23 70:4 71:6 84:10 105:3,6 114:17
usual 31:7,8
usually 8:1

V

vacations 104:7
Vague 40:14
Valentine 21:8
vehicle 30:22 33:12,25 87:8 87:10 104:25 114:6 118:14 120:15
vehicles 38:4,12
vein 6:5
Vena 27:14
verbal 5:25 111:3,4
verify 58:13,23 58:25
Verizon 32:20
versus 48:19
vertebrae 69:12
Village 21:20 22:17,19,21,25 23:2
violence 14:11 15:2,9 89:20
virtually 112:16
vision 45:9 99:16
visit 63:9 81:3 82:11 125:18
visited 75:12
visiting 127:16
visits 75:1 77:6 81:3,11
vs 1:6

W

W 2:12
wage 19:13 20:1
wait 6:5 29:20 69:16
waited 60:21 127:11
waitress 51:5 72:1 125:18
Wal-Mart 26:17 26:18
Walgreens 26:12 26:18 82:15 95:10,11,14 108:21 109:2 110:5
walk 30:22 38:1 38:3 42:3 46:16 106:11
walker 69:23
walking 39:1 41:13 46:15 70:4 74:20 106:4 119:24 120:15 128:16
wall 96:8,8 107:2,9,10 111:24 113:4,5 113:5,8 116:18
walls 107:11
want 10:20 16:21 29:13 36:15,18 44:21 46:16 58:13,22 62:8 68:15 74:12 86:15 89:22 92:8 93:14 106:16 113:13 113:16 120:12 125:10
wanted 67:22 93:11 126:21
wanting 77:18
wants 44:1 53:23
Warren 62:11,13 62:19 99:13
wasn't 34:12 59:23 87:3 93:11,13 99:18 123:2,8
water 94:4,4 124:4
way 20:17 26:11 48:2 67:9 81:24 89:13 107:10 113:14 114:13 118:13 121:2,17
we'll 10:23 25:11 79:9
we're 24:24 28:22 79:15 80:1,14 91:21 100:1,2 101:14
we've 110:20 131:1
wear 44:19 70:2 70:17,21 78:12 78:14 99:18 102:13
wearing 43:12,16 102:21
wears 74:5
weddings 104:13
Wednesday 1:23 5:2 13:25 26:3 26:25 31:11 66:19 67:15 119:8 125:25 126:3,3
week 13:3 15:3 20:2,8 31:9,13 62:20,21,21 66:24 67:23 75:6 78:18 89:2 90:6 119:6,9
weeks 25:6,14 62:8 67:22,23 68:2 71:9 87:20 129:10
weight 80:7
went 5:17 16:14 16:16 28:6 30:22 46:20,21 48:7,8 50:13 52:4,7 59:3 62:3,22 66:4 67:7,14,24 68:1 69:15,18 76:17 81:4,5

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

82:6,14 83:3 96:8 103:12 108:1,4 116:18 119:15 125:22 125:24 126:6 127:7,13
west 104:11
wet 46:21
white 35:13 36:13 38:9 107:8
wife 51:2
willing 127:2
window 93:2,4,5 96:8 106:7
wings 69:9
winter 57:6 91:9 116:12 117:4 118:5 120:20 130:17
wintertime 87:12
witness 5:9 7:11 7:15,17,20,23 7:25 8:3,6 14:23 16:6 19:16,22 22:6 30:9 32:23 33:24 35:24 36:17,20 37:3 37:12,18,23 38:19 39:4,19 40:23 41:6 43:4,20,22 44:3 48:22 49:8,13 51:1 54:4,17,24 55:5,16 56:13 57:3,23 59:13 60:4 65:6 66:12 70:13 71:20 72:16,21 73:8 75:20 79:1 94:7,22 97:24 98:12 102:20 106:13 106:15,17 109:6,14,18 110:1 126:16 127:24 129:7 132:21 133:10 133:12
witnesses 32:7
woman 119:19
word 36:16,24 105:3,6,24
words 113:16
wore 78:12 87:23
work 13:20 20:2 21:1,19 22:12 25:7,14 30:20 31:7,9 46:22 46:23 47:3 48:2 49:19 50:10,15 52:7 52:15 54:5 72:18,22,25 73:4,9 77:17 78:20,22 87:21 87:23 90:25 91:4,9,12 97:18,20 101:9 114:13 118:16 126:3,4
worked 19:5,7 20:7,11,17 21:18,20,23 22:1,17,19 25:8 31:10,10 39:15 50:18,19 53:6,7 54:17 57:21 123:1
worker 84:14 103:2
Workers' 23:7,22 28:8,10 30:14
working 22:11,22 25:15 55:3 72:10,12 86:9 123:8 125:11
Workmen's 13:22 30:10 61:3 126:25
workplace 58:1
works 56:3 121:6 121:17
worse 52:6
worth 115:20
wouldn't 116:19 125:14
wrestling 88:6
written 85:20 111:2,3
wrong 11:9 51:3 51:6

X

X 128:9
x-rays 82:2

Y

yards 33:16,24 106:1,12,13 114:8
yeah 11:15 16:6 19:22 29:10 33:23 44:8 64:11 79:6 86:20 93:16 111:8 128:13
year 14:20 16:23 17:2 24:5 57:3 61:13 65:24 77:24 86:25 88:18 99:3,25
years 8:13,19 9:2,9 15:19 16:3,12 17:3 19:7,8,9,12 20:14 22:6,8 22:16 29:22 39:15 57:20,21 72:10 75:15 77:17 78:5,10 80:25 81:1,2 82:8,9 83:11 83:20 84:1,7 85:19 86:6,7,9 99:8 123:1,8,9
Yep 88:24 119:10
youngest 12:8 13:4,4

Z

zip 9:7

0

1

1 1:18 4:16 111:12,17 115:1 117:8 120:3,7 128:8
1:00 50:14
1:30 50:14
10 8:19 9:9 16:3 16:12 17:3 19:8,9 22:6 39:15 52:2 57:20 68:5 89:2 108:4 123:1
10/325 7:20
10:00 116:20
10th 61:22
11 19:12 53:6 99:13 108:18 110:22,23
11,000 19:23
111 4:5,16
11th 17:2
12 82:15,17,22 108:23
120 1:20 2:5
122 4:6
128 4:7
13 83:5 99:24
130 4:8,18
132 4:9
133 1:18
14 24:8 50:8 62:14
140s 80:11
14th 89:16
15 109:13
163 80:10
17 15:19 58:20 58:25
190 107:7
1960 10:5
1974 10:10
1977 12:10
1978 11:5 17:5
1980 11:5
1983 11:10 12:12
1984 12:14
1986 11:10
1989 11:16
1990 11:16
1996 11:20
1999 11:20
1st 29:24

2

2 4:18 130:21,22

RECEIVED by MCOA 3/18/2019 4:38:36 PM

RECEIVED by MSC 7/8/2020 5:41:14 PM

131:1,9
2-21-14 97:7
2.90 19:16
2:00 31:10,11
2:45 1:22 5:3
20 72:10 80:25 84:19
20-year 123:16
2000 14:13,21 19:3 76:20 89:19
2001 23:1
2004 19:11 21:19 21:23 22:23
2009 45:3
2010 15:3 90:6
2011 98:24
2012 19:25 99:4
2013 19:18 91:9 129:9
2013-2014 130:17
2014 5:20 17:21 17:24 18:6,14 19:9 21:23 26:1 29:14 52:13 58:10 61:1 62:2 64:23,24 71:21 91:9 98:18,25 112:9 115:10 115:16 116:9 118:6 127:17 129:9
2015 18:16 28:4 45:5,11,16 59:13 60:8 64:22,24 71:20
2016 28:6 29:17 29:19,24 69:5
2016-1819-NI 1:7
2017 1:23 5:2 133:24
203 2:14
20th 117:11
21st 5:19 30:20 52:12 69:5 112:5,9
22 1:23 5:2
22nd 17:21,24 125:25
23 133:24
233-5535 3:7
23rd 118:9
24 58:4 93:22
248 2:16 3:7
25 80:25
25800 3:5
25th 125:25
27059 8:11
28 127:13
28-day 127:12
28,578 28:20
28100 8:24
2901 1:24 133:20
29th 64:22
2nd 10:5

3

30 29:15,20 70:2 71:7 80:25
30th 61:21
33 75:15,15
34 81:1,2
38 20:7
39475 2:14

4

400 3:5
469-1111 2:7
48043 2:6
48066 8:11
48075 3:6
48081 8:25
48082 8:16
48377 2:15

5

5 4:3
5:50 30:22 41:16 90:13 92:8 95:24 96:9 112:24
50 97:15
56 72:9
586 2:7

6

6:00 30:20
6:10 132:20
615 27:25 28:6 73:8
65,000 28:18
6th 61:17 67:14

7

70 33:16,24 106:10,12,13 106:17,22,24 107:2,6,6,14 107:15 114:8,9 114:11,12
734 27:24 28:5
75 16:21 33:16
750 9:18
77 17:9
78 17:7
79 4:4

8

8:00 31:11
80 51:5,10 107:6
87 17:8,9

9

9:00 7:17 47:2
9:30 31:10
96 76:13
97 76:13 89:16
98 24:6
99 24:6
994-0060 2:16

RECEIVED by MCOA 3/18/2019 4:38:36 PM

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EXHIBIT C

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STATE OF MICHIGAN

COURT OF APPEALS

JACK BARCH,

Plaintiff-Appellant,

v

RYDER TRANSPORTATION SERVICES, RYDER INTEGRATED LOGISTICS, INC., and TOTAL LOGISTIC CONTROL, LLC,

Defendants-Appellees.

UNPUBLISHED
October 20, 2016

No. 327914
Van Buren Circuit Court
LC No. 14-640261-NO

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Jack Barch, appeals as of right the trial court's order granting summary disposition to defendants, Ryder Transportation Services, Ryder Integrated Logistics, Inc., and Total Logistic Control, LLC (collectively, Ryder). We affirm.

I. FACTUAL BACKGROUND

Barch testified at his deposition that he was employed as a truck driver. On February 13, 2012, he was scheduled to deliver ice cream to Ryder's facilities. It was a snowy day and Barch was aware that the parking lot was covered with "[l]ight snow over what I figure was, you know, being icy underneath." When Barch arrived, he parked his truck and walked across the parking lot to the office to receive further instructions about where to unload it. There was no clear path across the parking lot. After walking about ten yards, he slipped and fell on his shoulder.

According to Barch, he went into the office and attempted to report the incident, but the office employee would not accept his report. The employee took Barch's bill of lading and assigned him to a loading dock, where Barch needed help to unload his truck because he was unable to reach high enough to operate the doors. After unloading his truck, Barch arranged for another driver to complete his next delivery.

As Barch drove out of the parking lot, he realized that he had hurt his arm badly, and he stopped the truck. Barch testified that he parked the truck in the middle of the parking lot, "where the cars are parked for the office," and went in to speak with the office employee. Again, the employee would not allow Barch to fill out an accident report, so he returned to his truck, called his employer on his cellular phone, and created an accident report for himself. Barch

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returned to his employer and was eventually diagnosed with a torn rotator cuff in his shoulder, which required surgery.

Barch filed a complaint against Ryder, alleging that the hazard posed by the icy parking lot was effectively unavoidable because Ryder required him to park in a certain area and traverse the parking lot from his truck to the office. Ryder moved for summary disposition, contending that Barch could have chosen not to confront the hazard. The trial court granted summary disposition to Ryder, concluding that the danger was not effectively unavoidable because Barch could have chosen other options than traversing the icy parking lot. Barch now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

Barch contends that the trial court erred when it determined that there was no genuine issue of material fact regarding whether the hazard posed by the icy parking lot was effectively unavoidable because Barch had no choice but to cross the icy parking lot. We disagree.

A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A premises owner has a duty to protect invitees—persons who enter the owner's premises at his or her express or implied invitation—from hidden or latent defects on his or her property. *Id.* at 90-91. The open and obvious doctrine provides that the premises owner does not have the duty to warn invitees of conditions "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them[.]" *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

However, a premises owner may be liable even for open and obvious dangers in some narrow circumstances. *Hoffner v Lanctoe*, 492 Mich 450, 472; 821 NW2d 88 (2012). A landowner may be liable if the open and obvious danger has special aspects "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2010). Special aspects include hazards that are "effectively unavoidable" or that present "a substantial risk of death or serious injury[.]" *Id.* at 518. To be effectively unavoidable, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Hoffner*, 492 Mich at 468. "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make

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the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014).

In this case, Barch failed to provide support for his assertion that he could not have parked his truck in any other location to avoid the hazard. To the contrary, Barch testified at his deposition that, as he was leaving the facility, he parked his truck near where the cars parked for the office. Barch was not physically trapped. Additionally, there was evidence that Barch had a cellular telephone in his possession and could have either called Ryder to report the conditions, see *Bullard*, 308 Mich App at 413, or called the office to make other arrangements to deliver his bill of lading and receive his delivery bay assignment. We conclude that the trial court did not err when it determined that Barch did not present evidence showing a genuine issue of material fact regarding whether the icy parking lot was effectively unavoidable.

We affirm. As the prevailing party, Ryder may tax costs. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Mark T. Boonstra

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

Case No. 2016-1819-NI
Hon. Edward A. Servitto

v

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

Defendants.

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DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S, MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, Sage's Investment Group, LLC, by and through its attorneys David J. Yates, Eric P. Conn, Mark W. Steiner and Segal McCambridge Singer & Mahoney, Ltd. and in support of its Motion for Summary Disposition states as follows:

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1. This matter arises out of a completely avoidable winter, snow and ice slip and fall that occurred at the Grand Dimitre's Family Dining ("Grand Dimitre's") premises on or about February 21, 2014.

2. The Plaintiff claims injury after falling three feet from her vehicle in the Grand Dimitre's parking lot after parking her vehicle for her early morning shift.

3. Consequently, the Plaintiff filed suit against Sage's Investment Group, LLC ("Sage's") alleging claims of premises liability (despite Sage's owning, but not controlling/operating on the subject premises). (Exhibit A).

4. First and foremost, this claim is barred by the open and obvious doctrine.

5. The open and obvious doctrine is a defense to premises liability cases that focuses only on the "objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp., Inc.*, 464 Mich 512, 524 (2001).

6. The Plaintiff admitted in her deposition, however, that she knew the parking lot was slippery and observed ice and snow, thus the open and obvious doctrine bars the Plaintiff's recover in this case. (Exhibit B, pg. 32).

7. It is anticipated, however, that the Plaintiff will argue that the condition was "effectively unavoidable."

8. Even viewing the evidence in the light most favorable to the Plaintiff, she cannot establish that the parking lot at issue was effectively unavoidable. In fact, Michigan case law holds otherwise.

9. To be effectively unavoidable, "a hazard must be unavoidable or inescapable in effect or for all practical purposes." *Hoffner v Lanctoe*, 492 Mich 450, 468 (2012). "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not

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make the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403 (2014).

10. In *Barch v Ryder Transp Services*, unpublished Court of Appeals decision decided October 20, 2016 (docket no. 327914) (Exhibit C), the Court of Appeals held that a parking lot covered in ice was not effectively unavoidable because the plaintiff "failed to support his assertion that he could not have parked his truck in any other location to avoid the hazard" and that "there was evidence that [the plaintiff] had a cellular telephone in his possession and could have either called Ryder to report the conditions, or called the office to make other arrangements…." *Id.* (citations omitted).

11. Further, in *Walder v St John the Evangelist Parish*, unpublished Court of Appeals decision decided September 27, 2011 (docket no. 298178), *cert. denied* 491 Mich 913 (2012) (Exhibit D), the Court of Appeals held that because the plaintiff could have used a different entrance, other individuals testified that the entire lot was not covered in ice, and the plaintiff was able to walk into the building after her fall, the effectively unavoidable doctrine did not apply. *Id.*

12. In this case, the Plaintiff had a cell phone and could have called to report the slippery conditions prior to getting out of her car. (Exhibit B, pg. 46). She could have parked in the front lot (where the owners of Grand Dimitre's salted the sidewalks and where chef, Robert Spear, parked). (Exhibit B, pg. 34, 40). After she fell, she was able to traverse the parking lot and reach the front door. (Exhibit B, pg. 46). Both Debra Buck and Robert Spear were able to walk across the parking lot and gain entrance to the building without issue. (Exhibit B, pg. 34-35). After the Plaintiff's fall, she went home to change and was able to park in another location, where she did not fall again when entering Grand Dimitre's (Tom Shkoukani, the owner of

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Grand Dimitre's, testified that she parked in the area not covered in water). (Exhibit B, pg. 46; Exhibit E, pg. 16). Finally, other individuals (namely Mr. Shkoukani), testified that the entire parking lot was not covered in ice. (Exhibit E, pg. 39).

13. It is clear that the condition in this case was open and obvious and that the effectively unavoidable exception does not apply. Accordingly, the Plaintiff's case against Sage's should be dismissed as a matter of law.

14. Additionally, the Plaintiff's claim must be dismissed as she cannot demonstrate that Sage's exercised the requisite degree of possession and control needed to be held liable under a premises liability theory.

15. Indeed, "premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552 (1980).

16. "Ownership alone is not dispositive. . . . [P]ossessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id.* at 552-553.

17. It is only "appropriate to impose liability on the person who created the dangerous condition or who had knowledge of and was in a position to eliminate the dangerous condition." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662 (1998).

18. In this case, Grand Dimitre's, the restaurant, was the sole, exclusive user of the subject premises and was certainly in the best position to monitor and eliminate the dangerous condition.

19. Not only was the subject parking lot solely used by Grand Dimitre's, it is clear that Sage's conferred the duty to Grand Dimitre's for parking lot maintenance (including snow removal) through application of the applicable lease agreement.

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20. Contained in all of Sage's lease agreements, Sage's tenants (including Grand Dimitre's) agree to maintain the "driveways, sidewalks, parking areas, yards, plantings, pavement, [and] car stops…" by removing "snow [and] ice…" from those areas. (Exhibit F).

21. It is clear that the Plaintiff is unable to prove that Sage's possessed and controlled the land such that it can be held liable under a premises liability theory and thus, Sage's must be dismissed from the instant lawsuit.

22. Because the Plaintiff's claim is barred by application of the open and obvious doctrine and further is unable to demonstrate that Sage's exercised possession and control over the subject premises, the Plaintiff's claims against Sage's must be dismissed as a matter of law.

WHEREFORE, Defendant, Sage's Investment Group, LLC, respectfully requests that this Honorable Court grant the instant Motion for Summary Disposition, dismiss the Plaintiff's claims with prejudice and award such other relief this Court deems equitable and just under the circumstances.

SEGAL McCAMBRIDGE SINGER & MAHONEY

By/s/ Mark W. Steiner

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

v

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

Defendants.

Case No. 2016-1819-NI
Hon. Edward A. Servitto

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DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S, BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

I. Introduction.

On February 21, 2014, the Plaintiff slipped and fell on a patch of snow/ice on her way into work that she admitted that she saw and knew to be slippery. Indeed, this claim is absolutely barred by application of the open and obvious doctrine. The Plaintiff will attempt to

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save her lawsuit through application of the "effectively unavoidable" exception; however, the Michigan Court of Appeals has expressly declined to apply the exception in nearly identical circumstances. On this basis alone, summary disposition must be granted.

Furthermore, Sage's Investment Group, LLC (hereinafter "Sage's") did not possess or control the premises such that it can be held liable under a theory of premises liability. The applicable lease agreement, as well as the deposition testimony of Grand Dimitre's Family Dining (hereafter "Grand Dimitre's) employees, make certain that the premises was solely controlled and possessed by Grand Dimitre's, not Sage's. Accordingly, even if the open and obvious doctrine did not apply (which it clearly does), Sage's must still be summarily dismissed from this lawsuit.

II. Factual Background.

This matter is no different than any Michigan snow/ice slip and fall case. Simply, the Grand Dimitre's parking lot was wet, the Plaintiff parked her vehicle in a puddle of water near a drain, and the Plaintiff could have avoided the incident had she been paying any degree of attention to where she was going. The Plaintiff admitted that she knew the parking lot was slippery and that she saw the substance that she slipped on. This is a simple open and obvious case.

A. The Plaintiff's Fall.

The Plaintiff was a waitress working at Grand Dimitres for ten years prior to her avoidable slip and fall. (Exhibit B, pg. 19). She routinely parked in the back parking lot and was aware of its condition for at least two months prior the incident. (Exhibit B, pg. 42).

On the date of the Plaintiff's slip and fall, February 21, 2014, the Plaintiff arrived for work at approximately 5:50 a.m. (Exhibit B, pg. 31). She saw another waitress', Debra Buck's,

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vehicle in the parking lot (Ms. Buck, notably, made it safely into the restaurant just minutes before the Plaintiff). (Exhibit B, pg. 31-32). Indeed, the Plaintiff testified:

> Q. Did you see the snow coming into the parking lot –
> **A. Yes.**
> Q. –on the – let me just finish the question. Did you see the snow coming into the parking lot?
> **A. Yes.**
> Q. Did you know it might be slippery in the parking lot?
> **A. Yes.**

(Exhibit B, pg. 32). The Plaintiff further testified that she had a cell phone at the time of the incident and did not call anyone before her fall. (Exhibit B, pg. 32). Instead of either calling the restaurant to notify Grand Dimitre's condition, and instead of parking in the front parking lot (which chef, Robert Spear, had done), the Plaintiff parked her vehicle **70 yards** from the back door, parked in a **puddle of water**, and fell 3 feet from her vehicle. (Exhibit B, pg. 33-34; Exhibit E, pg. 11). While the Plaintiff testified that the entire parking lot was covered in six inches snow and ice, that testimony makes **no sense** when examining the objective evidence in this case (Tom Shkoukani's deposition testimony, Tom Caramagno's deposition testimony and the objective weather records).

The Plaintiff testified that while it was dark, a light by the back door and the ambient light of the restaurant provided enough light that she could see snow and ice in the parking lot. (Exhibit B, pg. 42, 92-93). Following the Plaintiff's fall, she was on the ground approximately 5 seconds and she called Grand Dimitre's on her cell phone to notify Ms. Buck that she was going to come through the front door (something she admittedly could have done <u>before</u> she fell). (Exhibit B, pg. 46). When she arrived at the front door, the Plaintiff's clothes were so wet (because she fell in the puddle that Mr. Shkoukani described, detailed below) that she returned home to change her clothes. (Exhibit B, pg. 46). She then returned to work, parked in another

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spot, safely walked back in, and completed her shift that day, as well as the following day. (Exhibit B, pg. 49-50).

The owner of Grand Dimitre's, Tom Shkoukani, testified that the Plaintiff fell because she parked in a puddle of water caused by a drain that was backed up with leaves. Mr. Shkoukani's restaurant does not stand to lose anything with respect to this lawsuit, as this Court previously granted Grand Dimitre's Motion for Summary Disposition on the exclusive remedy provision of the Workers' Disability Compensation Act. Accordingly, his testimony is objective and must be considered to be the best evidence of how the incident occurred. Mr. Shkoukani testified:

> Q. Okay. How did you become aware of that incident?
> A. Well, I – you know, I come in, I used to go to the restaurant everyday at 9:00 o'clock. So when I went there on that day, she told me I fell in the parking lot, and, um, I went home and I change my clothes. I said okay, I mean where did you fell? She said in the back building. So I – **she said it's like a lot of water right now, it's puddle of water right now over there.** So I said, okay, let me take a look, see what's going on....

(Exhibit E, pg. 11). Upon Mr. Shkoukani investigating the back lot, he noticed the drain at issue and poked the drain hole with a stick, alleviating the buildup of water in the lot (caused by *melting* snow, given the warm weather overnight). Mr. Shkoukani also noticed that all other employees had parked their vehicles away from the standing water. (Exhibit E, pg. 18-19). Notably, Mr. Shkoukani did not recall any snow or ice being in the parking lot other than near the drain (Exhibit E, pg. 14), and specifically asked the Plaintiff why she chose to park in a puddle of water:

> Q. Okay. What did Donna tell you about her fall? Did she tell you why she fell, or how she fell, anything like that?
> A. Um, not really. She said it's slippery where I park and when I ask her, I said I mean **it's like full of water, why you park there?** Because the first waitress when she come in, which is Debbie, I

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> think she tried to park there, and when she saw it was a lot of water she move her car and **she move her car and she moved back to the side where there's no water. The first waitress.**

(Exhibit E, pg. 14). Mr. Shkoukani also testified there was no ice where he parked in the back parking lot (he chose not to park in the puddle) and that he did not have trouble walking to the back door on the date of the incident. (Exhibit E, pg. 35-36). He further recalled that the weather was relatively warm in the days preceding the accident. (Exhibit E, pg. 11-12). Ms. Debra Buck also confirmed the presence of water in the rear parking lot. (Exhibit G, pg. 22). Indeed, the Plaintiff had safe alternative places to park and she ***chose*** not to do so.

The objective weather records corroborate Mr. Shkoukani's account of the day of the incident. As indicated in Exhibit H, in the two days prior to February 21, 2014, there was only a period of 7 hours where the weather was even below freezing. The day prior, it rained/was misty. (Exhibit H). There is no evidence that the subject parking lot would contain hard packed snow as the Plaintiff testified and this evidence makes Mr. Shkoukani's testimony much more believable.

Furthermore, the Plaintiff's testimony that the parking lot contained a layer of six inches of snow is entirely unbelievable given the testimony of Tom Caramagno, the T&J Landscaping owner that was responsible for clearing the subject parking lot. Indeed, Mr. Caramagno testified that when he plowed the lot, he plows "pretty darn close to the surface of the parking lot." (Exhibit I, pg. 29). Simply, Mr. Caramagno testified the Plaintiff's version (that six inches of snow remained on the lot) "cannot be." (Exhibit I, pg. 33). A document produced by T&J Landscaping evidences that the last time Mr. Caramagno plowed the subject parking lot was February 18, 2014, when it last snowed. (Exhibit J). Given the weather records and the deposition testimony of Mr. Shkoukani and Mr. Caramagno, it is simply unbelievable that a

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sheet of ice and snow would magically appear across an entire parking lot when the weather never got below freezing and there was no snow accumulation from when Mr. Caramagno last plowed. Furthermore, to the extent any party owed a duty to clear the lot of snow and ice, it was done two days prior to the Plaintiff's fall and the last time that it snowed. (Exhibits H and J).

B. Lease Agreement with Grand Dimitre's

While Grand Dimitre's owner, Tom Shkoukani, denies that a written lease governed their relationship with Sage's, the deposition of Jim Sage confirms that the parties did agree to its terms and the parties had referred to the agreement on several occasions. (Exhibit K, pg. 52). The terms of the subject lease agreement also confirm that the responsibility of the snow removal and parking lot maintenance was Grand Dimitre's responsibility. Indeed it specifically stated:

> (b) The Tenant shall also, at its own cost and expense, put, keep, replace and **maintain in thorough repair** and in good, clean, safe and substantial order and condition and **free from dirt, snow, ice,** rubbish and other obstructions or encumbrances, and to the satisfaction of the Landlord, **the driveways, sidewalks, parking areas, yards, plantings, pavement, car stops**, gutters and curbs in front of and adjacent to the restaurant and, generally, the property comprising the Premises.

(Exhibit F, 8b). Accordingly, ***Grand Dimitre's*** was responsible to maintain the premises "free from dirt, **snow, ice...**" (Exhibit F). Any problem related to the condition of the premises was the responsibility of Grand Dimitre's and accordingly, it assumed the duty to maintain the parking lot, including the snow removal. While Sage's negotiated the agreement with T&Js Landscaping to remove the snow, it did so to ensure that its tenants were complying with their lease obligations. (Exhibit K, pg. 53). Grand Dimitre's had the right to hire its own snow removal company and apparently should have chosen to do so had the parking lot truly appeared as the Plaintiff testified. (Exhibit K, pgs. 53-54). Sage's cannot be held to have possessed and controlled the land, when Grand Dimitre's had the duty to maintain all aspects of the property.

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III. Argument.

A. Standard of Review.

Defendant, Sage's seeks summary disposition pursuant to MCR 2.116(C)(10). Under this court rule, summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." MCR 2.116(C)(10); *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and the reviewing court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 446, 454; 597 N.W.2d 28 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Further, under MCR 2.116 (G)(4), the adverse party to a Motion for Summary Disposition requires the party to "not rest upon the mere allegations or denials of his or her pleadings but must, by affidavits or as otherwise provided in this rule, set forth the specific facts showing that there is a genuine issue for trial." Further, the Supreme Court in *Maiden v Rozwood* explained that "[t]he court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

B. The Plaintiff's claims are barred by application of the open and obvious doctrine.

Plaintiff's cause of action is one based upon premises liability. The level of care owed to a particular plaintiff depends on her status on the land. For the purposes of this motion, the Defendant will concede that Plaintiff was an invitee and that the condition of the premises was as she testified.

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An invitee is a person who enters the land of another on the invitation of the possessor for the pecuniary benefit or commercial purposes of the invitor, which carries with it an implication that reasonable care has been used to prepare the premises to make them safe.

An invitor is not an absolute insurer for the safety of an invitee. *Bertrand v Alan Ford, Inc.*, 449 Mich 606 (1995), citing *Quinlivan v The Great Atlantic & Pacific Tea Co.*, 395 Mich 244 (1975). In general, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on their land. *Id.* However this duty does not extend to require a warning or requirement protecting invitees from hazards that are open and obvious. *Lugo v Ameritech Corp*, 464 Mich 512 (2001). "Where the dangers are known to the invitee or are "so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products*, 440 Mich 85 (1992). A duty to take reasonable precautions to protect invitees from an open and obvious danger will arise only "if special aspects of the condition make even an open and obvious risk unreasonably dangerous." *Lugo, supra*, at 517. Special aspects impose liability for an open and obvious condition when the hazard is "effectively unavoidable," so that there exists a "uniquely high likelihood of harm," or when the condition "imposes an unreasonably high risk of severe harm." *Id.* at 518-519. Neither an avoidable condition, nor a common condition is uniquely dangerous. *Corey v Davenport College of Business (on remand)*, 251 Mich App 1, 8-9 (2002).

Indeed, the Michigan Court of Appeals has held "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67 (2006).

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Michigan appellate courts also routinely hold that snow covered areas are not special aspects creating a "uniquely high likelihood of harm." *Lugo, supra*, at 518-519. The Michigan Court of Appeals has held that a layer of snow on a sidewalk did not constitute a unique danger that created a "risk of death or severe injury," *Joyce v Rubin*, 249 Mich App 231, 243 (2002), as well as found that ice coated stairs also did not give rise to such a condition. *Corey, supra*. Very clearly, Michigan courts have routinely held that snow and ice do not constitute unique dangers that constitute a risk of death or severe injury.

Further, an icy parking lot, alone, is not an effectively unavoidable condition. To be effectively unavoidable, "a hazard must be unavoidable or inescapable in effect or for all practical purposes." *Hoffner v Lanctoe*, 492 Mich 450, 468 (2012). "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403 (2014). **The Michigan Supreme Court further implored that "exceptions to the open and obvious doctrine are narrow and designed to permit liability for such dangers only in limited, extreme situations."** *Hoffner, supra*, at 472. The *Hoffner* Court directly opined that:

> **An "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard.**

Id. at 472-473.

The Michigan Court of Appeals in *Bullard* recognized that an electrician was not compelled to confront an icy ladder to perform maintenance on a roof generator while in the course of his employment. Indeed, the Court of Appeals ruled that the trial court erred in finding

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a question of fact on the issue when the plaintiff "consciously decided to put himself in a position where he would face the ice." *Bullard, supra*, at 413. The Court of Appeals ruled that because the plaintiff could have informed his employer of the condition, waited until the weather improved, turned back after realizing it was icy, or otherwise sought assistance, the trial court should have granted summary disposition in favor of the defendant. *Id.* The Court further determined that that the trial court erred in finding the ice to be "effectively unavoidable as part of [the plaintiff's] job" and the plaintiff could have informed his employer of the ice prior to confronting the hazardous condition. *Id.*

While it is anticipated that the Plaintiff will cite *Attala v Orcutt*, 306 Mich App 502 (2014) in support of his position that the effectively unavoidable doctrine applies in this case, it is important to note that the Court of Appeals in *Attala* explicitly did not make any ruling as to whether the icy conditions in the parking lot was effectively unavoidable. Simply, the Court of Appeals held that because the defendant had failed to argue that that the condition was not effectively unavoidable, the defendant waived the issue. *Id.* at 507. Indeed, other Michigan appellate decisions with far more similar facts have actually evaluated the applicability of the effectively unavoidable exception and ruled that it does not apply in situations such as the instant matter.

Even viewing the facts in the light most favorable to the Plaintiff, this case is indistinguishable from *Barch v Ryder Transp Services*, unpublished Court of Appeals decision decided October 20, 2016 (docket no. 327914) (Exhibit C). In *Barch*, the plaintiff was scheduled to make a delivery within the scope of his employment. The plaintiff alleged that the parking lot was covered in a light snow and knew that it was "icy underneath." The plaintiff, however,

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stated that there was no clear path across the lot and after walking approximately 10 yards, he fell, injuring his shoulder.

The Court of Appeals held that the trial court did not err in determining that the "effectively unavoidable" doctrine did not apply:

> In this case, Barch **failed to provide support for his assertion that he could not have parked his truck in any other location to avoid the hazard.** To the contrary, Barch testified at his deposition that, as he was leaving the facility, he parked his truck near where the cars parked for the office. Barch was not physically trapped. **Additionally, there was evidence that Barch had a cellular telephone in his possession and could have either called Ryder to report the conditions, see *Bullard,* 308 Mich App at 413, or called the office to make other arrangements**....

Id.

Another indistinguishable case is *Walder v St John the Evangelist Parish*, unpublished Court of Appeals decision decided September 27, 2011 (docket no. 298178), *cert. denied* 491 Mich 913 (2012) (Exhibit D). In *Walder,* another plaintiff slipped and fell in a parking lot. She broke her ankle and the trial court granted summary disposition in favor of the defendant. The Court of Appeals affirmed the trial court's decision holding:

> 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 in to the building, evidently avoiding any other slippery spots.**

Id. at 2.

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As highlighted above, even taking Plaintiff's account as true, the Plaintiff knew that the parking lot was slippery and saw the ice and snow. (Exhibit B, pg. 32). She had a cell phone and could have called to report the slippery conditions prior to getting out of her car. (Exhibit B, pg. 46). She could have parked in the front lot (where the owners of Grand Dimitre's salted the sidewalks and where chef, Robert Spear, parked). (Exhibit B, pg. 34, 40). After the Plaintiff fell, she was able to traverse the parking lot and reach the front door. (Exhibit B, pg. 46). **Both Debra Buck and Robert Spear were able to walk across the parking lot and gain entrance to the building without issue.** (Exhibit B, pg. 34-35). After the Plaintiff's fall, she went home to change and was able to park in another location, **where she did not fall again when entering Grand Dimitre's** (Tom Shkoukani testified that she parked in the area not covered in water). (Exhibit B, pg. 46; Exhibit E, pg. 16). Finally, other individuals (namely Tom Shkoukani), did not recall the entire parking lot being covered in ice:

> Q. Okay. Do you recall ever seeing the front of Grand Dimitri's on the day of the incident, as in the front parking lot?
> A. Did I see the front parking lot?
> Q. Right.
> A. Yes.
> Q. Do you recall any ice or snow in the front parking lot?
> A. No.

(Exhibit E, pg. 39). Mr. Shkoukani further did not recall any snow or ice being in the parking lot other than near the drain (Exhibit E, pg. 14). In light of the holdings of *Walder* and *Barch*, it is clear that the Plaintiff's claims must be dismissed as a matter of law.

C. Sage's did exercise the requisite degree of possession and control necessary to be held liable under a premises liability theory.

While Sage's was the technical landlord at the time of the Plaintiff's alleged injury, it did not exercise the requisite degree of possession and control to be held liable under a premises

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liability theory. Indeed, "premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552 (1980). A possessor is:

> (a) a person who is in occupation of the land with intent to control it or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)

Id. Furthermore, "[o]wnership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id.* at 552-553. It is only "appropriate to impose liability on the person who created the dangerous condition or who had knowledge of and was in a position to eliminate the dangerous condition." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662 (1998).

In this case, Grand Dimitre's was the possessor of the premises in question. Indeed, Jim Sage testified:

> Q. With regard to the parking lot itself, right by Grand Dimitri's, who would use that parking lot?
> A. Grand Dimitri's customers and employees.
> Q. You wouldn't use that parking lot, would you?
> A. No.

(Exhibit K, pg. 54). The Plaintiff, herself, testified that both the front and back Grand Dimitre's lots were used only for Grand Dimitre's employees and customers. (Exhibit B, pg. 40-41). Debra Buck also was not aware of any other uses for the parking lot other than for Grand Dimitre's business. (Exhibit G, pg. 28).

Further, as noted above, there is some discrepancy over whether a lease agreement existed that covers the relationship between the parties. Mr. Shkoukani testified that when they

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took over the premises, the lease had expired and he "never renewed it." (Exhibit E, pg. 38). He, however, had looked over the lease and knew its contents. (Exhibit E, pg. 38). While Mr. Shkoukani did not believe a written lease governed his relationship with Sage's, Grand Dimitre's is technically a holdover tenant. When a tenant holds over, "the law implies a continuance of the tenancy on the same terms and subject to the same conditions." *Bay Co v Northeastern Michigan Fair Ass'n,* 296 Mich. 634, 640–641 (1941). The terms of a holdover tenant may be determined by inquiring into the terms of the original lease. *Glocksine v Malleck,* 372 Mich 115, 120–121 (1963). Accordingly, the provisions highlighted above that requires Grand Dimitre's to care for the parking lot and remove ice and snow from the premises is a clear indication that Grand Dimitre's assumed sole possession and control over the parking lot and would be the "possessor" of purposes of premises liability. (Exhibit F).

D. To the extent Sage's owed a duty to exercise reasonable care, it complied with such a duty as a matter of law.

Should the Court find that Sage's, in fact, owed a duty of care to the Plaintiff and Grand Dimitre's was not the sole possessor and controller of the premises, it is clear that Sage's complied with any duty that it owed to the Plaintiff. In *Buhalis v Trinity Continuing Care Services,* 296 Mich App 685 (2012), the Court held that a premises possessor does not have a "duty to guarantee that ice will never form on its premises, but it does have a duty to ensure that invitees are not unnecessarily exposed to an unreasonable danger." *Id.* at 696. The Court further held the defendant "had no duty to clear every surface on which [the plaintiff], individually, may have chosen to park her trike, whenever she might visit, in whatever type of weather." *Id.* at 697.

Even taking the Plaintiff's account as true, Sage's arranged for snow plow services to remove snow from the subject premises upon an accumulation of snow fall. Tom Caramagno

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testified as to the relationship between T&J's Landscaping and Sage's. It is clear that Mr. Caramagno would advise Mr. Sage when salting and snow services were needed:

> Q. Okay. But let's say you're on the property to plow it –
> A. Right.
> Q. –and you see a sheet of ice that might be dangerous, there's nothing you would do?
> A. If I saw something that was dangerous, of course I would tell the person. But at the time, if I didn't salt it, you know, or if there's a phone log saying that I called him and told him to do it, I don't recall that. **All I know is I would never leave that site if I thought, you know, it was ice conditions and then I'd call him.**
>
> ...
>
> Q. Okay. So at least with respect to February 18th, had a sheet of ice existed that was a dangerous condition you would have at least called Mr. Sage?
> A. I would think so.

(Exhibit I, pg. 39). Mr. Caramagno later confirmed:

> Q. Okay. So if you were on the premises and you saw a dangerous condition and you made a call to Mr. Sage, would you expect him to refuse your recommendation?
> A. **Not at all.**
> Q. Has he ever refused any of your recommendations in the past?
> A. **Never.**

(Exhibit I, pg. 51-52). It is evident that Sage's would rely on the professional recommendations of Mr. Caramagno when determining whether salting was required on the premises.

The weather records establish that it did not snow between the time Mr. Caramagno last plowed (February 18, 2014) and the Plaintiff's fall (February 21, 2017). (Exhibit H). Further, it was only below freezing in 7 of the previous 48 hours before the Plaintiff's fall (notably, it was above freezing at the time of the Plaintiff's fall, around 5:50 a.m. on February 21, 2014). If Sage's had any obligation to the Plaintiff in this case, it certainly satisfied its obligation by hiring a reputable landscaping company.

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IV. Conclusion.

This snow and ice slip and fall case must be dismissed as a matter of law given prevailing Michigan case law. Indeed, the Plaintiff testified that she knew the surface of the parking lot where she parked was slippery. The testimony of Tom Shkoukani objectively verifies that the Plaintiff had alternative routes into the restaurant (not to mention the fact that Ms. Buck and Mr. Spear did not fall on their way into Grand Dimitre's and the Plaintiff was able to return without issue). Further, the evidence proves that Sage's did not exercise the requisite degree of possession and control over the subject premises such that it owed the Plaintiff any duty and if it did, it complied with that duty by hiring T&J's landscaping. The overwhelming evidence in support of this Motion compels this Court to grant Summary Disposition in Sage's favor.

WHEREFORE, Defendant, Sage's Investment Group, LLC, respectfully requests that this Honorable Court grant the instant Motion for Summary Disposition, dismiss the Plaintiff's claims with prejudice and award such other relief this Court deems equitable and just under the circumstances.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

Case No. 2016-1819-NI
Hon. Edward A. Servitto

v

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

Defendants.

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PROOF OF SERVICE

The undersigned certifies that Defendant Sage Investment Group, LLC's Motion for Summary Disposition was served upon all parties to the above cause by service through TrueFiling & Served on May 22, 2017.

Robyn A. Goldberg

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EXHIBIT A

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

-vs-

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

Defendant.

Case No. 2016-1819 NI

Hon.

EDWARD A. SERVITTO

Christopher R. Baratta (P51293)
BARATTA & BARATTA, P.C.
120 Market Street
Mt. Clemens, MI 48043
586.469.1111
Attorneys for Plaintiff

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CARMELLA SABAUGH
MACOMB COUNTY CLERK

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

Christopher R. Baratta (P 51293)

PLAINTIFF'S COMPLAINT AND JURY DEMAND

NOW COMES Plaintiff, DONNA LIVINGS, by and through her attorneys, BARATTA & BARATTA, P.C., and for her Complaint against Defendant, SAGE'S INVESTMENT GROUP, LLC, a Michigan limited liability company, states as follows:

COMMON COUNTS

1. Plaintiff, DONNA LIVINGS is a resident of the County of Macomb, State of Michigan.

2. Defendant, SAGE'S INVESTMENT GROUP, LLC, is a Michigan limited liability company which conducts business in the County of Macomb, State of Michigan.

BARATTA & BARATTA, P.C.
Attorneys and Counselors at Law
120 Market Street
Mt. Clemens, MI 48043

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3. Defendant's property is located at 25001 Gratiot Avenue, Roseville, MI 48021.

4. Defendant's Registered address is 10 Cabri Lane, Dearborn Heights, MI 48127.

5. The Registered Agent for Defendant is Jamal Sage.

6. That the amount in controversy exclusive of interest costs and/or attorney fees is in excess of $25,000.00 and this matter is otherwise within the jurisdiction of this Court.

7. On or about February 21, 2014, Plaintiff, DONNA LIVINGS, was an invitee at defendant's premises, when she sustained injury to her person.

8. At all pertinent times herein, Plaintiff was employed at Grand Dimitri's Family Dining, a restaurant that was located on Defendant's premises.

9. On the aforementioned date, at approximately 6:00 a.m., Plaintiff arrived at the employee entrance on Defendant's premises for her scheduled work shift.

10. On said date, while attempting to enter her employer's restaurant, Plaintiff did slip and fall as a result of an unsafe condition on the premises, to wit, a parking lot that was completely covered in ice and snow, such that Plaintiff had no choice but to encounter said condition in order to enter her workplace, causing her to sustain severe and permanent injuries more fully set forth below.

11. That your Defendant herein knew or should have known of the aforementioned hazardous condition that existed, prior to Plaintiff's trip and fall.

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12. That your Defendant herein was responsible, at all pertinent times, to maintain the premises in a reasonably safe condition.

13. As a result of her injuries, Plaintiff has sustained pain, suffering weakness and disability, including, and not by way of limitation, exacerbation of L4-5 spinal stenosis, lumbar radiculopathy, anterior lumbar fusion at L4-5, anterior lumbar instrumentation at L4-5, and has required medical aid and attention for her injuries.

14. Plaintiff has incurred permanent affects and residuals from her injuries, sustained as a result of Defendant's negligence and will continue to incur future medical treatment, costs and expenses.

WHEREFORE, plaintiff prays that this Honorable Court enter a judgement in an amount in excess of Twenty-Five Thousand ($25,000.00) Dollars that the trier of fact may find fair and just, together with costs interest and attorney fees.

COUNT I NEGLIGENCE

15. Plaintiff hereby incorporates paragraphs 1 through 14 as if fully set forth herein.

16. That the defendant's had a duty to the general public and to Plaintiff in particular as an invitee to maintain said premises in a reasonably safe condition, and to:

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Attorneys and Counselors
at Law
120 Market Street
Mt. Clemens, MI 48043

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a. Exercise reasonable care and prudence to render the premises safe for invitees;
b. Expect that a person invited on its premises would not discover or realize the danger of the aforesaid inadequate condition of the premises or would fail to protect themselves against it;
c. Remove hazardous conditions in a reasonably prudent manner;
d. Maintain the premises in a safe condition;
e. Remove, correct or prevent the existence of said dangerous condition when it was known, or through the exercise of reasonable care should have been known, that said condition would cause a person to fall and be injured;
f. To take reasonable care to know the actual condition of its premises and in the exercise of reasonable care, either remedy, remove, or correct the condition, or adequately warn the invitee of the presence of a dangerous condition(s) on the premises;
g. Exercise reasonable care to diminish the hazards on said premises and to take reasonable and appropriate measures in light of the circumstances, then and there existing.

17. Defendant breached its duties owed to the Plaintiff in the following, but not limited to manner:

a. Failing to exercise reasonable care and prudence to render the premises safe for business invitees;
b. Failed to warn invitees of the dangerous and hazardous condition of the premises and failing to remedy the dangerous conditions about the premises, when it was economically feasible to do so;
c. Failing to remove hazardous conditions in a reasonably prudent manner;
d. Failing to maintain the premises in a safe condition;
e. Failing to remove, correct or prevent the existence of said dangerous condition when it was known, or through the exercise of reasonable care should have been known, that said condition would cause a person to fall and be injured;
f. Failing to take reasonable care to know the actual condition of its premises and in the exercise of reasonable care, either remedy, remove, or correct the condition, or adequately warn the invitee of the presence of a dangerous condition(s) on the premises;

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Attorneys and Counselors
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g. Failing to exercise reasonable care to diminish the hazards on said premises and to take reasonable and appropriate measures in light of the circumstances, then and there existing.

18. One or more of the defendant's negligent acts or omissions was a legal and proximate cause of Plaintiff's injuries.

19. That as a direct and proximate result of the Defendant's negligent acts and omissions, including those alleged herein, Plaintiff, DONNA LIVINGS, tripped and fell causing serious injury to herself, sustaining the following, but not limited to damages in the past, present and future:

a. Lumbar radiculopathy;
b. Anterior lumbar fusion at L4-5;
c. Anterior lumbar instrumentation at L4-5;
d. Denial of social pleasures and the inability to enjoy the normal functions of life;
e. Physical pain and suffering, weakness and disability;
f. Medical expenses;
g. Mental anguish, embarrassment, humiliation and mortification;
h. Emotional trauma, fright and shock;
I. Wage loss;
j. All other damages permitted by law or that may become known throughout the pendency of this action.

WHEREFORE, Plaintiff prays that this Honorable Court enter a judgement in an amount in excess of Twenty-Five Thousand ($25,000.00) Dollars that the trier of fact may find fair and just, together with costs interest and attorney fees.

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BARATTA, P.C

Attorneys and Counselors
at Law
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Mt. Clemens, MI 48043

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COUNT II PREMISES LIABILITY

20. Plaintiff hereby incorporates paragraphs 1 through 19 as if fully set forth herein.

21. That the Defendant, as owner of said property had a nondelegable duty to the general public and to Plaintiff in particular as an invitee to maintain said premises in a reasonably safe condition, and to:

a. Exercise reasonable care and prudence to render the premises safe for invitees;
b. Expect that a person invited on its premises would not discover or realize the danger of the aforesaid inadequate condition of the premises or would fail to protect themselves against it;
c. Remove hazardous conditions in a reasonably prudent manner;
d. Maintain the premises in a safe condition;
e. To take reasonable care to know the actual condition of its premises and in the exercise of reasonable care, either remedy, remove, or correct any unsafe or dangerous condition(s), or adequately warn the invitee of the presence of a dangerous condition(s) on the premises;
f. Exercise reasonable care to diminish the hazards on said premises and to take reasonable and appropriate measures in light of the circumstances, then and there existing.

22. Defendant breached its duties owed to the Plaintiff in the following, but not limited to manner:

a. Failing to exercise reasonable care and prudence to render the premises safe for business invitees;
b. Failed to warn invitees of the dangerous and hazardous condition of the premises and failing to remedy the dangerous conditions about the premises, when it was economically feasible to do so;
c. Failing to remove hazardous conditions in a reasonably prudent manner;
d. Failing to maintain the premises in a safe condition;
e. Failing to remove, correct or prevent the existence of said dangerous condition when it was known, or

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through the exercise of reasonable care should have been known, that said condition would cause a person to fall and be injured;

f. Failing to take reasonable care to know the actual condition of its premises and in the exercise of reasonable care, either remedy, remove, or correct the condition, or adequately warn the invitee of the presence of a dangerous condition(s) on the premises;

23. One or more of the Defendant's negligent acts or omissions was a legal and proximate cause of Plaintiff's injuries.

24. That as a direct and proximate result of the defendant's negligent acts and omissions, including those alleged herein, Plaintiff, DONNA LIVINGS, slipped and fell causing serious injury to herself, sustaining the injuries and damages more fully set forth above.

WHEREFORE, Plaintiff prays that this Honorable Court enter a judgement in an amount in excess of Twenty-Five Thousand ($25,000.00) Dollars that the trier of fact may find fair and just, together with costs interest and attorney fees.

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JURY DEMAND

NOW COMES Plaintiff, DONNA LIVINGS, by and through her attorneys, BARATTA & BARATTA, P.C., and hereby demands a trial by jury of the above-captioned cause.

BARATTA & BARATTA, P.C.
Attorneys for Plaintiff

By: _____
Christopher R. Baratta (P 51293)
120 Market Street
Mt. Clemens, MI 48043
(586) 469-1111

Dated: May 23, 2016

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EXHIBIT B

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1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB
3
4 DONNA LIVINGS,
5 Plaintiff,
6 vs. Civil Action
7 No. 2016-1819-NI
8 Hon. Edward A. Servitto
9 SAGE'S INVESTMENT GROUP, L.L.C.,
10 a Michigan Limited Liability
11 Company, T&J LANDSCAPING & SNOW
12 REMOVAL, INC., a Michigan
13 Corporation and GRAND DIMITRE'S
14 OF EASTPOINTE FAMILY DINING, a
15 Michigan Corporation,
16 Defendants.
17 _____/
18 PAGE 1 TO 133
19 The Deposition of DONNA LIVINGS,
20 Taken at 120 Market Street,
21 Mt. Clemens, Michigan,
22 Commencing at 2:45 p.m.,
23 Wednesday, February 22, 2017,
24 Before Gail R. McLeod, RPR, CSR 2901.
25

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APPEARANCES:

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APPEARANCES: (Continued)

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Appearing on behalf of the Defendant T&J Landscaping.

* * * * *

TABLE OF CONTENTS

DONNA LIVINGS	Page
EXAMINATION BY MR. STEINER:	5
EXAMINATION BY MR. GABEL:	79
EXAMINATION BY MR. BARATTA:	111
RE-EXAMINATION BY MR. STEINER:	122
RE-EXAMINATION BY MR. GABEL:	128
RE-EXAMINATION BY MR. BARATTA:	130
RE-EXAMINATION BY MR. GABEL:	132

INDEX TO EXHIBITS
(Exhibits attached to transcript)

Exhibit	Page
DEPOSITION EXHIBIT 1 - Photographs	111
DEPOSITION EXHIBIT 2 - Statement of Charges	130

Mt. Clemens, Michigan
Wednesday, February 22, 2017
About 2:45 p.m.

DONNA LIVINGS,
having first been duly sworn, was examined and testified on her oath as follows:

MR. STEINER: Could you please state your name for the record?

THE WITNESS: Donna Ann Livings.

MR. STEINER: Let the record reflect that this is the discovery deposition of Donna Livings taken pursuant to Notice and to be used for all purposes under the Michigan Court Rules and Michigan Rules of Evidence.

EXAMINATION BY MR. STEINER:

Q. Ms. Livings, my name is Mark Steiner. We meet briefly before we went on the record here. I represent Sage Investment Group, a company that you sued as a result of an incident that I believe occurred February 21st, 2014. Have you ever had your deposition taken before?

A. No.

Q. Well, I'm sure your attorney has gone over it with you, but I'm just going to go over for the record a couple ground rules with you. First, it's important to keep all of your answers verbal. As you probably are aware,

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Donna Livings
2/22/2017

Page 6

there's a court reporter taking down everything that you and I say. It will be transcribed on a sheet of paper, so it's important that you don't nod your head, shrug your shoulders, things like that. In the same vein, it's important to wait to answer your questions or the questions that I ask you until after I've completed the full question and that's simply to keep the record clear, too.

Another rule is this isn't a game to test your memory. If you don't know something, it's okay. Don't guess. If you don't know something, you can just say, "I don't know." That's a perfectly acceptable answer.

I'm going to assume the questions or I'm going to assume that you understood the questions that I ask you if you respond. I'll assume that you answered them truthfully and accurately to the best of your knowledge. Is that fair?

A. Yes.

Q. Okay. If you need a break at any time, just let us know and again, this isn't an endurance contest, so if you need a break, just let us know. Have you taken any medication today that would affect your ability to answer truthfully or honestly?

A. Yes.

Page 7

Q. And what medication is that?

A. I take Norco.

Q. Does that affect your ability to tell the truth at all?

A. No.

Q. So you would be able to truthfully and honestly answer the questions I ask you?

A. Correct.

MR. GABEL: May I ask you a question? Did you take Norco close to the testimony today so that your perception is a little off right now?

THE WITNESS: No.

MR. BARATTA: Let me ask her a question.

When was the last time you took Norco? This morning?

THE WITNESS: Yes.

MR. BARATTA: What time about?

THE WITNESS: About 9:00 o'clock.

MR. BARATTA: And what strength was it if you know?

THE WITNESS: 10/325.

MR. BARATTA: Okay. Do you take those every day?

THE WITNESS: Yes.

MR. BARATTA: All right. How many a day?

THE WITNESS: Three. Three times.

Page 8

MR. BARATTA: Do you usually take them morning, noon and night?

THE WITNESS: Correct, every eight hours.

MR. BARATTA: But the last time was this morning?

THE WITNESS: Yes.

MR. BARATTA: Thank you.

MR. GABEL: Thank you.

BY MR. STEINER:

Q. What is your present address?

A. 27059 Pinewood Street, Roseville, Michigan, 48066.

Q. And how long have you lived there?

A. Seven years.

Q. Where did you live prior to that?

A. I can't remember the house number, but Raymond, St. Clair Shores, Michigan, 48082.

Q. And do you remember how long you lived at that Raymond Street address?

A. Approximately 10 years.

Q. Do you remember where you lived before that?

A. Detroit.

Q. Do you remember the street --

A. No, actually, I'll correct myself on that. I lived on Little Mack, 28100 Little Mack, St. Clair Shores, 48081.

Page 9

Q. And how long did you live there?

A. Two years.

Q. Did you live in Detroit before that?

A. Yes.

Q. Do you remember the street address for that?

A. The house number, no. Payton, and that was Detroit, Michigan. I don't remember the zip code.

Q. And do you remember how long you lived there?

A. 10 years.

Q. Okay. At that Pinewood Street home, do you own that home?

A. No.

Q. Do you rent that home?

A. Yes.

Q. Who do you rent that from?

A. Fairway Rentals.

Q. Do you know how much your rent payment is?

A. 750.

Q. Do you own any real property?

A. No. My car.

Q. Who do you live with at the Pinewood Street home?

A. Just me.

Q. It's my understanding that you have gone by a couple previous names. Donna Lasko. Donna --

A. Czerniawski.

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Donna Livings
2/22/2017

Page 10

Q. And Donna McMillan, is that right?
A. Yes.
Q. Have you gone by any other name?
A. No.
Q. Is your date of birth May 2nd, 1960?
A. It is.
Q. Were you born in London, England?
A. I was.
Q. And when did you move to the United States?
A. February of 1974.
Q. May I ask what brought you to the United States?
A. My parents. My father, his job brought him here.
Q. And what's your Social Security number? I'd ask just that the last four digits appear on the record for your privacy.
MR. BARATTA: Why don't we take it all off. Is that okay?
MR. STEINER: That's fine. I think it's in the Answers to Interrogatories anyway. I probably have it, so I just want to confirm.
MR. BARATTA: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. It's my understanding that you've been married four

Page 11

times; is that right?
A. Yes.
Q. Was your first husband Mark Lasko?
A. He was.
Q. And was that from 1978 to 1980?
A. Yes.
Q. Was your second husband Ray Czerniawski?
A. Yes.
Q. I'm probably pronouncing that wrong. That was from 1983 to 1986?
A. Yes.
Q. And then were you next married to Mujo --
A. Mujo.
Q. Mujo Buzdoraj?
A. Yeah. Mujo Buzdoraj.
Q. Was that from 1989 to 1990?
A. Yes.
Q. And then Timothy McMillan?
A. Yes.
Q. And is that from 1996 to 1999?
A. Yes.
Q. Do any of your previous husbands owe you any spousal support?
A. No.
Q. What about child support?

Page 12

A. No.
Q. Do you have children?
A. I do.
Q. How many do you have?
A. Three.
Q. What are their names?
A. Michael is my oldest, Steven is my middle son and Matthew is my youngest.
Q. When was Michael born?
A. 1977.
Q. When was Steven born?
A. 1983.
Q. And when was Matthew born?
A. 1984.
Q. Are they all financially independent?
A. Of me?
Q. Correct.
A. Yes.
Q. Do you have any grandchildren?
A. I do.
Q. How many do you have?
A. Nine.
Q. Do any live in the area?
A. They all live in the area.
Q. Do you see them regularly?

Page 13

A. I do.
Q. About how often do you see them?
A. My oldest son's family, two, three times a week. My youngest son, I actually baby-sit my youngest grandson, so I see him every day and my middle son, a couple times, you know, like every couple of months I see the twins.
Q. Are you currently financially dependent on anyone?
A. No.
Q. Is anyone currently financially dependent on you?
A. No.
Q. Do you have any social media accounts like Facebook, Twitter, Instagram, anything like that?
A. I have Facebook.
Q. Did you ever post anything regarding this incident on Facebook?
A. I have.
Q. Do you recall what that was?
A. Originally when I fell obviously, something to the effect of fell at work today, you know, my back hurts. having to go to Concentra, probably months later something to the effect of Workmen's Comp dropping me and refusing to pay my medical anymore and whenever I've had my surgeries, I've posted that, surgery on Wednesday, hopefully everything goes well, that kind of

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thing.
Q. You haven't deleted anything off your Facebook, right?
A. No, sir.
Q. So it's all there?
A. Yes, it is.
Q. Have you ever been convicted of any crimes?
A. Yes.
Q. What crimes are those?
A. Retail fraud.
Q. Anything else?
A. I also have a domestic violence.
MR. BARATTA: Just for the record, the retail fraud was in 2000.
MR. GABEL: Was there an incarceration that ended at a certain point in time?
MR. BARATTA: No. It was probation out of St. Clair Shores District Court.
MR. GABEL: Do you know when that was terminated?
MR. BARATTA: Probably within one year following the guilty plea in approximately 2000.
MR. GABEL: Does that sound correct, ma'am?
THE WITNESS: Yes.
MR. GABEL: Thank you very much.
MR. BARATTA: I'll just object to relevance.

BY MR. STEINER:
Q. And when was the domestic violence charge?
A. September, the last week of September of 2010.
Q. Do you know if that was a felony or misdemeanor?
A. I have no idea.
Q. Do you recall what court that was through?
A. St. Clair Shores.
Q. As a result of either of those, did you owe any money?
A. The domestic violence, I was ordered to go to anger management which I had to pay a fee for. I had to pay a monthly amount to my reporting probation officer and I had my court costs for my attorney and I was ordered to drug test whenever my color came up.
Q. With regard to the retail fraud, do you know what company that --
A. It was from Burlington Coat Factory.
MR. BARATTA: If you'll just give me a continuing objection on relevance and also, the fact that it's almost 17 years old at this point and I don't think it's admissible for purposes of trial. You can ask away.
MR. STEINER: That's fine.
MR. GABEL: I have no problem with that.
BY MR. STEINER:
Q. Have you ever treated for alcohol or substance abuse?

A. No.
Q. Did you graduate from high school?
A. I graduated 10 years late.
MR. BARATTA: If you have to get up and stretch, do it.
THE WITNESS: Yeah, I'm just moving around. If I have to sit in one position too long, it gets sticky.
MR. BARATTA: I'm sorry to interrupt. Go ahead.
BY MR. STEINER:
Q. So you mentioned you graduated 10 years late. Did you complete a GED?
A. No, I have a diploma. I went to night school. I actually graduated with honors for that.
Q. All right. My records indicate that you went to East Detroit High School for some period. Is that right?
A. Correct.
Q. When did you start East Detroit High School if you know?
A. '75 I want to say.
Q. And when did you leave?
A. Actually, you know what, it was probably a year later. I was pregnant and they would not allow me to continue school.

Q. What grade were you in if you know?
A. I was in my 11th grade going into my senior year.
Q. Then you mentioned 10 years later, you completed a night program?
A. Yes, 1978, I graduated from Mount Clemens High School Adult Education.
Q. Did you say '78?
A. I'm sorry. '87. Because I was supposed to graduate '77 and I actually graduated '87.
Q. Okay. Did you ever attend college or any secretarial school?
A. No.
Q. Do you have any degrees or certificates in any other area of study?
A. No.
Q. Did you ever serve in the military?
A. No.
Q. Are you currently employed?
A. No.
Q. When was the last time you were employed?
A. February 22nd, 2014.
Q. Are you currently looking for a job?
A. No.
Q. Have you looked for a job since February 22nd, 2014?
A. No.

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Donna Livings
2/22/2017

Page 18

Q. Have you applied for Social Security Disability?
A. Yes.
Q. Were you granted Social Security Disability?
A. Yes.
Q. When did you apply?
A. October 2014.
Q. Were you granted Social Security Disability the first time you applied?
A. I was.
Q. Did you hire an attorney?
A. I did.
Q. Do you recall who that attorney was?
A. Randall Mansour.
Q. You mentioned you applied in October 2014. When were those benefits granted if you know?
A. February 2015.
Q. What injury did you claim?
A. My back.
Q. Do you know what physician diagnosed your back problem such that you were able to get Social Security Disability?
A. Martin Kornblum.
Q. Did you ever apply for unemployment benefits?
A. Yes.
Q. When have you applied for unemployment benefits?

Page 19

A. When I was terminated from Burlington Coat Factory.
Q. When was that?
A. 2000.
Q. Oh. I'm sorry. I thought you were -- was Grand Dimitre's the last place you worked?
A. Yes.
Q. Do you recall what years you worked at Grand Dimitre's?
A. 10 years.
Q. So 10 years prior to 2014?
A. Yes.
Q. So approximately 2004?
A. Yes. It might even be 11 years.
Q. What was your wage there?
MR. BARATTA: When she left?
MR. STEINER: Right.
THE WITNESS: $2.90 an hour plus tips.
BY MR. STEINER:
Q. Do you know how much you made in 2013? If you need to approximate, you can.
MR. BARATTA: If you don't know, you don't know. They can get your tax returns.
THE WITNESS: Yeah, I -- approximately $11,000.
BY MR. STEINER:
Q. What about 2012?

Page 20

A. The same. I mean my wage stayed the same.
Q. Okay. How many hours per week would you work at Grand Dimitre's?
A. Depended. I did have a set schedule, but because I was an opening server, when the lunch crowd would be done, I got to go home.
Q. Some records indicate that you worked approximately 36 hours per week. Is that about right?
A. Correct.
Q. Were you an opening server for the entire time you worked at Grand Dimitre's?
A. No.
Q. How long were you an opening server?
A. Seven years approximately.
Q. What were you before you were an opening server?
A. Afternoons, nights. It was a seniority thing. I worked my way up the ladder.
Q. So opening server was considered a desirable position?
A. Absolutely.
Q. And what were your general job duties?
A. Server, cashier, busser, janitor, whatever was required.
Q. Did it require a certain amount of ability to lift heavy things?
A. Correct.

Page 21

Q. Did you ever try to go back to work at Grand Dimitre's?
A. No.
Q. Did any doctor tell you that you could go back?
A. No.
Q. Did any doctor tell you that you could not go back?
A. Yes.
Q. Which doctor is that?
A. The first one was Dr. Valentine I believe his name was. He was the initial doctor at Concentra. The next doctor was Albert Belfi. He was the specialized doctor at Concentra and Martin Kornblum who was my surgeon.
Q. When you were paid by Grand Dimitre's, were you paid in cash or by check?
A. By check.
Q. How far of a drive is it from where you live to Grand Dimitre's?
A. Five minutes.
Q. Before you worked at Grand Dimitre's in approximately 2004, where did you work?
A. I worked at Burlington Coat Factory, Village Market, Grand Dimitre's, but at a different location, different owner.
Q. Okay. From at least 2004 to 2014 when you worked at Grand Dimitre's, was it always the same owner?
A. No.

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Donna Livings
2/22/2017

Page 22

Q. Who was the owner when you last worked there?
A. Tom and Jamal Chakani.
Q. Do you know how long they were owners?
MR. BARATTA: I'm just going to object based on foundation, but you can answer if you know.
THE WITNESS: To date? I would say 10 years.
BY MR. STEINER:
Q. So just a couple years after you started, it switched to them?
A. Correct.
Q. Immediately before working for Grand Dimitre's, did you work at Burlington?
MR. BARATTA: That's been answered.
BY MR. STEINER:
Q. I'm just trying to figure out the time line here. Were you unemployed for a period of about three years then?
A. No. I worked at Village Market.
Q. Okay.
A. I worked at Burlington Coat Factory, to Village Market, to Grand Dimitre's.
Q. Okay. When did you leave Village Market?
A. Before I started working for Grand Dimitre's.
Q. So right around 2004?
A. Yes.
Q. When did you start Village Market?

Page 23

A. 2001 maybe after my unemployment was done.
Q. Okay. And what did you do for Village Market?
A. I was a cashier, stocker, swept the floor, lottery, stocked the liquor shelves, whatever was required.
Q. Did that job require heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim or anything like that as a result of your employment there?
A. No, sir.
Q. Were you ever injured on the job there?
A. No, sir.
Q. What did you do for Burlington Coat Factory?
A. I was a customer service manager.
Q. What kinds of things would you do there?
A. I was responsible for the front end of the store, the cashiers, the money, taking care of lay-aways and putting them upstairs, all of the paperwork from the cash registers.
Q. Did that job require any heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim there?
A. No.
Q. Were you ever injured on the job there?
A. I was.

Page 24

Q. What did you injure?
A. Actually, my shoulder.
Q. Did you see a doctor?
A. I did, at Concentra.
Q. Do you know what year that happened?
A. '98 I'm guessing, '99 maybe.
Q. Do you know which Concentra clinic you saw?
A. The one in Fraser, 14 and Groesbeck.
Q. What did you do to your shoulder?
A. It was actually like Christmastime and they have the big rolling racks for the clothes that would come out of shipping and we were keeping those up front by the cash register and as people were coming to put their lay-aways in, they would be bagged and the whole thing would be put up on a rolling rack. Then it would be rolled back to the back of the store where we'd put it in lay-away.
All of the hangers that we would use that would come out of receiving was like the plastic kind with the metal hooks, so when you pushed them, they would glide easily down the rack and for whatever reason, the one lay-away that the cashier had did had several plastic hooks on them. So as I put it up on the rack and we're talking coats and jeans and, you know, this kind of thing in the lay-away, as I pushed

Page 25

it, the plastic just stopped fast on the rod and it just like put my shoulder out.
Q. Did you treat for a period of time?
A. I did at Concentra.
Q. How long?
A. Approximately six weeks maybe.
Q. Were you off work?
A. No. I still worked.
MR. GABEL: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. So you mentioned that you treated for approximately six weeks and you didn't take off work, right?
A. No. I was still working, but I did every day like even if it was my day off, I had to go to Burlington, punch my time card, go to Concentra, then go back to Burlington and punch my time card.
Q. Did that event affect your back at all?
A. No.
Q. I forgot to ask earlier, are you presently married?
A. No.
Q. Earlier, you mentioned that you are currently taking Norco. When was the first time you were prescribed Norco?

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Page 26

A. September, I believe, of 2014.
Q. Do you know who prescribed that?
A. Dr. Wednesday Hall.
Q. Does he continue to prescribe that?
A. She, and yes, she does.
Q. Where do you get your prescriptions refilled?
A. Wherever I can get them.
Q. Can you give me a list of where you can get them?
A. CVS is my main pharmacy. Norco is one of the hardest medications to get a hold of because it's a narcotic, so when I can't get it at CVS, I will make my way down the street to Walgreens and check there and if they don't have it, I will move on to the next one until I can fill my prescription.
Q. You mentioned there might be a next one. What might that be?
A. I have gotten them at Kroger, CVS, Wal-Mart -- I'm sorry, never Wal-Mart, Walgreens, I don't believe anywhere else.
Q. Okay. Any other medications you're taking?
A. I take Gabapentin.
Q. What's that for?
A. Nerves.
Q. Who prescribes that?
A. Dr. Wednesday Hall.

Page 27

Q. What do you mean by nerves? Does it help relax you or what is that?
A. No, no, it's nerves for my back.
Q. Nerve pain?
A. Yes.
Q. So that's just another pain medication?
A. Yes. I'm sorry.
Q. That's okay.
A. And I also take Clonidine.
Q. What's that for?
A. It's actually a blood pressure medication, but I take it for hot flashes.
Q. Who prescribes that?
A. Vena Panthanji. She's my primary care doctor.
MR. GABEL: Can you spell that, please?
MR. STEINER: I have the spelling in here somewhere. It's in the interrogatories.
MR. GABEL: Thank you. I'll get it.
MR. BARATTA: You can't spell that. Steve?
MR. GABEL: I'm good, but I'm not that good.
BY MR. STEINER:
Q. How much are you presently receiving in Social Security Disability?
A. My total payment is $734 a month. I actually receive $615 a month.

Page 28

Q. Do you have any other sources of income?
A. No.
Q. Has that amount stayed the same since you started receiving it in February of 2015?
A. The $734 started then. When I was -- got the Medicare August of 2016, that's when it went to the 615 a month because I have to pay for my Medicare.
Q. I see. I know that you filed a Workers' Compensation lawsuit arising out of this incident. Have you ever filed for Workers' Compensation before?
A. No.
Q. It's my understanding that you redeemed that lawsuit. Is that right?
A. I did.
Q. Do you remember how much that was for?
A. The total amount or my amount?
Q. Total amount.
A. 65,000.
Q. How much did you receive?
A. 28,578 I believe.
Q. And that was for injuries arising out of the incident that we're here to talk about today?
A. Correct.
Q. Have you ever filed a lawsuit for any other injury?
A. No, sir.

Page 29

Q. Have you ever been a party to any other lawsuit that we haven't discussed already?
A. No, sir.
Q. Did you have health insurance at the time of this incident?
A. No.
Q. Have you ever had health insurance other than the Medicare that we talked about?
A. Ever or just --
Q. Yeah.
A. When I was married to Timothy McMillan, I had Aetna through his employer. When I originally started with Medicaid, that was in I want to say November, approximately, of 2014. Then they gave me the Total Health Care like 30 days after that, so I had the combination of Total Health Care and Medicaid. Then August of 2016 is when the Medicare started, so now I have Medicare with Medicaid as a backup.
Q. May I ask why the Medicare started in August 2016?
A. Because you have to wait I believe it's 30 months or something like that. You have to be on disability for at least two years and a couple of months and then Medicare automatically starts. So mine automatically started August 1st of 2016 and, you know, it was their doing, not mine.

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Q. I see. Okay. It's perfectly okay if you don't know this, but has any medical facility told you that you owe any money to them as a result of the injuries that you sustained in this incident?
A. I owe them nothing.
MR. BARATTA: Did you understand his question? Do you have any patient balances with any doctors? I think that's what he's asking.
THE WITNESS: Nothing. When the redemption was done through Workmen's Comp, they claimed all of the debt that was associated and since then, I've had full coverage, so I've had no bills.
BY MR. STEINER:
Q. Are you aware of a Workers' Compensation lien that's been filed in this lawsuit? If you don't know, that's okay.
A. I believe not, but anything is possible.
Q. Okay. Let's just start generally, how did the incident happen?
A. I was scheduled to work at 6:00 a.m. on the 21st of February. It was a Friday and I got there approximately 5:50, parked my vehicle, went to walk into the door and maybe three steps and I fell straight back.
Q. So you were coming from your Pinewood Street home

address?
A. Correct.
Q. Then you were heading to Grand Dimitre's which I believe is located on Gratiot Road in Eastpointe, right?
A. Correct.
Q. Is this the usual time that you would go to work?
A. That was my usual time Monday, Thursday, Friday.
Q. What other days of the week did you work?
A. I worked Tuesday 9:30 to 2:00 and I worked Saturday 8:00 a.m. until 2:00 and my days off were Wednesday and Sunday.
Q. Do you remember what day of the week this incident occurred?
A. Friday.
Q. Were there other cars in the parking lot at the time of the incident?
A. One.
Q. Do you know whose car that was?
A. Debra Buck's.
Q. Did you say Debra?
A. Yes.
Q. What does she do?
A. She's a server.
Q. Did she open that day?

A. Yes. We opened together.
Q. Was she already in the restaurant at that time?
A. Correct.
Q. When I say at that time, I mean at the time of your fall.
A. Yes.
Q. Are you aware of any witnesses to the actual fall?
A. No.
Q. Did you see the snow coming into the parking lot --
A. Yes.
Q. -- on the -- let me just finish the question. Did you see the snow coming into the parking lot?
A. Yes.
Q. Did you know it might be slippery in the parking lot?
A. Yes.
Q. At the time of the incident, did you own a cell phone?
A. Yes.
Q. Who was the carrier?
A. I know who it is. I can't think of the name.
Q. Sprint? Verizon? T-Mobile? AT&T?
A. Nope. Brain freeze. It's the cheap one.
MR. BARATTA: I don't know.
THE WITNESS: I don't know.
BY MR. STEINER:
Q. That's fine. Did you call anyone before you got out of

your car on your cell phone?
A. No.
Q. Did you call anyone on your cell phone after you fell?
A. Yes.
Q. Who did you call?
A. The restaurant.
Q. The owner?
A. No, the restaurant phone.
Q. Okay. And who answered? Was it Debra that answered?
A. Yes.
Q. Now, where in the actual parking lot did you fall? You mentioned you were about three steps from your vehicle. Are you able to say --
A. I was in the rear of the building in the parking area.
Q. How close to the back door was that?
A. I would have to approximate 75 yards, 70 maybe.
Q. Could you have parked closer to the building?
MR. BARATTA: Hold on a second. I'm not sure that you understood his question. He was asking you, I think, how far your car was parked from the door that you were going into.
Is that correct? And if it's not --
MR. STEINER: Yeah, that's generally -- yes.
THE WITNESS: Yes, it was about 70 yards from my vehicle to the back door.

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Page 34

MR. BARATTA: Okay.
BY MR. STEINER:
Q. And you fell approximately three feet from your car?
A. Yes.
Q. Could you have parked closer to the door?
A. No.
Q. And why not?
A. Because the parking area was all piled up with snow. That was the first available full parking spot.
Q. How much snow on the ground was there?
A. Approximately six inches, but it was packed snow. It wasn't soft snow.
Q. So it's fair to say that you fell closer to your car than the door that you were going into?
A. Correct.
Q. Was Debra the only one scheduled to arrive at about that time?
A. No. There was a cook, also.
Q. And he just hadn't arrived yet?
A. I have no idea. He parks in the front of the building because that's where his key is.
Q. Okay. What's the cook's name?
A. Robert Spear.
Q. Do you know if he was in the building?
A. I didn't know who was in the building. I just seen

Page 35

Debra's car.
Q. But do you know now if he was in the building?
A. When I got inside the building, yes, he was.
Q. Where were you looking when you fell?
A. On the ground.
Q. Could you see the ice?
A. Yes.
Q. Could you see pavement?
A. No.
Q. How much ice would you say you were able to see?
A. The whole parking lot.
Q. What did it look like?
A. A sheet of white ice.
Q. Was the snow on top of that?
A. It was trodden. It was flattened to the ground. There was no fluffy snow, no.
Q. Do you know what caused it to flatten?
A. It being plowed over after it snowed.
Q. So it looked like a truck had been through there already?
MR. GABEL: Object to the form and foundation. She didn't even say whether one -- but you can answer what you saw, what you observed.
THE WITNESS: What was the question again?
BY MR. STEINER:

Page 36

Q. You mentioned it looked like the parking lot had been plowed over. Had there been a plow through there if you know?
A. No. You asked me if I seen snow and I said that there was no snow, except flat where it had been plowed. There was no snow on top.
Q. I guess I'm a little confused. There was no snow on top of where?
A. It was solid. There was no soft stuff. It was solid block. It was just one big block of ice and ground trodden -- it's hard to describe.
MR. BARATTA: Her answer was that the whole lot was a sheet of white ice. Her additional answer was there was no fluffy snow. I think she also described the lot as being trodden. I want to say another word may be packed if that's correct.
THE WITNESS: Packed.
MR. BARATTA: But I don't want to testify for my client.
THE WITNESS: Packed would be a perfect interpretation.
BY MR. STEINER:
Q. All right. Did --
MR. BARATTA: Is trodden the word that you used?

Page 37

MR. STEINER: I heard flattened to the ground.
THE WITNESS: Yes.
BY MR. STEINER:
Q. Do you know what caused that to flatten?
MR. BARATTA: I'm going to object based on foundation and speculation.
You can answer to the extent that you know.
MR. GABEL: Join. Go ahead.
MR. BARATTA: Do you know -- do you remember his question?
THE WITNESS: Yes.
MR. BARATTA: All right.
BY MR. STEINER:
Q. What caused the snow to flatten to the ground if you know?
MR. GABEL: Same objection. Go ahead.
THE WITNESS: You guys are confusing me.
MR. BARATTA: Don't pay attention to our objections. Unless I instruct you not to answer a question, then don't answer it, but Mr. Gabel will object sometimes. Sometimes I'll object.
THE WITNESS: Okay. Here's the situation. It had been snowing for over a month. Every time it snowed, a snowplow would come and plow the area for

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Page 38

everybody to walk. The next day, a snowplow would come if it had snowed and plow the area for everybody to walk.

In addition to that, vehicles would be driving through this area for several reasons. One, it was our parking area to park, so that's where we parked; two, it was the alley for the plaza, so trucks and delivery people would be going through the alley to deliver to the plaza. It was a solid sheet of white. Whether it be packed snow or ice I have no idea.

BY MR. STEINER:

Q. So did it look like vehicles had driven through the parking lot?

A. Yes.

Q. Did it look like the parking lot had been plowed?

A. Previous --

MR. GABEL: Asked and answered. You may go ahead.

THE WITNESS: Previously, yes.

BY MR. STEINER:

Q. Do you know about how much snow or ice was on the surface of the parking lot in inches or centimeters?

MR. BARATTA: Are you asking her the depth of the snow and/or ice?

MR. STEINER: Correct, on the surface itself.

Page 39

MR. BARATTA: That she was walking on the morning of the incident?

MR. STEINER: Right.

THE WITNESS: Approximately six inches.

BY MR. STEINER:

Q. When you arrived at Grand Dimitre's before this incident, had you ever had snow or ice in the parking lot before?

A. Yes.

MR. BARATTA: At what time?

MR. STEINER: I'm just asking before this incident.

MR. BARATTA: Any specific time frame?

MR. STEINER: No specific time.

MR. BARATTA: In the 10 years that she worked there?

MR. STEINER: Right.

MR. BARATTA: Okay. Go ahead.

THE WITNESS: Yes.

BY MR. STEINER:

Q. In those situations, did you ever report that to anyone?

A. Report what, sir?

Q. That there was snow or ice in the parking lot.

A. No.

Page 40

Q. Do you know if salt is kept on the premises?

A. Yes.

Q. Do you know who buys it?

A. The owners, Tom and Jamal Chakani.

Q. Do you know who applies it?

A. The purpose of the salt at the building was for the customer sidewalks in the front of the building and the side of the building.

Q. But they would apply the salt, the owners?

A. For the sidewalk.

Q. In your experience, was the Grand Dimitre's parking lot generally used for Grand Dimitre's employees and customers?

MR. BARATTA: Which lot? Object. Vague. Which lot?

BY MR. STEINER:

Q. The parking lot that you parked in.

A. We were required to park in the back of the building. The employees parked in the back of the building.

Q. Is that generally what that parking lot is used for?

MR. BARATTA: Objection; foundation. You can answer if you know.

THE WITNESS: That is where the employees parked. Some customers would park there, but the majority of the cars back there were employees.

Page 41

BY MR. STEINER:

Q. Do you know if that parking lot was used by any other business or anything like that?

MR. BARATTA: Foundation.

MR. STEINER: I asked if she knew.

THE WITNESS: That particular area, no. That area is for Grand Dimitre's.

BY MR. STEINER:

Q. Okay. Grand Dimitre's has a dumpster, right?

A. Yes.

Q. Is it in the back of the building?

A. Yes.

Q. Is it in that parking lot where you were walking?

A. No.

Q. You mentioned you got to the restaurant at approximately 5:50, right?

A. Correct.

Q. Was it light out?

A. It was dark.

Q. Are there lights on the premises?

A. The side of the premises, yes. The front, I have no idea.

Q. What about the back?

A. The back lighting was -- they had a night light over the back door.

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Donna Livings
2/22/2017

Page 42

Q. Nonetheless, you were still able to see the snow and ice, right?
A. Well, if you walk into your bathroom and you have a night light, that is how bright that light was. It just did the door: It didn't come out into the parking lot.
Q. I see. But again, nonetheless, you were still able to see the ice, right?
A. Yes.
Q. Do you have any personal knowledge how long the snow and ice had been there on the day of the incident?
A. It had been accumulating every day for two months.
Q. But what about on the parking lot surface itself? You did mention that trucks would come by, right?
A. Yes.
Q. And plow the snow, right?
A. Yes.
Q. So at least to some extent, it didn't all accumulate over two months, right?
A. Yes, it did.
Q. So no one had been there in the two months prior?
A. No, every day or whenever it snowed, a plow would come and plow the new snow. Did we ever see cement? No.
Q. Okay. Do you have any idea the last time a truck came by?

Page 43

A. Probably Thursday.
Q. So the night before?
MR. BARATTA: Do you know?
THE WITNESS: Absolutely not. I couldn't tell you specifically when the last time a truck was there. It's an alley.
MR. BARATTA: Tell Mr. Steiner you don't know.
MR. STEINER: Well, I think she already answered the question.
BY MR. STEINER:
Q. What type of shoes were you wearing on the date of the incident?
A. It's funny you should ask. Here they are. I'll even show them to you because I have to get up anyway. These were the shoes that I was wearing.
MR. BARATTA: You answered in the interrogatories, Ms. Livings, they were Skechers, they were a month old at the time of the incident?
THE WITNESS: These are them, yes.
MR. STEINER: Let the record reflect the witness has shown me her black Skechers that have rubber soles. They look like --
MR. GABEL: I'm sorry. If you'd just stand still for a moment.

Page 44

MR. BARATTA: Mr. Gabel wants a good peek.
MR. GABEL: Thank you very much.
THE WITNESS: I'll just stand. Go ahead. You can still ask me questions.
MR. GABEL: Chris, would you mind if I got a picture of that?
MR. BARATTA: Her shoes?
MR. GABEL: Yeah.
MR. BARATTA: Not at all. While you guys are snapping photographs, I'm going to get a quick refill on some coffee.
(Short recess.)
BY MR. STEINER:
Q. At the time of the incident, were you holding anything?
A. My purse.
Q. Anything else?
A. I actually brought that, too, just so you could see. No, just my purse.
Q. Do you wear contacts or glasses or anything?
A. Nope.
Q. I want to say that I saw some medical records that indicated that you had some sort of glaucoma or cataracts or something.
A. Cataracts.
Q. Did you have surgery?

Page 45

A. I've had two surgeries, one for each eye.
Q. When was that?
A. My first one I believe was 2009 I think.
Q. When was your second one?
A. The second one was December 2015.
Q. Did you have any trouble seeing after either one of those surgeries?
A. No.
Q. Did those surgeries correct your vision?
A. Yes.
Q. Why did you have the second surgery in 2015, just the other eye?
A. Yes, it was the other eye. The first surgery was my left. The second surgery was my right.
Q. Did you have trouble with your right eye leading into 2015?
A. No.
Q. All right. I think earlier, you mentioned that you fell straight back; is that right?
A. Correct.
Q. Do you know on what body part you landed on?
A. Like lower back.
Q. And I know you mentioned that you injured your lower back as a result of this incident. Anything else?
A. I don't understand the question.

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Page 46

Q. Did you injure anything else besides your lower back?
A. No. I mean I was sore. My arm hit, that kind of thing, but nothing permanent.
Q. So the only injury that you relate to this incident is with regard to your lower back at least for purposes of this lawsuit, right?
A. Correct.
Q. How long were you on the ground following this incident?
A. Five seconds.
Q. And then how did you get to the restaurant?
A. I tried to stand up and was slipping everywhere, so I got down on my hands and knees and crawled across the parking area. I tried to get to the back door. I could not, so I ended up walking the snow drift, plowed area, whatever you want to call it to walk around the building.
I called to the restaurant when I got to the front door where Debra Buck answered. She opened up the front door for me. I went inside. I was soaking wet. I then went home, changed my clothes and came back to work.
Q. Did you work that day then?
A. I did.
Q. Did you tell anyone else about the incident besides

Page 47

Debra Buck?
A. Mr. Spear, Maria Isaac at 9:00 a.m. when she came to work, my boss, Tom Chakani.
Q. Anyone else?
A. My customers. I mean, you know, there was no other employees.
Q. You mentioned Mr. Spear was the cook, right?
A. Correct.
Q. Who was Maria Isaac?
A. She was another server.
Q. And then Tom Chakani is one of the owners at Grand Dimitre's; is that right?
A. Correct.
Q. Did you -- strike that.
Did you tell all of these people the same story of how it happened?
A. Yes.
Q. And is it generally what we said just moments ago at this deposition?
A. Yes.
Q. You didn't tell them anything else?
A. Nope.
Q. What did you talk to your boss, Tom Chakani, about?
A. I believe somebody else had told him in the back when he came in the back door, so he came up to me and asked

Page 48

me what was going on and I told him that I had fallen on my way into work that morning in the back lot.
Q. Do you know if Mr. Chakani did anything after you told him?
A. He did.
Q. What did he do?
A. He went out the back door, took an ice pick, shovel type thing and went to where the drain was in the back parking lot and started to try to break up the packed driving area.
Q. Did you slip near the drain?
A. I don't know. I couldn't see the drain.
Q. Did he clear the entire back lot?
A. Did he?
Q. Correct.
A. No.
Q. Just near the drain?
A. Correct.
Q. Why did he do it at that location versus another location?
MR. BARATTA: Object to foundation.
THE WITNESS: You'd have to ask him. I don't know.
BY MR. STEINER:
Q. Had he ever done that in the past if you know?

Page 49

A. I don't know.
Q. You certainly never told him to do in it in the past though, right?
A. No.
Q. Do you believe it was his responsibility to do that?
MR. BARATTA: To do what?
MR. STEINER: Break off the ice like he did.
THE WITNESS: No.
MR. BARATTA: I'll object to form; foundation; also calls for a legal conclusion.
To the extent you can answer, please go ahead.
THE WITNESS: No, I don't believe it was his responsibility to do that.
BY MR. STEINER:
Q. Do you have any idea if he told anyone else about this incident?
A. I don't know.
Q. All right. So after you changed and came back to work, were you able to generally do your everyday duties?
A. Yes.
Q. Did you complete your shift?
A. I did.
Q. Where did you go after?
A. Home.

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Page 50

Q. What did you do?
A. I took some Motrin and laid down.
Q. Eventually, did you go seek medical attention?
A. I did.
Q. Where was that?
A. Concentra.
Q. Which one is that?
A. 14 and Groesbeck in Fraser.
Q. What did you tell them?
A. That I fell at work.
Q. Was that the following day?
A. Yes.
Q. Do you know what time you went there?
A. Approximately 1:00 o'clock. 1:30.
Q. Were you scheduled to work on that Saturday?
A. I was.
Q. Did you call in?
A. No, I worked.
Q. You worked that Saturday, too?
A. I did.
Q. Did you report this incident to anyone else?
A. Anyone else being who?
Q. Anyone else we haven't talked about or -- we haven't talked about?
MR. BARATTA: Object to form.

Page 51

THE WITNESS: I mean I told my son and his wife. They came in for breakfast on the Friday morning. "Mom, what's wrong with you?" "I fell this morning." I told my customers. I mean I'm a very efficient waitress and when I'm only moving at 80 percent, people ask, "Oh, what's wrong?" "Oh, I fell this morning. My back is kind of hurting." So of course I spoke to other people.
Q. So would you say at least following the incident, you were at about 80 percent at least for that --
A. Following the incident, my pride was hurt more than myself.
Q. So your injuries really didn't develop for some period of time, at least the extent of them?
MR. BARATTA: I'm going to object based on foundation. She's not a doctor.
MR. STEINER: I know, but she knows what she felt.
MR. BARATTA: If you can answer as to the progression of your injuries, whether or not your body was in shock, anything like that, then provide Mr. Steiner with an answer. If you can't, then tell him you don't know.
BY MR. STEINER:
Q. You can also tell me the extent of your pain level as

Page 52

well.
A. It hurt. On a scale of one to 10, probably five. I completed my shift. I did my job because that's the kind of employee I am. I went home, took two Motrin and I laid down. As the evening progressed, it got worse. I was unable to sleep all night.
The following day, I went to work because I was scheduled to. When my boss came in, I told him, "I don't know what's going on, but I have been in pain all night. I need to go see a doctor." He told me to go to Concentra, which is what I did.
Q. Okay. So this incident happened on February 21st, 2014. Do you know if it snowed on the night prior?
A. I have no idea. I don't remember.
Q. Do you know if it snowed coming into work that morning?
A. I don't remember. No, I don't believe it was snowing that morning.
Q. Do you have any idea the last time it snowed before this incident?
A. It was snowing every day, Mr. Steiner. It was February.
Q. Well, you just told me you didn't know if it was snowing the day before or if it was snowing that morning so --
A. I have no idea honestly.

Page 53

Q. Before this lawsuit began, did you know who Jim Sage was?
A. Yes.
Q. How did you know his name?
A. I actually became acquainted with Mr. Sage when I worked at Dimitre's located on 11 Mile and Gratiot in Roseville. I actually worked for Jim Sage for approximately four days and at Grand Dimitre's, Jim Sage was the landlord, so he called often and stopped by a lot.
Q. How often would you say he called?
A. Oh, I don't know. When he needed to call about something.
Q. Did he ever call you directly?
A. No.
Q. Did you ever speak with him directly?
A. Of course. I would have to answer the phone.
Q. And he would just ask for the owner or something like that?
A. Yes.
Q. Do you know what he called about?
A. I have no idea. He was the landlord. He would call about whatever he wants.
Q. Are you aware of any Sage Investment Group employee being on the premises?

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MR. BARATTA: Object to form. At what time?
MR. STEINER: Just in general before the incident.
THE WITNESS: Before the incident? Mr. Spear used to work for Mr. Sage.
BY MR. STEINER:
Q. Well, it's my understanding Mr. Spear was a cook, right?
A. Yes.
Q. So he was a Grand Dimitre's employee, right?
A. Yes.
Q. Are you aware of any Sage Investment Group employee as an employee for Sage Investment Group being on the premises?
MR. BARATTA: Object to form and foundation. You can answer if you know.
THE WITNESS: Like I said, Mr. Spear worked as a cook for Mr. Sage, also.
BY MR. STEINER:
Q. But in the capacity as an employee for Sage Investment Group, are you aware of an employee being on the premises?
MR. BARATTA: Same objections.
THE WITNESS: I don't understand the question and he's --

MR. BARATTA: If you don't understand the question, you let Mr. Steiner know. If you don't know who was working for Sage's Investment Company at the time, you let him know that.
THE WITNESS: But he asked and I answered.
MR. STEINER: I understand.
MR. BARATTA: Talk to Mr. Steiner right now. I've stated my objection. If you don't know, you don't know.
BY MR. STEINER:
Q. Let me see if I can rephrase this. Did you ever see any employee from Sage Investment Group in their capacity as an employee for Sage Investment Group be on the premises at Grand Dimitre's?
MR. BARATTA: Object to form and foundation.
THE WITNESS: I'm going to say I don't know.
BY MR. STEINER:
Q. Did you see an employee other than Mr. Spear --
A. Ever?
Q. Let me finish the question. Did you ever see a Sage Investment Group employee on the premises at Grand Dimitre's other than Mr. Spear?
A. I have seen whoever maintains the property.
Q. And who is that if you know?
A. T&J Landscaping.

Q. But what about a Sage Investment Group employee other than Mr. Spear?
A. I don't even know who works for Sage Investment, so no.
Q. Okay. Do you have any idea if Sage Investment Group knew the condition of the premises on the date of the incident?
A. You would have to ask them. I don't know.
Q. Are you aware of whether Sage would use the parking lot for any purpose other than for Grand Dimitre's business?
MR. BARATTA: Object to foundation.
MR. STEINER: I asked if she was aware.
THE WITNESS: I would assume that Sage Investments allows all of their tenants that are located in that plaza to use the parking lot.
BY MR. STEINER:
Q. Earlier, you mentioned the parking lot was generally used by the customers and employees of Grand Dimitre's, right?
A. Yes, sir.
Q. Were you familiar with T&J before this incident?
A. I am.
Q. Do you have any idea how often they were on the premises? If you don't know, that's fine.
A. Depends on --

MR. BARATTA: Object to form. Go ahead.
MR. GABEL: If she knows. Go ahead.
THE WITNESS: Depends on what time of year. During the summer, they would come and mow the lawns and do the edging for the front curbing around the property. During the winter, I mean they came when it was necessary to plow.
BY MR. STEINER:
Q. But it's fair to say you certainly did not see them every time they came on the premises, right?
A. Not every time, no.
Q. Do you know if Grand Dimitre's would call them?
A. I don't believe so.
Q. Do you know if the owner knew anyone at T&J, of Grand Dimitre's?
A. Which owner?
Q. The owner of Grand Dimitre's.
A. I don't believe so.
MR. BARATTA: Ms. Livings testified there were two owners for the last decade, 10 years or a couple years she worked there, so which owner?
MR. STEINER: Either owner.
THE WITNESS: Personally, no, they did not know those people.
BY MR. STEINER:

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Page 58

Q. When you had a workplace safety concern, did you generally report that to Grand Dimitre's?
A. Yes.
Q. In the 24 hours prior to the incident, did you consume any alcohol?
A. No.
Q. What about drugs, either medications or illicit drugs?
A. None.
Q. How soon after the incident did you contact a lawyer?
A. August of 2014.
Q. Okay. Now, your attorney and you provided us with some information in this case, actually a lot of information and I just want to verify that I have all of the medical providers that you've treated with as a result of this incident. So I'm handing you a copy of what is titled Plaintiff's Answers to Defendant T&J Landscaping's Interrogatories. I'm using these simply because they're more recent than the interrogatory answers that I have for Sage Investment Group.
I'm referring to interrogatory Number 17.
Now, if you could, just take a quick look through these and if you want to look through the whole document, that's fine with me, just to verify that it looks familiar to you, but I'm asking specifically to look at 17 and verify that those are the treaters that you

Page 59

treated with as a result of injuries you sustained as a result of this fall.
A. I don't believe I ever went to St. John Moross.
Q. Okay.
A. That looks like it's about it.
Q. Okay. I'm just going to ask you some questions about some of these providers. Earlier, you mentioned your primary care physician and I'm not even going to try to say it, so I'm just going to say Dr. P. Is that okay?
A. That's fine.
Q. When was the first time you treated with Dr. P?
MR. BARATTA: Object to the form.
THE WITNESS: January of 2015 I believe.
BY MR. STEINER:
Q. Do you still currently treat with her?
A. I do.
Q. Who was your primary care physician before that?
A. I did not have one.
Q. Did you have a primary care physician at all before her?
A. I did during my marriage with Mr. McMillan.
Q. Who was that if you remember?
A. Actually, I'll take that back. It wasn't a primary care doctor. It was an OB/GYN doctor.
Q. Who was that?

Page 60

A. I'm trying to think what his name was. He was out of St. John. I don't remember his name.
MR. BARATTA: Pappas?
THE WITNESS: No, John somebody. I don't remember his name.
BY MR. STEINER:
Q. Okay. What led you to treat with -- start treating with a primary care physician in January 2015?
A. I got medical insurance.
Q. Now, Mendelson Kornblum, it's my understanding that that's the office that handled some of your surgery, right?
A. They handled all of my surgeries.
Q. Had you ever treated with Mendelson Kornblum before this incident?
A. No.
Q. Did anyone refer you to Mendelson Kornblum?
A. Yes.
Q. Who was that?
A. Actually, I ran into a customer at -- from whom I had waited on in Meijer and she asked me where I had been. I told her that I fell and she said, "Oh, you need to call my guy," and she gave me his cord.
Q. When did you first start treating with Mendelson Kornblum?

Page 61

A. August I believe it was, my first appointment, of 2014.
Q. Do you know who paid to have you see them?
A. Initially, my Workmen's Comp people had told me that they would pay for his consult, but would not pay for nothing else.
Q. But it's your understanding eventually all of it was paid through your redemption?
A. Yes, after I sued them.
Q. You're still currently treating with them, right?
A. Yes.
Q. When was the last time you saw them?
A. January.
Q. This year?
A. Yes. I seen him in January and I seen my pain management doctor, Dr. Hall, in February.
Q. What day in February?
A. The 6th, I believe.
Q. Do you have any appointments to see them in the future?
A. Yes.
Q. Do you know when those are?
A. I can tell you. March 30th for Dr. Kornblum and Dr. Hall, I am due to see her on March 10th.
Q. Okay. Oakland Imaging Diagnostic Center, did they just do an MRI or something like that?
A. Yes.

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Q. Do you know when that was?
A. April sometime of 2014.
Q. The Concentra in Fraser you mentioned you went to a couple days after the accident or the day after the accident, right?
A. Correct.
Q. How long did you see them?
A. I want to say three weeks.
Q. Did anyone refer you to them?
A. My boss told me to go there.
Q. What about the Concentra in Warren?
A. I have no idea. I've never been there. I'm sorry. The Warren location is Dr. Belfi. He's the Concentra specialist that I was sent to from the 14 Mile location.
Q. And would that time be in the three-week period that you treated with Concentra?
A. No.
Q. How long did you treat with the Warren one?
A. From, I don't know, the first week of March maybe, second week. It was like second week of March and I stayed with them until I went to go see Dr. Kornblum in August.
Q. Since going to see Dr. Kornblum in August, did you see any other physician other than Dr. Kornblum's office?

A. Between Concentra and Dr. Kornblum? No, I don't believe so.
Q. What about after you first saw Dr. Kornblum's office, did you ever see another physician?
A. I've actually seen several. They were like things that --
Q. Through the insurance company?
A. Yes, the insurance, IMEs or whatever they were.
Q. Right. Other than those, did you go visit any other physician?
A. No.
Q. Pure Healthy Back, when did you first start treatment there?
A. That was through Concentra.
Q. So between the time of the incident and seeing Dr. Kornblum, you treated at Pure Healthy Back?
A. Yes, and at Flex Therapy or whatever that place was.
Q. Okay. Do you still do physical therapy through Dr. Kornblum?
A. No.
Q. So since you started seeing Dr. Kornblum, he hasn't had you do any physical therapy?
A. Oh, no, I've had physical therapy. I'm just not doing any right now.
Q. Okay. Who did Dr. Kornblum refer you to for physical

therapy?
A. Mendelson Kornblum Physical Therapy.
Q. Okay. So they handle it all in-house?
A. Yes.
Q. St. John Macomb, is that where your surgery occurred?
A. My surgeries, yes.
MR. BARATTA: I don't know if you're aware, Mr. Steiner. I thought I mentioned that she had a recent fusion.
MR. STEINER: I think you mentioned that, yeah. That sounds familiar.
MR. BARATTA: That's why she's not in PT.
BY MR. STEINER:
Q. Okay. Let's talk about those surgeries. The first one, who performed the first one?
A. Martin Kornblum.
Q. Did he perform the second one, too?
A. Yes, he did.
Q. When did the first one occur?
A. He also did a third one.
Q. Okay.
A. The first one was April 29th, 2015.
Q. So you mentioned you started seeing him in August 2014. What did he do in between August 2014 and April 2015?
MR. BARATTA: What did who do?

BY MR. STEINER:
Q. The doctor and you.
MR. BARATTA: In reference to treatment for her?
MR. STEINER: Right.
THE WITNESS: Not much. I would go see him every couple of months. I was seeing Dr. Hall every month for pain management.
BY MR. STEINER:
Q. What did Dr. Hall do for you in those couple months, every couple months?
A. I see her every month. She's pain management. That's where I have to get my pain medication from.
Q. So she would just prescribe you pain pills like Norco?
A. Yes.
Q. And the other ones that we talked about earlier?
A. Yes, the Gabapentin.
Q. Did she do anything else?
A. No, that's all. She's a pain doctor. Actually, I'll take that back. She did. She gave me injections. I did have injections. The steroid whatever kind of injections, I had three of those with Dr. Hall.
Q. Do you know when those occurred?
A. I don't remember. It was last year.
Q. Was it before or --

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Page 66

A. It was after my second surgery.
Q. Do you know what Dr. Kornblum did in your first surgery?
A. My first surgery, he went through my back and it was supposed to be a couple of pins and that kind of thing. When he got in there, it was not quite as he anticipated and I ended up getting a couple of titanium rods or whatever put in there.
Q. Do you have any idea if those rods will need to be removed at some point?
MR. BARATTA: Objection; foundation.
THE WITNESS: They'll never be removed.
BY MR. STEINER:
Q. Did you get a second opinion before going through with that surgery?
A. No.
Q. How long were you in the hospital after that first surgery?
A. My surgery was on the Wednesday and I believe I left there Friday, two days.
Q. Following that surgery, how often would you follow up with Dr. Kornblum?
A. Following that surgery, I had another surgery the following week.
Q. Okay. Was that planned?

Page 67

A. Yes. It was my second surgery.
Q. Okay. And Dr. Kornblum performed that, right?
A. Yes.
Q. And what did he do in that surgery?
A. Actually, I had two surgeons there. I had a general surgeon who was Dr. Harris I believe his name is. They went through my stomach and attached more bars, so Dr. Harris ended up having to move everything out of the way and Dr. Kornblum did his thing on my back.
Q. So that was installing more rods in your back?
A. Yes, more hardware.
Q. How long were you in the hospital following that surgery?
A. I went in on May 6th for the surgery and I believe that was a Wednesday, so I think I didn't get out until Saturday on that one, so that was three days.
Excuse me one second.
(Discussion off the record.)
BY MR. STEINER:
Q. How long did you follow up with Dr. Kornblum after that surgery?
A. I believe it was two weeks. He wanted to see me in two weeks. Since both surgeries were only a week apart from each other, you know, it was like I really went. had the surgery, stayed there a couple days, came home

Page 68

a couple days, went back for a couple of days, so I believe it was like two weeks after.
Q. And how many appointments have you had with Dr. Kornblum since that second surgery?
A. Approximately 10.
Q. Is it like once every couple months or something like that?
A. Yes. Sometimes him, sometimes his PA. I don't always see him.
Q. And then did he schedule you for physical therapy at that time?
A. My physical therapy was six months after my second surgery is when I started.
Q. How long were you in physical therapy for?
A. I want to say like two months.
Q. Then following that, did you just continue to see Dr. Hall for the pain management?
A. No, I've never been able to stop getting pain management.
Q. I understand. I'm saying after your physical therapy was completed after those couple months, what did you do?
A. We had to stop physical therapy. It was never really completed because of the pain level that I was in.
Q. So from about eight months after your second surgery,

Page 69

you stopped treatment until your third surgery; is that right?
A. Correct.
Q. When was your third surgery?
A. December 21st of 2016.
Q. And Dr. Kornblum performed that surgery?
A. He did.
Q. What did he do?
A. I call it adding wings. He extended the metal bars to fuse --
Q. To fuse these --
A. The vertebrae, yes.
Q. Did Dr. Kornblum mention whether or not he thought the surgery after the second surgery was successful?
A. He felt that the surgery went well and we would have to wait to see how I recovered.
Q. Okay. Has Dr. Kornblum expressed that he believed this third surgery went well as well?
A. He's very happy with the third surgery, yes.
Q. Has your pain gotten better since you've gone through these surgeries?
A. Eventually, yes.
Q. Are you required to use crutches, a brace, walker, anything like that?
A. I have a brace at home and I also have -- I'm not sure

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Page 70

what it's called, but it's a bone stimulator that I have to wear every day for 30 minutes. It's like a battery operated unit.
Q. But you don't use any walking aids, right?
A. No.
Q. What is your back brace called, if you know?
A. It's a back brace. It has metal rods in there. It's a black, heavy-duty ortho back brace.
Q. Where did you get it?
A. The supply store. I had to go in there and get measured for it.
MR. BARATTA: Binson's.
THE WITNESS: Binson's.
BY MR. STEINER:
Q. Was that prescribed to you by Dr. Kornblum?
A. Yes.
Q. How often do you wear it?
A. When I need to.
Q. How often is that?
A. Depends on what I'm doing. Sometimes I don't have to wear it at all and if I'm doing my housework, then yes, I do it, you know, to try and keep my back still.
Q. So it's as needed?
A. Yes.
Q. Did Dr. Kornblum prescribe that bone stimulator?

Page 71

A. Yes.
Q. Where did you get that?
A. His office.
Q. And do you have any idea what that does?
A. It's supposed to stimulate bone growth.
Q. Okay. Do you still use it?
A. Every day for 30 minutes.
Q. When did you first start using it?
A. Three weeks after my third surgery.
Q. So recently?
A. Yes. In January.
Q. Have you ever heard that you've had arthritis in your back before?
A. Yes.
Q. And when is the first time you heard that?
A. Dr. Belfi told me when I had the MRI done.
Q. When was that?
A. April.
MR. BARATTA: Asked and answered. Go ahead.
THE WITNESS: April of 2015. I'm sorry. 2014.
BY MR. STEINER:
Q. Has any doctor told you that you've had degenerative conditions?
A. Yes. Dr. Belfi and Dr. Kornblum.

Page 72

Q. Being a waitress, you mentioned that you had to bend over and carry heavy objects, right?
A. I didn't mention that I bent over, but yes, I do carry five, six plates on my arm which tends to be heavy.
Q. Did you ever have problems with your back before?
A. Of course. My back ached. I'm on my feet all day for six to eight hours.
Q. How long had that been a problem?
A. I'm 56, so I've had three children, I've had backaches for 20 years, nothing that has kept me from working.
Q. Has any doctor told you that you are permanently disabled from working?
MR. BARATTA: Objection; asked and answered. She testified regarding applying for and being granted first time Social Security Disability.
THE WITNESS: I already answered it so --
BY MR. STEINER:
Q. So it's your understanding that you cannot work?
MR. BARATTA: Asked and answered.
Go ahead. Donna, you can answer.
THE WITNESS: At this time, the doctors have stated that I am unable to work due to my back condition.
BY MR. STEINER:
Q. Do you believe you'll be able to work in the future?

Page 73

A. That's the future. I have no idea what's going to happen tomorrow. I only know what's happening now, so no.
Q. Are you optimistic that you might be able to work again?
MR. BARATTA: Objection; relevance.
You can answer, Donna.
THE WITNESS: My income is $615 a month. Do you think I would like to go back to work? Yes.
BY MR. STEINER:
Q. Did you ever take any pain medication for any reason before this accident?
A. Nope. Occasional Motrin.
Q. Any prescription?
A. No.
Q. Prior to this incident, did you ever have any problems with your back that required medical treatment?
A. Nope.
Q. Any pain that we haven't already discussed in your back?
A. No.
Q. On the date of this incident, were you treating for any medical conditions?
A. No.
Q. On the date of this incident, were you taking any

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Page 74

1 medication?
2 A. No.
3 Q. Presently, are you doing anything other than medication
4 to alleviate your pain?
5 MR. BARATTA: Asked and answered. She wears
6 a back brace, she's got a TENS unit and she takes
7 Norco.
8 MR. STEINER: Okay, those are three things
9 that she did mention.
10 BY MR. STEINER:
11 Q. But is there anything other than --
12 A. My doctor doesn't want me to do anything at this time
13 except heal.
14 Q. Okay. So nothing else?
15 A. No.
16 Q. Do you recall any particular incident after this fall
17 that aggravated the pain in your back?
18 A. Everything I do aggravates the pain in my back.
19 Q. Like what type of activity?
20 A. Standing, walking, sitting, sleeping, bending. It's
21 constant pain every day.
22 Q. After this incident, did you ever have a slip and fall?
23 A. Nope.
24 Q. Any automobile accidents after?
25 A. Nope.

Page 75

1 Q. Any visits to the emergency room other than related to
2 this incident after the accident?
3 A. I've actually been to urgent care since this accident.
4 Q. For what?
5 A. I had an infected tooth that required antibiotics and
6 that was a week ago Friday, so whatever date that was.
7 Q. What urgent care was it?
8 A. Roseville Urgent Care.
9 Q. After this incident, have you done any surgeries
10 unrelated to this incident?
11 A. Nope.
12 Q. Have you ever visited a chiropractor?
13 A. Once.
14 Q. When?
15 A. Let's see. My son is 33, so 33 years ago.
16 Q. Do you remember who that was through?
17 A. A chiropractor that was on Ten Mile and I-94 in
18 Eastpointe.
19 MR. BARATTA: Lupo.
20 THE WITNESS: No. Nowicki or something like
21 that in the strip mall right there.
22 BY MR. STEINER:
23 Q. Before this incident, had you had a slip and fall?
24 A. No.
25 Q. Before this incident, had you had an automobile

Page 76

1 accident?
2 A. No.
3 Q. Before this incident, had you been hospitalized for any
4 reason other than for your children?
5 A. Yes, I had a laparoscopy and I had a partial
6 hysterectomy.
7 Q. What's a laparoscopy?
8 A. It's where they go through your naval with a scope and
9 check it out to see what needs to be done.
10 Q. What was that in relation to?
11 A. I had endometriosis.
12 Q. When was that?
13 A. It actually started in like '96, '97, the pains all
14 started.
15 Q. What hospital?
16 A. St. John Moross. So actually, you know what, that's
17 when I went to St. John Moross.
18 Q. Before this incident, did you ever see a physical
19 therapist?
20 A. Yes, when I injured my shoulder in 2000, I seen the
21 Concentra physical --
22 Q. Any other incident?
23 A. Not that I can recall.
24 Q. Before this incident, did you ever have an MRI, CT
25 scan, anything like that?

Page 77

1 A. No.
2 Q. Have we pretty much covered all your treatment for
3 after the accident?
4 A. I believe so. Everything was pretty much done and
5 ordered through Concentra or through Mendelson Kornblum
6 and a couple of visits to Dr. Panthanji.
7 MR. STEINER: Let me just go through my notes
8 real quick off the record. I think I'm just about
9 done.
10 (Short recess.)
11 BY MR. STEINER:
12 Q. Before the incident, did you have any hobbies,
13 activities, stuff you liked to enjoy?
14 A. Of course.
15 Q. What types of stuff would you do?
16 A. I was actually on a bowling team with a couple of the
17 girls from work. It hadn't been for a couple of years
18 because everybody just kind of stopped wanting to go.
19 I used to go dancing. My grandsons -- I have nine
20 grandchildren. So three of my grandsons play soccer,
21 so I mean we always used to screw around with the
22 soccer ball.
23 At the time of the incident, I had twin
24 granddaughters that were a year old that I was
25 responsible to take care of them that I couldn't even

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do that because I couldn't lift up anything. It was like I couldn't do nothing. All the time, "Nana, come" -- "I can't come." "Nana, come" -- "No, I can't do that either."

Q. With respect to the bowling, had it been a couple years before this incident that you --

A. Yes.

Q. So with respect to the dancing, how often did you go dancing before this incident?

A. I actually hadn't been for probably a couple of years either, you know. But it's all things that I can't do anymore. I can't wear high heels. I wore three, four-inch high heels all the time, so now if I dress to go anywhere, I have to wear flats because I can't even dress correctly.

Q. Earlier, you mentioned that you do baby-sit one of your grandchildren at least every day, right?

A. Yes. Well, three, four times a week depending on what the mom and dad's schedule is.

Q. Okay. Is that to accommodate a work schedule or something like that?

A. Yes. My son and his fiance work.

Q. Do they pay you or anything?

A. No. It's my grandson. Do they pay me? No.

MR. BARATTA: She should pay them.

THE WITNESS: Correct. Because I go to their house.

BY MR. STEINER:

Q. Okay. And you still see the other grandchildren as well?

A. Yeah, all the time. I have a great-grandchild coming next month.

Q. Congratulations.

A. So we'll have another baby in the family.

MR. STEINER: Congratulations. Thank you. That is all I have.

EXAMINATION BY MR. GABEL:

Q. My name is Steve Gabel. I represent T&J Landscaping and I'm going to ask you some questions about the incident we're here for today. Same ground rules apply. Okay? You have to answer out loud which I'm going to ask you to answer out loud. Okay?

A. Okay.

Q. All the other ground rules Mr. Steiner discussed with you apply to me as well. Okay?

A. Okay.

Q. We just took a break for a second. Do you need to take another break before we go ahead?

A. I actually do.

(Short recess.)

MR. GABEL: We're back on the record.

BY MR. GABEL:

Q. Ma'am, I'm going to jump around a little bit because Mr. Steiner asked a lot of questions and I'm going to do my best not to go over those questions. I may, but I'm going to do my best not to do that. Okay? What is your weight currently?

A. Right now?

Q. Yes.

A. 163.

Q. And as I understand it, it was around the 140s or so around the time of the incident, right?

A. Correct.

Q. For whatever you posted on social media, we're going to ask you please do not delete that and we may follow up with your attorney, but whatever it was, commentary you mentioned, those photos, just leave it there.

A. No photos just --

Q. Thank you. Do you do Twitter?

A. No.

Q. Do you do Instagram?

A. No. I can barely do Facebook.

Q. All right. So you mentioned this chiropractor who was in Eastpointe. Is that the only chiropractor you would have seen in the last 20, 25, 30 years?

A. In the last 34 years and that was the only time. It was 34 years ago.

Q. Was it one visit or a series of visits?

A. I believe I went about five times.

Q. You tell us, what was the condition you went there for?

A. When I had my middle son, I had an epidural and it was just to the point when I came out of the hospital, my friend, because my back was aching and --

Q. So you're pointing to your low back?

A. Yes.

Q. Was that what you complained about for the five visits?

A. Yes.

Q. So epidural is typically an injection into the low back area to decrease pain, so you have your hand on the low back?

A. Correct.

Q. And that's the area you complained about?

A. I'm just standing here.

Q. I understand. But that's the area you complained about, correct?

A. Yes.

Q. To the chiropractor?

A. Yes.

Q. What did he do, manipulate the back in some way?

A. Yes.

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Donna Livings
2/22/2017

Page 82

Q. How did he do that?
A. He had taken x-rays and then he put me on the bed thing and adjusted my spine I guess.
Q. Did he give you a diagnosis?
A. No.
Q. What were the pharmacies you went to prior to this incident? I know you mentioned a few, but I'm going back in time in the five years before this incident.
A. Five years before the incident?
Q. Correct.
A. I really was never sick. I can recall one visit where I had an upper respiratory infection.
Q. Just tell me the name of the pharmacy, the name of the place you went to, the establishment.
A. I would have to say Walgreens at 12 Mile and Harper because that was closest to my home.
Q. On 12 Mile?
A. Yes. It sits right on the corner.
Q. Near Harper?
A. On Harper.
Q. I identify these by street and cross street and city, so that's what I'm going to do. On 12 Mile, correct?
A. Yes.
Q. Near Harper?
A. Sir, it's on Harper. It sits right on the corner.

Page 83

Q. At the corner. What's the city?
A. St. Clair Shores.
Q. Is there another one you went to besides that location?
A. I would have to say CVS that sits on -- it's on Harper by 13 Mile Road.
Q. Again, what city is that, St. Clair Shores?
A. Yes.
Q. Was there another one besides those two locations you just mentioned?
A. Prior to the incident?
Q. Yes, in the five years or so.
A. I don't believe so.
Q. You mentioned you would go to Kroger I think after this incident. Did you ever go to a Kroger pharmacy before this incident?
A. No.
(Discussion off the record.)
BY MR. GABEL:
Q. So were there any other pharmacies other than the two you told me about in the five years before the incident?
A. I don't believe so, no.
Q. Did you have an existing standing prescription, refillable prescription at these two places?
A. Prior to the incident?

Page 84

Q. Correct, in the five years before.
A. No.
Q. Any pain medications you filled at these two locations --
A. No.
Q. -- you have to let me finish the question -- in the five years before?
A. No.
Q. Are you right or left-handed?
A. Right, but I do use my left.
Q. But you're right-hand dominant?
A. Yes.
Q. Prior to this incident, had you seen a psychologist, psychiatrist or social worker?
A. No.
Q. As I understand from your records, you smoke cigarettes.
A. I do.
Q. And one record said you smoked 20 cigarettes. Is that per day?
A. Yes.
Q. And you tell me. I don't know. Is that equivalent to one pack per day or more?
A. Yes.
Q. One pack per day?

Page 85

A. Yes.
Q. Has any doctor told you that you should not do that because it's generally not good for you, reduces the amount of oxygen in your bloodstream?
A. Yes.
Q. Did a doctor tell you that it reduces the amount of oxygen in your bloodstream that could inhibit healing?
A. Yes. But --
Q. Hold on. So do you today still smoke cigarettes?
A. I do.
Q. Is it the same amount, one pack per day?
A. Depends on what I'm doing.
Q. How often do you smoke one pack per day?
MR. BARATTA: Since when?
BY MR. GABEL:
Q. Currently, how often do you smoke one pack per day?
A. Probably every day.
Q. Okay. Are you under any -- strike that. Before this incident, in the five years before, were you under any written medical restrictions?
A. No.
Q. Did you have any medical restrictions on your driver's license?
A. No.

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Q. Did you have corrective lenses stated on your driver's license?
A. I don't believe so.
Q. Before this incident, you were telling us about some of the hobbies and I know they were prior. You told us about the bowling within five years prior. You told us about dancing in the five years prior and obviously caring for your grandchildren. Is there anything else in the five years prior in addition to working that you would do?
A. I sew. I have a sewing machine, so I'm always making things. In fact right now, I've just -- we have my great-grandson's baby shower on this coming Sunday, so I've done like the flower arrangements, but it takes me double the time. You know, if I want to paint my toes, it takes me two hours because I have to do a little bit, then stop.
Q. So other than the sewing, do you think you kind of covered what your general hobbies were?
A. Yeah. I'm just a crafty kind of person, always have been, making curtains and --
Q. I'm going to move toward the incident now and again, Mr. Steiner has asked you a lot of questions, so I'm going to jump around a little on that topic. Actually, prior to the incident, approximately one year before

the incident, did you have a slip and fall in the parking lot that we have been talking about here?
A. It wasn't a slip and fall per se. It was I slipped.
Q. You slipped, but you did not fall?
A. Right.
Q. Was this in the parking lot we have been talking about?
A. Correct.
Q. Were you exiting a vehicle?
A. Yes.
Q. Were you out of the vehicle?
A. Yes.
Q. Was it in the wintertime?
A. Yes.
Q. Did you catch yourself on something so that you didn't need to fall?
A. My door, the car door.
Q. Did you hurt anything as a result of that?
A. My ankle.
Q. As I understand, the ankle hurt for a couple of days or a couple of weeks was it?
A. I didn't work for about three days.
Q. Did you continue to have an ankle problem after that?
A. No. I wore an air brace to work for several days because my ankle and my whole foot was just black where I had hit it on my car.

Q. Did anybody give you a diagnosis as to what happened in that incident?
A. I didn't even go to the doctor.
Q. How did you get the air brace?
A. I had it. I have three sons that played football, soccer, wrestling. I have lots of stuff like that.
Q. So you didn't get a diagnosis because you didn't go to a medical doctor?
A. Correct.
Q. You didn't get any medical treatment for that; is that true?
A. No.
Q. That's true?
A. Yes.
Q. Did you have any -- was it the right or the left ankle?
A. My left.
Q. Did you have any instability of the left ankle continuing on over the course of the year after that occurred?
A. No, it did nothing, just unbruised and I was good to go.
Q. So it healed after several days because you used the air cast --
A. Yep.
Q. You have to let me finish my question -- and then you

were okay in your opinion?
A. Yes. It took a week to 10 days for the swelling, the black and blue to go down.
Q. When that happened, did you feel any problems in your back at all?
A. No.
Q. Do you recall when you had the last name McMillan having an incident at Meijer?
A. An incident at Meijer?
Q. Did you ever fall at a Meijer location?
A. No.
Q. You did not fall and hurt your arm or fall or hurt yourself in any way at a Meijer?
A. No.
Q. Okay. When was it you were married to Mr. McMillan?
A. We got married February 14th of '97.
Q. And then you gave us the end date. I apologize. When was that?
A. September 2000 I think.
Q. You told us about a domestic violence incident and so I'm not going to particularly ask about that, but what I want to know is were you hurt as a result of the incident?
A. No.
Q. You did not fall as a result of that incident?

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A. No.
Q. Did you hurt your back at all as a result of that incident?
A. No.
Q. What was the date of that again?
A. The first week of October of 2010.
Q. Did you have to seek any medical care and treatment as a result of that matter we just described?
A. No.
Q. Prior to this incident, did you ever seek care and treatment for drug or alcohol abuse?
A. No.
Q. So you said you arrived at the parking lot 5:50 a.m., correct?
A. Yes.
Q. Now, had you ever spoken to anyone from T&J's Landscaping prior to this incident?
A. Yes.
Q. When did you speak to anyone from T&J's?
A. They would come into the restaurant, so we'd give them drinks or they would order food sometimes.
Q. Now, when you talked to them, would this just be social talk?
A. Yes.
Q. You would not discuss the ins and outs of their work

activities, would you?
A. No.
Q. So is it fair to say that you do not know the scope of any work they were to do, if any, at this location?
A. No.
Q. Is that true, you would not know?
A. I would not know.
Q. If we were to ask you whether you knew when they did any work at all in the winter of 2013 to 2014, would you know that exactly without guessing?
A. No.
Q. If we were to ask the means and methods of the work and exactly how they did it and what they did and who was there, would you know anything about those details without guessing?
A. No.
Q. You did not have any agreement with T&J's, did you?
A. No. Could I talk to my attorney for one second?
MR. BARATTA: Sure. There's no question.
(Short recess.)
MR. GABEL: We're back on the record.
BY MR. GABEL:
Q. You do not know exactly when T&J's would have last been on the premises, would you?
A. I do not know.

MR. BARATTA: You mean last before the date of incident?
MR. GABEL: Correct.
BY MR. GABEL:
Q. That was the question, last before the moment of the incident. You do not know that, do you?
A. No.
Q. I want to ask you about the lighting. So at 5:50 a.m., was the sun still below the horizon?
A. Yes, it was dark.
Q. It was not twilight yet, correct?
A. No.
Q. That's correct?
A. Correct.
Q. But you described some lights. Were there any other lights? Was there light from any other source, ambient light, light from light posts at all?
A. Just the --
MR. BARATTA: Other than the door light she described?
MR. GABEL: Correct. She stated that already. I understand.
BY MR. GABEL:
Q. Anything in addition to what you have said? Were there any car lights, ambient light from light posts you

haven't mentioned?
A. The back window that is in the rear of the building, some form of night light came through that, but it didn't go past the window if that makes any sense. It was just illuminating the window on the inside of the building.
Q. Did you carry a flashlight with you or a little personal light?
A. No.
Q. So there was enough light for you to navigate from your car if you wanted to to the building? It wasn't totally black?
A. No, it wasn't pitch black.
Q. I want to ask you about the conditions there at the time of the incident right before you fell. Okay?
A. Yeah.
Q. You told us what you said about snow and its condition. I heard that. I'm going to ask you a few other things. Do you know exactly what the temperature was at that time?
A. It was in the negative numbers.
Q. Do you know whether it was above freezing in the 24 hours before the incident?
A. It was not.
Q. Do you know whether it had rained at all in the three

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Page 94

days before the incident?
A. I don't recall.
Q. Do you know the exact amount of accumulation, if any, of water, not snow, but water in the three days before?
MR. BARATTA: Foundation.
MR. GABEL: Only if she knows of course.
THE WITNESS: I don't know.
BY MR. GABEL:
Q. Do you know the exact amount of accumulation of snow without guessing within the three days before?
A. No.
Q. If we were to ask you the minimum and maximum within the three days before, would you know that?
A. No.
Q. You provided some photos at some point during the course of the litigation. Mr. Baratta was kind enough to provide those. They're really dark. Do you know the source where they are sitting? Are they on a phone? A digital camera?
A. The reason why they are --
MR. BARATTA: Answer his question.
THE WITNESS: I thought the question was -- okay.
BY MR. GABEL:
Q. Do you know the source? Are they on a digital camera,

Page 95

on a phone or something else?
A. They were on my phone.
Q. Are they on the phone you currently have?
A. Not anymore.
Q. Have you stored them on a computer, the cloud or E-mail anywhere?
A. No, I copied them, gave them to my attorney and then deleted them from my phone.
Q. So you copied them. How would you copy them?
A. I sent it to I believe Walgreens and I had copies made.
Q. Did you E-mail them to Walgreens?
A. I must have. I believe -- I didn't do it. I'm not like really tech savvy on that kind of stuff.
Q. So who did that for you to get it to Walgreens?
A. I think my daughter-in-law I believe.
Q. Who is that? What's her name?
A. Jessica.
Q. Last name?
A. Livings.
Q. Now, why would they appear dark? Do you know without guessing? If you're going to guess, don't tell me. They seem really dark.
A. Because it was dark.
Q. Were they taken the morning of the incident, 5:50 a.m. and slightly beyond?

Page 96

A. No.
Q. Were they taken days later?
A. They were taken months later.
Q. So months later. Okay. What was the purpose of taking the photos if they were taken months later?
A. Mr. Baratta asked me if I had any pictures of the time of the incident which I did not and rather than trying to explain this wall, that wall, this window, I went there at 5:50 in the morning and tried to shoot the whole area with a different shot.
Q. So you were using it just for the general description of the area, correct?
A. Correct.
Q. And then you had a list which described things. Was the list -- what was the list about? Can you describe that?
A. The list was showing where exactly each picture was located on the building and where my car was parked at the time of the incident.
Q. Okay. It did not depict the condition at the time of the incident? It was just to give some description to Mr. Baratta and perhaps anybody else interested at a later point in time?
A. Correct.
Q. All right.

Page 97

MR. BARATTA: I believe the list was an index provided.
MR. GABEL: That's correct. We have that. I get that.
BY MR. GABEL:
Q. I'm just asking what it was and you've answered that. So this incident was 2-21-14, correct?
A. Correct.
Q. Do you recall at all whether the temperature actually got up into the forties within the day of and the two days before the incident?
A. I don't believe so. It may have, but I don't believe so.
Q. All right. Do you even know whether it rose up as high as 50 within the time frame I described?
A. Absolutely not.
Q. And when you said that your interactions with T&J's would be about more social things and not the work they did, my question is after the incident, is that also true, you did not talk to T&J's about the work they did after the incident?
A. Correct. I've never seen them.
MR. BARATTA: Since?
THE WITNESS: Yes, since the incident, I've never seen any of them.

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Page 98

BY MR. GABEL:
Q. And you haven't spoken to them either, right?
A. Correct.
Q. Does the name Tom Caramagno sound familiar?
A. I think he might have been one of the delivery guys.
Q. So you say delivery. What's the delivery, delivery for what?
A. Food. I mean Caramagno's, I really don't know what they delivered, but they were delivery people.
MR. BARATTA: Do you know who Mr. Caramagno is?
THE WITNESS: No.
BY MR. GABEL:
Q. If I was to ask you whether or not you know whether he's with T&J's, would you know that?
A. No.
Q. If I was to ask you what Mr. Caramagno did or did not do relative to this premises around February of 2014, would you have any idea?
A. No.
Q. Did you go to a gym before this incident?
A. I had signed up at Planet Fitness.
Q. When did you sign up there?
A. 2011 January.
Q. Were you still going there as of 2014?

Page 99

A. No.
Q. When did you stop?
A. It was a year membership and I really didn't even go.
Q. So you stopped somewhere around January of 2012 perhaps at the latest?
A. Correct.
Q. Did you go to any other gyms other than what was talked about in the five years prior to the incident?
A. No.
Q. So the Planet Fitness was in what location?
A. You can go to any location.
Q. But the one you signed up at?
A. 11 Mile and Schoenherr. It's Warren I guess.
Q. You told us about the cataract surgeries, one on each eye, I guess, two surgeries. Did you have any problems with your vision prior to the incident?
A. No. You know, I should probably backtrack on that. It wasn't that I had a problem. I did wear contacts, but at some point in time, my optometrist said I needed my cataract done.
Q. Where did you get the contacts from?
A. I was getting them at Sam's Club in the optometry area.
Q. What location?
A. 13 Mile, Roseville.
Q. Okay. After that incident you told me about the year

Page 100

before this incident we're here for today and what we're here for today, did you have any discussions with anyone at Grand Dimitre's or with anyone else about the condition of the premises?
A. We complained all the time to Tom.
Q. Tom Chakani?
A. Yes.
Q. That's the owner of the restaurant?
A. Yes, that the parking lot needed to be done correctly, you know.
Q. And you don't know what he did or didn't do --
A. I have no idea.
Q. -- with those comments you made, do you?
A. Some mornings our customers would do it for us.
Q. But you don't know what Mr. Chakani did with that information you gave him?
A. No.
Q. And you don't know whether anyone was a recipient of any of that commentary you made?
A. No.
MR. BARATTA: I don't understand the question.
BY MR. GABEL:
Q. Meaning if you told Mr. Chakani what you thought about the premises, you don't know whether he gave that

Page 101

information to anyone to do anything?
A. I don't know.
Q. Okay. Was it actively snowing at the time of the incident?
A. No, I don't believe so.
Q. If I was to ask you the temperature at the time of the incident, would you know?
A. No.
Q. Were you on time to start work that day?
A. I was early.
Q. You were early. Okay. Which foot slipped if you remember?
A. Which --
Q. So for the incident we're here for today, which foot slipped; do you know?
A. I don't recall.
Q. How did you come down on the ground? Do you recall that?
A. Straight on my lower back.
Q. And was the ground as you described packed down type snow?
A. Correct.
Q. When you called in to Ms. Buck, what did she do?
A. Opened up the front door to let me in.
Q. Did you get up under your own power?

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Page 102

A. I tried to get up and it was just too slippery, so I ended up going on my hands and knees across the parking lot.
Q. So you crawled to what exactly?
A. The snowbank, the building.
Q. Where you fell, there was no snowbank, was there?
A. No.
Q. It was flat as you described, correct?
A. Correct.
Q. So there was no EMS that day, was there?
A. No.
Q. And you did your shift, correct?
A. Yes. You have glasses. Why don't you wear them?
Q. They're actually not for reading.
MR. BARATTA: You can't ask him any questions.
MR. GABEL: No, you know what? The lighting is low in here. I'm -- no complaints. I'm not complaining.
THE WITNESS: They're sitting right there. Why isn't he wearing them?
MR. GABEL: That's okay. I'm not complaining. I'm doing great.
(Discussion off the record.)
BY MR. GABEL:

Page 103

Q. So, ma'am, after the incident, did you see any psychologist, psychiatrist or social worker?
A. No.
Q. And did you see any chiropractors after the incident?
A. No.
Q. Do you remember filling out the Social Security Disability form? The application you fill out, do you remember filling that thing out?
A. For disability?
Q. Yes, your Social Security Disability.
A. Actually, I believe my attorney filled that stuff out. I just went and signed it.
Q. One of the first questions is why, you know, why are you applying. Do you know what you said?
A. I referred to the slip and fall, what had transpired that day.
Q. Since the incident, have you been diagnosed with any new illnesses or diseases that we haven't talked about?
A. No.
Q. Since the incident, have you had any new injuries that we haven't talked about?
A. No.
Q. Since the incident, have you done -- I'm going to go over a couple things you told us -- any bowling at all?
A. No.

Page 104

Q. Dance?
A. No.
Q. Sew?
A. Yes.
Q. You still deal with your grandchildren, right?
A. Yes. My kids, too.
Q. Have you been on any vacations at all since the incident?
A. No.
Q. Have you gone up north at all since the incident or to the west side of the state?
A. No.
Q. Have you been to any major family events, any weddings, anything like that since the incident?
A. No, I don't think so.
Q. Now, you said earlier under questioning from Mr. Steiner that you thought a truck might have come by on a Thursday, but then I think you said you were guessing. So were you guessing with that answer?
A. Actually, no. Thursday was delivery day. We had trucks there every day.
Q. So that may have been a delivery truck?
A. I'm sure it was.
Q. Now, you don't know without guessing whether that was a T&J's vehicle, do you?

Page 105

A. No.
Q. You told Mr. Steiner about some of your conditions prior to the incident. Did anyone ever use the word to you "stenosis" prior?
A. No.
Q. But they did use the word "degenerative"? I think you talked to Mr. Steiner about that, right?
A. Not prior.
MR. BARATTA: I think that's what you testified to.
BY MR. GABEL:
Q. Do you remember somebody telling you that?
A. The first person to tell me that was Dr. Belfi.
Q. He told you he thought you had a degenerative type condition, correct?
A. Correct.
Q. That's fine. So at the parking lot where the incident occurred, you said the snow was flattened. How big of an area was that if you can tell us?
MR. BARATTA: The snow?
BY MR. GABEL:
Q. Let me be more specific. You said that, several times, that the snow was flattened, pushed down I think was your word.
A. Yes.

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Donna Livings
2/22/2017

Page 106

Q. How big of an area? Could you say in terms of yards, feet, portions of a football field? Could you describe that at all to us how big an area that was around you?
A. The area that I was walking in?
Q. Right, from the point where you fell where you described it as flattened, how big an area was that?
A. If you look out that window, it was at least to that house.
Q. Can you describe that in feet perhaps?
A. Like I said, it was like 70 feet to where I had to walk --
MR. BARATTA: You said 70 yards.
THE WITNESS: Did I say 70 yards?
MR. BARATTA: You did.
THE WITNESS: Okay.
MR. BARATTA: Do you want to change that?
THE WITNESS: Yes. It was like 70 feet from --
BY MR. GABEL:
Q. In any direction from you?
A. No, from where -- where I got out of my car to where I had to enter, it was about 70 feet.
Q. So let me ask my question. From where your body ended up, if you were to look around you, 70 feet in all directions, is that what the condition was, flattened

Page 107

type snow?
A. Not 70 feet all around because there was a brick wall behind me.
Q. Right. Other than that?
A. Yes, I mean the whole complete area from the driveway coming in which was another 70, 80 feet to the 70 feet that I had to go to the 190 feet going along the building, everything was white, packed snow.
Q. Other than where there was a wall, correct?
A. Correct. There was a wall this way and the building walls, but that's where the snow plows were all -- snowplowed the snow up.
Q. Well, when you say snowplows plowed the snow up, that was beyond 70 feet, correct?
A. That was above the 70 feet against the buildings.
Q. But not where you fell?
A. Correct.
Q. So can you tell me, were there any other medical care providers other than what you told Mr. Steiner since the incident?
A. Everything that I've had done since the incident was either through Concentra or through Mendelson Kornblum. I have nothing outside of that other than my primary care.
Q. But there's nothing else, right? There's no other

Page 108

place you went that we haven't discussed for care and treatment?
A. I don't believe so other than the urgent care that I went to 10 days ago.
Q. Tell us that. What's that urgent care?
A. I had an infection.
Q. Is that your --
A. My tooth, yes.
Q. Okay. Other than that, as it relates to this incident, anything related to the back, were there any other medical care providers that you haven't told us about, anything else?
A. No.
Q. Any other pharmacies that we haven't discussed?
A. I don't believe so.
Q. So the CVS that you told Mr. Steiner about after this incident, can you tell me the street that one is on?
A. It's 11 Mile and Harper.
Q. City?
A. St. Clair Shores.
Q. And the Walgreens you told him about, what street is it on?
A. There's one at 12 Mile and Harper.
Q. What city?
A. St. Clair Shores.

Page 109

Q. Is there another one?
A. I've gotten them at the Walgreens down here on Gratiot.
Q. On Gratiot?
A. I think that's --
MR. BARATTA: Probably Clinton Township.
THE WITNESS: Clinton Township.
BY MR. GABEL:
Q. On Gratiot. What's the closest cross street?
MR. BARATTA: Metro Parkway.
BY MR. GABEL:
Q. Is that correct?
A. No.
MR. BARATTA: Or 15 Mile Road?
THE WITNESS: No, it's right here by the hospital.
MR. BARATTA: So the hospital is up on Groesbeck and Harrington.
THE WITNESS: So just like north of Harrington. That's like the only street that I know.
BY MR. GABEL:
Q. Is it on Gratiot near Harrington?
A. Yes.
Q. Is that here in Mount Clemens?
A. I believe it's Clinton Township.
MR. BARATTA: Is it Gratiot or Groesbeck?

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THE WITNESS: No, it's Gratiot right here.
MR. BARATTA: Gratiot and Harrington, that is probably Clinton Township.
BY MR. GABEL:
Q. Any other Walgreens?
A. I don't think so.
Q. How about the Kroger, can you tell me the street that's on?
A. Kroger, I've had two locations, one in Eastgate shopping center.
Q. What street is that, Gratiot?
A. Frazho and Gratiot, yes.
Q. On Frazho?
A. No, just north of Frazho.
Q. So Gratiot north of -- Gratiot near Frazho?
A. Correct.
Q. City?
A. I believe it's Roseville.
Q. Are there any other pharmacies other than the ones we've gone over all together?
A. I've gotten Norco at the Kroger in Farmington Hills on 11 Mile and Middlebelt.
Q. 11 Mile and Middlebelt in Farmington Hills?
A. Yes, Kroger.
Q. Where else?

A. I think that's it.
Q. Today, are you under any written medical restrictions?
A. Not written. Verbal.
Q. Tell me what the verbal commentary is from your doctors.
A. Not to lift more than five pounds.
MR. BARATTA: Are you all right?
MR. GABEL: Yeah. I don't have anything else.
MR. BARATTA: Can we mark this? I have a few questions.
DEPOSITION EXHIBIT 1
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
EXAMINATION BY MR. BARATTA:
Q. Mrs. Livings, I'm going to show you what's been marked as Deposition Exhibit 1 and I think I'm going to concentrate on the bottom photograph on this page. Do you see that photograph?
A. I do.
Q. Do you recognize what's contained in that?
A. Yes.
Q. What is it?
A. The back wall of the property.
Q. Okay.

A. And the building at the back of the restaurant.
Q. Is that where you fell?
A. In this area here, yes.
Q. Does this picture generally depict the area where you fell on February 21st?
A. Yes.
Q. Okay. We see some blacktop or asphalt?
A. Yes.
Q. If we go back to February 21st, 2014, looking at all the area of the asphalt in this bottom photograph, do you recall whether it was snow covered as you described the snow?
A. Completely snow covered.
Q. So all the asphalt we see in this bottom photograph and I guess the top for that matter because they're from virtually identical places, that would have been covered in snow, correct?
A. Correct.
Q. You mentioned very early in the deposition when Mr. Steiner talked about the incident that you parked in the first available spot. Can you describe what you mean by that?
A. On a normal day?
Q. No. On this day, this morning at 5:50 a.m., you indicated you parked your car in the first available

spot. Do you recall that?
A. Correct.
Q. All right. Can you tell me what you meant by that?
A. From the wall here where the dumpster is, the dumpster is behind this wall, so from that wall there, it was one, two, three, I believe the fifth parking area was where I parked because one through four was a solid snow mound up to the wall.
Q. Now, when you say snow mound, are you talking about stock piles of snow that a snowplow would push in the back of a lot somewhere?
A. Yes.
Q. Okay. I want you to draw or delineate for me -- let's do it this way so it's nice and easy.
A. Delineate?
Q. Bad choice of words. I'm sorry. I want you to draw for me a little rectangle about this big where you parked your car in the top photograph that morning.
A. It would be right here.
Q. Okay. Now, can you see the employee entrance door that you were heading into that morning in looking at either of these photographs?
A. No.
Q. Can you give me an approximate idea of where it is? Just point with your finger.

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Donna Livings
2/22/2017

Page 114

A. Back in here.
Q. Would it be closer to this light-colored truck we see?
A. It's behind that truck.
Q. Okay. So the entrance would be somewhere behind this light-colored truck we see in the photograph, the vehicle that's on the left of the two that we can see?
A. Yes.
Q. All right. So then when you said 70 yards and you changed it to 70 feet, the distance from your car approximately to this door you're estimating is about 70 feet?
A. Yes, I think maybe 70 feet.
Q. You were on your way to work for your scheduled shift that morning?
A. Yes.
Q. Is this the only entrance that was available and open for you to use that morning?
A. Yes, the employee entrance.
Q. Now, you described I think one of these gentlemen were asking you to estimate the depth of the hard packed snow that you described in your deposition. I think you said -- refresh me.
A. About six inches.
Q. About six inches. Okay. But you also said that you had seen or knew that T&J had been on the premises and

Page 115

plowed this lot we see in Exhibit 1, correct?
A. Yes.
Q. So if you know --
MR. GABEL: Let me just object. I think she said she didn't know exactly when they were last there.
MR. BARATTA: Right. I didn't mean to imply she did in my question.
BY MR. BARATTA:
Q. Just the fact that they had plowed let's say sometime prior to your incident in February of 2014, were you aware of that?
A. Yes.
Q. The guys would come in and ask for a drink, maybe get something to eat?
A. Yes.
Q. And in the front of 2014, do you remember the snowplow guys coming in on more than one occasion?
A. No.
Q. Do you have any idea how there could be six inches deep worth of snow in the lot if they had plowed?
A. Okay. Prior to the incident?
Q. That's a bad question. I'm trying to figure out how to ask it.
The snow is covering the lot?
A. Yes.

Page 116

Q. The snow is six inches deep and it's hard packed. My question is if you know and only if you know, if someone had been in there to plow the lot, how come the snow was that deep?
A. When the lot was plowed, it was never plowed to the ground and salted.
Q. I'm going to stop you there. When you say it was never plowed down to the ground, are you talking about February of 2014 or are we talking about a different time period?
A. It was an accumulation over a time period.
Q. It was a bad winter, right?
A. Correct.
Q. Record snow?
A. Yes.
Q. So go ahead.
A. Originally, like when the snow first started, they plowed. Everything went up against the wall. Then the snow would come, but they wouldn't come until, you know, 10:00 o'clock in the morning, so all of the cars and everything coming in would start packing the snow down. So when they would come to plow, they would only plow whatever was brushed up, so the rest was -- then the next two days, whenever it snowed again, it would snow and cars are coming in and you kept getting these

Page 117

ruts packing this stuff down. They never scraped to the bottom, so it just kept accumulating over time.
Q. So you're describing a gradual process over a course of the winter?
A. Correct.
Q. Thank you. Prior to your incident, are you aware of anyone else slipping and falling in this lot that we see here in Exhibit 1?
A. Yes.
Q. Who?
A. On February 20th, Thursday.
Q. The day before?
A. Yes.
Q. Who?
A. Dave, the owner's brother-in-law who is a cook.
Q. Okay.
A. He fell as he was entering the building.
Q. Do you know if Dave was hurt?
A. He hurt his elbow.
Q. Do you know if he sought medical treatment for that?
A. I have no idea.
Q. Did you talk to Dave about his slip and fall?
A. Yes.
Q. What did Dave say to you?
A. He was pissed. He was trying to open up the door and

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Page 118

there was so much piles of mounds of snow around the door, as he stepped on it to go in the door, he ended up going down.
Q. Are you aware of anyone else who slipped and fell in this lot prior to your incident during the winter of 2014?
A. Not prior.
Q. What about after your incident?
A. After, on the 23rd, Sunday.
Q. Of February?
A. Yes.
Q. Okay.
A. Tom Chakani fell in the back parking lot on his way to his vehicle.
Q. Do you know if Tom was injured?
A. I have no idea because I didn't work anymore. I didn't see him.
Q. How did you hear about it then?
A. Debra Buck told me.
Q. Do you know if Tom -- did I ask you if you know if Tom was hurt?
A. Yes, you did, but I have no idea. She said he hurt his arm.
Q. So brother and brother-in-law both hurt their arm or elbow you pointed to?

Page 119

A. Yes.
Q. Do you know any of the facts surrounding Tom's fall?
A. Just that he slipped on the ice when he was going to his car. There's more.
Q. There are more people who fell?
A. The same week.
Q. Go ahead.
A. I'm not sure if it's Tuesday or Wednesday --
Q. Of the next week?
A. Yep.
Q. Go ahead.
A. Maria Isaac.
Q. Who is that?
A. A server. She fell in the parking lot, bruised up all her knees, black and blue where she went straight down on her knees.
Q. How did you find out about that?
A. Debra Buck.
Q. Did Debra indicate whether or not this woman sought medical treatment?
A. I don't think so, but she did show Debra the bruises where she fell outside and Tom was again told he needed salt out there because Maria was actually on the sidewalk walking to her car when she fell. She like slipped off the sidewalk into the street.

Page 120

Q. Are you aware of anyone else who slipped in this lot?
A. That Friday, a customer fell.
Q. Was it in this lot we see here in Exhibit 1?
A. She actually slipped -- they both slipped down in this area here.
Q. You're pointing to the left of the photos we see in Exhibit 1?
A. Yes.
Q. Can you say that again?
A. Yes.
Q. No, your answer again. You were. We were talking over each other. I just want it clear on the record. Tell me about the circumstances of this lady falling to the left of the photo.
A. She was walking to her vehicle and she slipped on the pavement and ended up going into the road.
Q. And you heard about this from?
A. Debra Buck.
Q. Any other slip and falls you're aware of on the property during this winter?
A. A customer.
Q. Another customer?
A. Yes, on that Friday.
Q. And how did you obtain this information?
A. Debra Buck.

Page 121

Q. Tell me what you understand about that.
A. That she had fell in the parking lot on her way to her car in the actual parking lot.
Q. Are we talking about two customers who fell to the left of the photograph?
A. One is the server. Maria works there. There was a customer who fell, also, and it's my understanding that there was an incident report on that for the customer on the Friday.
Q. Did you ever discuss with any of the Chakani brothers whether or not it was their obligation to remove snow or de-ice the parking lot on these premises?
A. He discussed with me.
Q. He being?
A. Tom.
Q. Okay.
A. The way that the property works is it's broke up into square footage. Each business has their own square feet. Mr. Sage's company takes care of everything in the property. They do any repairs. If there's a sewer problem, they bring in the contractors. It's their company that does the snow, the grass, all of that. He pays for all of that --
Q. Mr. Sage or Mr. Sage's company?
A. Yes. Mr. Sage's company.

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Q. Okay. What else did Mr. Chakani say about that?
A. They receive, I believe, quarterly billing, maybe six-month billing on whatever their square footage is that they are responsible for and they pay that accordingly.
Q. And what was the reason that you were discussing this with Mr. Chakani?
A. He shows us his business all the time. He showed us the actual bill and for that particular one that I had seen, the whole parking lot was blacktopped. So he got his billing for that portion of his square footage which was the whole around the building and in fact the store next door to Grand Dimitre's is also part of our square footage. So he has to pay for that little area, also, but we don't have access to it. It's rented out.
MR. BARATTA: I don't have anything else. Thank you.
RE-EXAMINATION BY MR. STEINER:
Q. Just a real quick follow-up. When was this discussion with Tom Chakani regarding the business model that he had with Jim Sage?
A. I'm sorry. I don't understand the question.
Q. When was your discussion with Tom regarding this business model where certain businesses are responsible for a certain square footage?

A. All the time. I worked there for 10 years. There really wasn't a bill that I didn't see or the girls didn't see. They were always left out on the bar area.
Q. Okay. But that's you looking at bills. When was this conversation that you had with Tom?
A. Whenever he had the blacktop put in.
Q. When was that?
A. A couple years before I wasn't working there.
Q. So it was prior to your fall by a couple years?
A. Yes.
Q. It's your understanding that Grand Dimitre's would pay for these services?
A. It was part of their lease agreement.
Q. And do you have any idea the contents of that lease agreement?
A. As far as I understand, it was a 20-year lease that they have.
Q. But do you know the terms of who may be responsible for what?
A. No. I just -- no, not specifically.
MR. BARATTA: Was your question does she know what the specific pro-rata allocation is for this tenant?
MR. STEINER: The terms of the lease agreement with this tenant.

BY MR. STEINER:
Q. Do you have any idea of the specific contents of that agreement?
A. My understanding is if the hot water heater goes, if there's a hole in the roof, if there's anything to do with this specific building, Tom and Jamal Chakani took care of that inside the building. Anything that was outside of the building, they paid whatever Jim Sage told them they owed.
Q. Did you ever see that agreement?
A. Yes, I said I seen the bill.
Q. Not the bill, the agreement.
A. No. It's not my business.
Q. Okay. So when you say that's your understanding, it's based on secondhand knowledge through Tom?
A. It was based on the bill that he received in the mail from Sage Industries or whatever -- Investments.
Q. Right, that Tom paid?
A. Yes, when he received the bill.
Q. Do you know whether Tom ever talked with T&J, any employees?
A. If he happened to be at the cash register whenever they came in, of course. He would take their order and, you know, social conversation.
Q. Do you know if he ever talked business with them? If

you don't know, that's fine.
A. I don't know.
Q. I know we discussed following your complaint to Tom that you didn't know what Tom did with that information, but what about with regard to any of these other incidents that Jessica Buck relayed to you, do you know what Tom did with that information?
A. Her name is Debra.
Q. I'm sorry. Debra Buck.
A. I just don't want you to get mixed up. I have no idea because I was not working at that time.
Q. Do you know if Debra Buck reported that to Tom?
A. You would have to ask her. No, I don't know.
Q. And you certainly wouldn't know if Sage Investment Group would ever have notice of any of these incidents?
A. Absolutely not.
Q. Okay. Did you ever go back to Grand Dimitre's, I know not as a waitress, but to go visit the premises following your injury?
A. Yes.
Q. How many times?
A. Every time I went to Concentra, I would have to take my do-not-work slip back to Dimitre's because I was day-to-day. Originally, when I went on the Saturday the 22nd, they told me to come back Wednesday the 25th

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or whatever. I'm just guessing on the dates. So I had to take my initial report and give it to my employer, no work until Wednesday, then I'd go back on Wednesday and they'd say no work until Saturday and then I'd go back on Saturday. So I mean I was a day-to-day they said, you know, so that's what we went with.

Q. Was it not until Dr. Kornblum that he recommended Social Security Disability?

A. Dr. Kornblum did not recommend --

Q. Was it through Concentra then? I'm sorry. I don't recall.

MR. BARATTA: What's your question, who recommended that she file for Social Security Disability?

MR. STEINER: Right.

THE WITNESS: My -- I'm trying to think of his name. Jason.

BY MR. STEINER:

Q. Jason who? I'm sorry.

A. I'm trying to think. In August when I contacted Concentra and I told them I wanted a second opinion. The information that I was receiving from Concentra was not going along with the pain. They kept saying muscular, muscular and I'm like this is not muscular.

In August, I was threatened by Workmen's

Comp. They told me, "If you go see this other doctor, your case could change as far as what we are willing to pay anymore." I said, "Do what you got to do because I have to get a second opinion." So at that point is when I contacted an attorney, Jay Trucks & Associates out of Clare, Michigan, and how I got their name was I just went on the computer, that name popped up and that's who I talked to.

After talking to my attorney, Jason, I can't remember his last name, but he said, "What's going on?" I told him. He said, "Why have you waited this long?" I said, "I didn't even know I had a 28-day" -- I could have went to another doctor 28 days after my incident. I did not know that. So he was the one who suggested I file.

Q. You also mentioned that you started visiting Dr. Kornblum in August 2014, right?

A. Yes.

Q. Was he the one that made the recommendation to the Social Security Disability that you were disabled?

MR. BARATTA: You mean was he the physician who testified?

MR. STEINER: Right.

THE WITNESS: Ultimately, his reports is what was turned over to Social Security that led to that

going through I believe.

BY MR. STEINER:

Q. Okay. And none of your prior physicians?

A. I don't believe Concentra had anything to do with it.

MR. STEINER: I think that's all I have. Thanks.

RE-EXAMINATION BY MR. GABEL:

Q. Ma'am, on Exhibit 1 that you were talking about, could you put an X and a circle in the spot that you fell?

MR. BARATTA: That's one of my two questions.

BY MR. GABEL:

Q. Could you do that?

A. Yeah. I would have to say it was like -- like right here.

Q. And circle it. Okay. Thank you. Good. So you were walking in the rectangle over to that spot, correct?

A. Yes.

Q. Okay. We talked before about T&J's and whether you knew or didn't know when they were to come out. So you don't know what would trigger them to come out, do you?

A. No.

Q. We talked about you thought that the snow was not scraped down. You don't know whether or not T&J's could have scraped down to this asphalt, do you, without guessing?

A. Can you repeat the question, please?

Q. Yes. You don't know whether T&J's could have scraped down to the ground the snow, correct, without guessing?

A. The day of the incident, no, they would not.

MR. BARATTA: No, do you know whether or not -- listen to his question.

THE WITNESS: I know. It's like --

BY MR. GABEL:

Q. I'm talking about the snow season of 2013 to 2014 and in the weeks leading up to your incident, do you know whether T&J's could have scraped down to the ground without guessing?

A. They could have, yes.

Q. You're not a snowplow operator, are you?

A. No.

Q. You don't know whether the blade would have been able to get under the packed snow that you described, do you?

A. It would not have been able to, no.

Q. It would not have. Okay.

A. No.

Q. And you don't know whether or not the fact that cars had driven over the snow would have impeded the blade, right, from going down to asphalt level, correct?

A. Correct.

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Q. And even assuming for the sake of discussion that the blade got down to asphalt level, you recognize that every bit of snow cannot be removed, correct?
A. Correct.
Q. Because in Michigan there's always residue of snow, correct?
A. Correct.
Q. And even if there's residue of snow, it can become packed again and become slippery? You understand that?
A. Correct.
Q. And you understand the temperature fluctuation in Michigan, even if the blade gets down to asphalt level, there can be a refreeze and a slippery condition? You know that, correct?
A. Correct.
Q. And again, as it relates to exactly what they did or did not do in the winter of 2013-2014, you do not know what T&J's did, correct?
A. Correct.
MR. GABEL: Okay. No further questions.
MR. BARATTA: Mark this, please, Exhibit 2.
DEPOSITION EXHIBIT 2
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
RE-EXAMINATION BY MR. BARATTA:

Q. We've marked Deposition Exhibit 2. I'm going to try and make it as quick as I can. The letters that you said, the correspondence you said you saw from Mr. Sage to the Chakani brothers where you described that they would owe certain things that were done on the property and they would owe their share of it, do you recall that testimony?
A. Yes.
Q. I'm going to show you what's been marked as Exhibit 2. Do you recognize that?
A. I do. Well --
Q. Have you ever seen that letter, that specific letter before?
A. Not this specific letter.
Q. Okay. Have you ever seen a letter from Sage Investment Group, LLC similar to that letter?
A. Yes, many of them.
Q. Okay. That letter indicates that there are some charges it looks like from Detroit Edison, T&J Landscaping, general maintenance, B.F. Domzalski it looks like insurance and then taxes.
A. Correct.
Q. Do you see that?
A. Yes.
Q. And then you see there's a Dimitre's restaurant with

the square footage indicated, pro rata square feet, how much they owed and what they prepaid?
A. Yes.
Q. Did Mr. Chakani ever indicate that he prepaid for some common area maintenance on the property?
A. No.
Q. But you've seen letters like this before --
A. Yes.
Q. -- wherein Mr. Sage or his company demanded money for expenses related to maintenance of the subject property?
A. Yes.
MR. BARATTA: I don't have anything else.
MR. STEINER: I think I'm all set.
RE-EXAMINATION BY MR. GABEL:
Q. You haven't seen any documentation from T&J's, have you?
A. No.
MR. GABEL: Nothing further.
(The deposition was concluded at 6:10 p.m.; signature of the witness was not requested by counsel for the respective parties hereto.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Gail R. McLeod, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth, that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party nor interested in the event of this cause.

Gail R. McLeod, CSR 2901
Notary Public,
Macomb County, Michigan

My Commission expires: September 23, 2017

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EXHIBIT C

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2016 WL 6139110
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Jack BARCH, Plaintiff–Appellant,
v.
RYDER TRANSPORTATION SERVICES, Ryder Integrated Logistics, Inc., and Total Logistic Control, LLC, Defendants–Appellees.

Docket No. 327914.
|
Oct. 20, 2016.

Van Buren Circuit Court; LC No. 14–640261–NO.

Before: K.F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

Opinion

PER CURIAM.

*1 Plaintiff, Jack Barch, appeals as of right the trial court's order granting summary disposition to defendants, Ryder Transportation Services, Ryder Integrated Logistics, Inc., and Total Logistic Control, LLC (collectively, Ryder). We affirm.

I. FACTUAL BACKGROUND

Barch testified at his deposition that he was employed as a truck driver. On February 13, 2012, he was scheduled to deliver ice cream to Ryder's facilities. It was a snowy day and Barch was aware that the parking lot was covered with "[l]ight snow over what I figure was, you know, being icy underneath." When Barch arrived, he parked his truck and walked across the parking lot to the office to receive further instructions about where to unload it. There was no clear path across the parking lot. After walking about ten yards, he slipped and fell on his shoulder.

According to Barch, he went into the office and attempted to report the incident, but the office employee would not accept his report. The employee took Barch's bill of lading and assigned him to a loading dock, where Barch needed help to unload his truck because he was unable to reach high enough to operate the doors. After unloading his truck, Barch arranged for another driver to complete his next delivery.

As Barch drove out of the parking lot, he realized that he had hurt his arm badly, and he stopped the truck. Barch testified that he parked the truck in the middle of the parking lot, "where the cars are parked for the office," and went in to speak with the office employee. Again, the employee would not allow Barch to fill out an accident report, so he returned to his truck, called his employer on his cellular phone, and created an accident report for himself. Barch returned to his employer and was eventually diagnosed with a torn rotator cuff in his shoulder, which required surgery.

Barch filed a complaint against Ryder, alleging that the hazard posed by the icy parking lot was effectively unavoidable because Ryder required him to park in a certain area and traverse the parking lot from his truck to the office. Ryder moved for summary disposition, contending that Barch could have chosen not to confront the hazard. The trial court granted summary disposition to Ryder, concluding that the danger was not effectively unavoidable because Barch could have chosen other options than traversing the icy parking lot. Barch now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Gorman v. American Honda Motor Co., Inc.*, 302 Mich.App 113, 115; 839 NW2d 223 (2013). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

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III. ANALYSIS

*2 Barch contends that the trial court erred when it determined that there was no genuine issue of material fact regarding whether the hazard posed by the icy parking lot was effectively unavoidable because Barch had no choice but to cross the icy parking lot. We disagree.

A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v. McLouth Steel Prods. Corp.*, 440 Mich. 85, 96; 485 NW2d 676 (1992). A premises owner has a duty to protect invitees—persons who enter the owner's premises at his or her express or implied invitation—from hidden or latent defects on his or her property. *Id.* at 90–91. The open and obvious doctrine provides that the premises owner does not have the duty to warn invitees of conditions "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them [.]" *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 500; 418 NW2d 381 (1988).

However, a premises owner may be liable even for open and obvious dangers in some narrow circumstances. *Hoffner v. Lanctoe*, 492 Mich. 450, 472; 821 NW2d 88 (2012). A landowner may be liable if the open and obvious danger has special aspects "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 517; 629 NW2d 384 (2010). Special aspects include hazards that are "effectively unavoidable" or that present "a substantial risk of death or serious injury[.]" *Id.* at 518. To be effectively unavoidable, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Hoffner*, 492 Mich. at 468. "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard v. Oakwood Annapolis Hosp.*, 308 Mich.App 403, 412; 864 NW2d 591 (2014).

In this case, Barch failed to provide support for his assertion that he could not have parked his truck in any other location to avoid the hazard. To the contrary, Barch testified at his deposition that, as he was leaving the facility, he parked his truck near where the cars parked for the office. Barch was not physically trapped. Additionally, there was evidence that Barch had a cellular telephone in his possession and could have either called Ryder to report the conditions, see *Bullard*, 308 Mich.App at 413, or called the office to make other arrangements to deliver his bill of lading and receive his delivery bay assignment. We conclude that the trial court did not err when it determined that Barch did not present evidence showing a genuine issue of material fact regarding whether the icy parking lot was effectively unavoidable.

We affirm. As the prevailing party, Ryder may tax costs. MCR 7.219(A).

All Citations

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EXHIBIT D

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2011 WL 4469529
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Mary A. WALDER, Plaintiff–Appellant,
v.
ST. JOHN THE EVANGELIST PARISH, a/k/a The Ordinary (Bishop) of the Roman Catholic Diocese of Lansing in Trust for St. John the Evangelist, Defendant–Appellee.

Docket No. 298178.
|
Sept. 27, 2011.

Genesee Circuit Court; LC No. 09–091572–NO.

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was on her way to help out with a bingo game when she slipped and fell in defendant's parking lot. She broke her ankle and required surgery. On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant on the basis of the open and obvious doctrine. Plaintiff argues that there were "special aspects" that made the icy condition of the parking lot effectively unavoidable. Plaintiff contends that, in order to reach the alternative rear entrance, she would still have had to cross the icy parking lot from her handicap parking spot; the alternative rear-entrance area and alternative parking lot were also ice-covered; and she was scheduled to work and thus had to cross the ice in order to enter the building. Plaintiff asserts that she raised a genuine issue of material fact regarding whether there was a "special aspect" of the open and obvious danger that precluded summary disposition.

We review de novo the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). *Oliver v. Smith*, 269 Mich.App 560, 563; 715 NW2d 314 (2006). In *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362–363; 547 NW2d 314 (1996), the Michigan Supreme Court explained the evidentiary requirements applicable to MCR 2.116(C)(10):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v. Ameritech Corp, Inc*, 464 Mich. 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not required to protect an invitee from open and obvious dangers, unless there are special conditions making the danger unreasonable. *Id.* at 517. An open and obvious danger is one that an average user with ordinary intelligence would have been able to discover upon casual inspection. *Joyce v. Rubin*, 249 Mich.App 231, 238; 642 NW2d 360 (2002). This is an objective test, and the court considers whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.* at 238–239.

*2 In this case, plaintiff does not dispute that the icy condition of defendant's parking lot was an open and obvious danger, but she contends that special

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aspects of the condition created an unreasonable risk of harm. A premises possessor has a duty to undertake reasonable precautions to protect invitees if special aspects of a condition make even an open and obvious risk unreasonably dangerous. *Lugo*, 464 Mich. at 517.

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. *Joyce*, 249 Mich.App at 242. 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. *Id.* at 593--594. Consequently, the ice was effectively unavoidable. *Id.* 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.

Affirmed.

SHAPIRO, J. (dissenting).

*2 I respectfully dissent.

On February 27, 2008, plaintiff, Mary Walder, age 74, was to work as a bingo caller at defendant's church.[1] Because she had health problems for which she was prescribed a handicap parking tag, plaintiff parked in one of the parking spots reserved and marked for handicap parking on the front side of the church. To get from the handicap parking to the entrance, one must walk across the surface of the parking lot. There is no dedicated walkway or sidewalk by which plaintiff or any other person could avoid doing so. Plaintiff testified that she did not see any ice in the parking lot as she exited the car, but that on her second step, she slipped and fell on black ice. She suffered a bimalleolar fracture of her right ankle. Given the severity of the fracture, surgery was required, and a plate and 10 screws were internally affixed to her ankle bones in order to reconstruct the joint.

*3 The weather records reveal that on the day before plaintiff's fall, slightly less than two inches of snow fell. The snow was plowed sometime that day by a snowplow company with which defendant contracts. At some point after the snowfall, the temperature rose above freezing. The following day, the day of plaintiff's fall, there was no precipitation and the temperature remained below freezing all day. Defendant's business manager testified that his custodial staff salts the sidewalks and handicap parking spots as needed, but will not apply salt to any portion of the parking lot other than the handicap parking, even if they see that it is icy. Defendant concedes that they do not have the snowplow company apply any salt at all.

Plaintiff filed suit alleging that she slipped on black ice and that defendant had negligently maintained its parking lot by failing to take any action to eliminate or reduce the presence of the ice despite a period sufficient to provide defendant with notice of the condition. Defendant filed a motion for summary disposition. The trial court granted the motion, having found that there was no question but that the hazard fell within the "open and obvious" doctrine. The trial court further found no question of fact that there was a reasonably safe alternative path available to plaintiff at the time of her fall, thus obviating plaintiff's claim that, even if the ice was "open and obvious," it was "effectively unavoidable," as described in *Lugo v. Ameritech*, 464 Mich. 512; 629 NW2d 384 (2001). Plaintiff appeals, not from the trial court's conclusion that the appearance of the ice was within the "open and obvious" doctrine, but rather from the trial court's conclusion that

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there was a reasonably safe alternative path available to her.

According to the record, the church had two entrances, one in the front and one in the back. Each had an adjacent parking lot. There was also a side parking lot, but no side entrance. Charlene and Richard Hamper, husband and wife, were at the church on the day of the incident and on the day prior and each testified as to the conditions. Charlene Hamper testified that on the day before plaintiff's injury, they were at the church and she saw the parking lots on both sides:

> We had to go over the day before for something, and whoever had plowed the lot, I told my husband, I said, "I don't know what they got paid, but if it was $5, they got overpaid." And he said "This is sad because," he said, "it's going to melt and it's going to be icy." That's what happened.

Charlene also testified as to the conditions the next day, i.e. the day of plaintiff's fall and injury. She agreed that her "predictions came to fruition." She testified that she and her husband parked in the back lot and that there was black ice in that parking lot and that it was bad enough that her husband got some salt out of his car to spread. She testified that he did so "because we have a lot of elderly people. In fact we've had some fall." When asked if there was black ice in the front parking lot on the day of plaintiff's injury, she testified, "I can swear there was in the back.... I was not in the front parking lot. But it would be my assumption if it's in the back, it's going to be in the front." [2] She testified that the black ice was worse in the areas where cars actually park because there are many "indentations" in the parking spots. She also testified that she told "Steve," [3] "you need to get somebody out there [with a salt] spreader."

*4 Richard Hamper also testified as to the conditions of the parking lot on the evening of plaintiff's fall. He stated that when he and his wife arrived at 5:00 p.m., the parking lot "was in bad condition." He further described the lot as "very bad. You had to be very careful. And it—it had been salted on the sidewalk part of it but the parking lot didn't indicate there had been any salt applied to that." He confirmed that he spread some salt that he kept in his car trunk. Consistent with his wife's description, he testified that "during the night before this bingo it had froze, and it was ice, snow and—it was just—it was just a mess."

The majority concludes that *Robertson v. Blue Water Oil Co.* 268 Mich.App 588, 590; 708 NW2d 749 (2005) is inapplicable because "after she fell, plaintiff was able to safely traverse an alternative route to the entrance." I do not agree. First, there is no evidence that whatever route plaintiff took into the building after her fall was ice-free or even relatively so. Rather, there was simply evidence that she did not fall again. The fact that plaintiff was able to traverse over an icy area without falling, as, presumably, did the other bingo helpers and participants, does not remove this case from the realm of *Robertson.* Indeed, it is safe to assume that the gas station in *Robertson* had other patrons that made it into the building without falling that day, but that did not preclude the ice from being deemed effectively unavoidable. To be effectively unavoidable, a hazard is not required to make everyone, or even a high percentage of those who traverse over it, fall. Rather, it simply means that everyone must traverse over or through it, such that there is no way to avoid the *risk* of falling. This is most evident from the example of an effectively unavoidable hazard from *Lugo*—only one exit for the general public where the floor is covered with standing water. Standing water on a floor will not cause everyone, or even, necessarily, any of the people traversing it, to fall. It is effectively unavoidable because everyone must *risk* slipping and falling in order to exit the store.

For this simple reason, the existence of an alternative path does not, by itself, rectify the unavoidability. Rather, the alternative path must *not* include the risk associated with the hazard. Thus, if there are two exits for the general public to use, but they are both covered with standing water, the result is the same. Accordingly, the existence of a back entrance to the church does not change the unavoidability of the black ice hazard where there was evidence that black ice was also present at that location. The record indicates that it made no difference through which entrance plaintiff attempted to enter the church; they all exposed her to the *risk* of slipping and falling on black ice.

The majority's assertion that the ice was not effectively unavoidable is based on its conclusion that "the evidence does not indicate that the parking lot and sidewalk area were completely covered with ice." I disagree with both the majority's conclusion that this was factually demonstrated and the majority's view that, if true, it would be controlling in this case. Richard Hamper was asked to describe the

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parking lot and he stated "it was ice." Charlene Hamper testified that there was ice in the back parking lot and distinguished it from the sidewalk which had "spots" of ice, which is consistent with defendant's policy of salting the sidewalks only. Plaintiff testified that "there was a lot of snow and ice" in the parking lot and that the ice in the parking lot had never been as bad as it was that night. Even defense counsel referred to "the sheet of ice" in his deposition questions. The sole evidence on which the majority relies for this factual conclusion is the testimony of Charlene Hamper regarding there being "spots" of ice. However, this was a statement that there were "spots on the *sidewalk* " and testimony had already established that the sidewalk had been salted, but the parking lot had not.

*5 More important, I disagree with the suggestion that, in order for ice to be actionable as an effectively unavoidable hazard, it must be continuous and completely cover the entire surface of the parking lot. I do not agree that the duty to make generally icy premises reasonably safe disappears because invitees might be able to leap from non-icy area to non-icy area through a parking lot. An obstacle course is not reasonably safe simply because it is possible to get through it unscathed. And why we as a state would find it more sensible to encourage 74–year–old women to leap over icy stretches of parking lot rather than encourage commercial premises owners to apply salt to their lots eludes me.

Defendant's assertion that the existence of a side parking lot and plaintiff's failure to provide any evidence regarding its condition precludes the condition from being effectively unavoidable lacks merit. Even assuming that the unsalted side parking lot was ice free—a meteorological miracle to be sure—there is no side entrance. Thus, even if plaintiff had parked in the side lot, she would still have had to traverse the icy area around the front entrance. In addition, defendant's business manager testified that he would expect that anyone who parked on the front side of the church would use the front doors. Indeed, he testified that it would be "unreasonable" for someone to park in the front of the church and then walk all the way around to enter through the back doors. Why, then, is it anything other than unreasonable to assert that a handicapped individual should be forced to utilize a parking space on a side of the building with *no* entrance?

As to the back entrance, there are no proofs that handicap parking spaces existed on that side of the building. In addition, plaintiff testified that she was unaware that the back door was unlocked. Indeed, to determine if it was unlocked, she would have had to park in back and traverse over the icy area to check the door. Ironically, had plaintiff done so and fallen while doing so, defendant would simply have reversed the roles of the front and back entrances in its argument and asserted that the ice in the pathway to the backdoor was open and obvious and that the front entrance constituted an alternative path.

Defendant's position seems to be that invitees must be able to divine which entrances to any particular building are open and, as among the multiple choices, carefully inspect each of them before deciding which entrance to attempt, and woe be it on the invitee who happens to select an entrance where, ultimately, the trial court determines that a less icy entrance existed. To expect plaintiff, a person who has been prescribed a handicap parking sticker, to park further away from the entrance and walk a longer distance around the building on the *chance* that it *might* be safer is to stretch the open and obvious doctrine to the point of farce.

Moreover, there are many businesses with entrances of which the general public is unaware. Invitees are not required to drive around buildings attempting to locate every single entrance and correctly assess their relative safety before embarking across a parking area toward an entrance. This position is even more absurd when one considers that plaintiff went to the *front* door. Why invitees should ever assume, unless they have been instructed otherwise, that a side or back entrance will be better tended than a front/main entrance is difficult to understand. Invitees ought to be able to at least assume that all front/main entrances are equal unless there is clear evidence to the contrary.[4] In any event, the repudiation of a defendant's duty to maintain a reasonably safe premises applies only where the hazards are "apparent on casual inspection" by an invitee, not where they are discoverable by an invitee as a result of a detailed investigation. *Novotney v. Burger King Corp.* 198 Mich.App 470, 474; 499 NW2d 379 (1993).

*6 Because plaintiff presented evidence that the icy condition was effectively unavoidable, I would reverse the trial court's grant of summary disposition and remand for trial.

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All Citations

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Footnotes

1 At this point in the litigation, it is not disputed that plaintiff was an invitee.

2 The deposition pages provided only go through page 25, which cuts off the phrase "going to be in the front." However, the remainder of the quote is provided within the text of the brief and there is no contention that this was inaccurately quoted.

3 It is unclear from the record who "Steve" is.

4 For example, where it is evidence that one entrance has been plowed and another has not, or where orange construction cones evidence potholes or other hazards around one entrance but not another, or even the existence of a sign advising patrons to use a different entrance.

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EXHIBIT E

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In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

Ayman Shkoukani

March 23, 2017

Court Reporting and Video

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Ayman Shkoukani
March 23, 2017

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,
Plaintiff,
vs. Case No. 2016-001819 NI
HON. EDWARD A. SERVITTO
SAGES INVESTMENT GROUP, LLC, a
Michigan limited liability company, and
T&J LANDSCAPING & SNOW REMOVAL, INC., a
Michigan corporation,
Defendants.

The Deposition of AYMAN SHKOUKANI,
Taken at 25800 Northwestern Highway, Suite 400,
Southfield, Michigan,
Commencing at 2:05 p.m.,
Thursday, March 23, 2017,
Before Lisa M. Fix, CSR-3121.

APPEARANCES

CHRISTOPHER R. BARATTA, ESQ.
BARATTA & BARATTA
120 Market Street
Mount Clemens, Michigan 48043
Appearing on behalf of the Plaintiff.

STEVEN R. GABEL, ESQ.
THE HANOVER LAW GROUP
25800 Northwestern Highway, Suite 400
Southfield, Michigan 48975
Appearing on behalf of the Defendant, T&J Landscaping.

MARK W. STEINER, ESQ.
SEGAL MCCAMBRIDGE
39475 13 Mile Road, Suite 203
Novi, Michigan 48337
Appearing on behalf of the Defendant, Sage's.

JAMES MOLLOY, ESQ.
SECREST WARDLE
2600 Troy Center Drive
Troy, Michigan 48007
Appearing on behalf of the Witness.

TABLE OF CONTENTS

WITNESS	PAGE
AYMAN SHKOUKANI	
EXAMINATION BY MR. BARATTA:	6
EXAMINATION BY MR. STEINER:	29
EXAMINATION BY MR. GABEL:	42
RE-EXAMINATION BY MR. BARATTA:	43

EXHIBITS

EXHIBIT	PAGE
(Exhibits attached to transcript)	
DEPOSITION EXHIBIT 1 (CAM)	23
DEPOSITION EXHIBIT 2 (Lease Agreement)	37

Southfield, Michigan
Thursday, March 23, 2017
2:05 p.m.
* * *

AYMAN SHKOUKANI,
was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. BARATTA: The record will reflect that this is the deposition of Tom Shkoukani, taken pursuant to Notice, to be used for all purposes consistent with the Michigan Court Rules.

My name is Chris Baratta, and I represent Donna Livings. How are you?

THE WITNESS: Very good.

MR. BARATTA: Good. Have you ever had a deposition before?

THE WITNESS: No.

MR. BARATTA: Okay. A few ground rules. When I ask you a question, I'm going to ask that you give me a verbal response, yes, no, not uh-huh, uh-uh, or nodding or shaking your head, because this lady to your right, she's writing everything down --

THE WITNESS: Okay.

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Ayman Shkoukani
March 23, 2017

Page 5

MR. BARATTA: -- okay? Okay?
THE WITNESS: Sounds good. Yeah, okay.
MR. BARATTA: That's the first rule. If you don't remember something, if you don't know something, that's an acceptable answer.
THE WITNESS: Okay.
MR. BARATTA: I'm only interested in what you know or don't know. If you want to take a guess, let me know that you're guessing at something, okay?
THE WITNESS: Okay.
MR. BARATTA: If you don't understand what I'm asking you, let me know that you don't understand me.
THE WITNESS: Okay.
MR. BARATTA: All right? And if you need to take a break at any time, we can take a break.
THE WITNESS: Yeah.
MR. BARATTA: If there's a question that's pending, though, I'm going to ask you to answer the question before you go on your break.
THE WITNESS: Okay.
MR. BARATTA: All right. Terrific.
May I call you Tom?
THE WITNESS: Yes.
MR. BARATTA: Thank you.

Page 6

EXAMINATION
BY MR. BARATTA:
Q. What is your full name, please?
A. Ayman Shkoukani.
Q. All right. And your address?
A. 19203 Rose Garden Street, Roseville, Michigan, 48066.
Q. Your date of birth?
A. 04-13-67.
Q. Coming up soon.
A. Uh-huh. Yeah.
Q. Fifty?
A. Fifty, yeah.
Q. You'll be 50 soon?
A. Yeah.
Q. Nice.
Were you born in the United States?
A. No.
Q. Born in Palestine?
A. Yeah. Yes.
Q. When did you come here?
A. Um, I think like 1998, '97, something like this.
Q. Okay. Did you graduate from high school?
A. Back home.
Q. Okay. Any education or training beyond high school?
A. Well, I did like electrician in high school.

Page 7

Q. Okay.
A. So I used to work electrician.
Q. In Palestine?
A. Palestine, yeah, and I work here, too.
Q. Okay. Were you ever employed as an electrician in the United States?
A. Yes.
Q. Any other education, schooling besides your high school and your vocational training to be an electrician in Palestine?
A. No.
Q. Okay. Are you currently employed?
A. Yes.
Q. Where are you employed?
A. Right now I'm employed with Dominion Technology Group.
Q. Dominion Technology Group?
A. Yes.
Q. And what is that?
A. We build machines for the Chrysler and GM. So I work electrician for the building the machine.
Q. Are you an owner of that company?
A. No.
Q. Just an employee?
A. Just an employee, yeah.
Q. And how many hours a week do you work there?

Page 8

A. Well, normal hours, 40 hours, but usually like 50 hours pretty much.
Q. How long have you been working for this company?
A. Um, well, I used to work before I bought the restaurant.
Q. Okay.
A. I work there like around seven years, and when I bought the restaurant I quit, and I just went back recently, like last year.
Q. About 2016?
A. In January 2016, yeah.
Q. So if I understand some of the records that I've reviewed already, just to save a little bit of time, you bought the restaurant, Grand Dimitri's in approximately 2004, correct?
A. Yes.
Q. Okay. And did you buy that with anyone in particular?
A. Me and my brother.
Q. Your brother's name is?
A. Jamal Shkoukani.
Q. You guys are 50/50?
A. Yes. Well, I mean we have like partner, like my other brother, like, you know, ten percent, five percent, you know, just like share in the whole family, but me and my brother are the one who work in it.

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Ayman Shkoukani
March 23, 2017

Page 9

Q. You guys are actually the operators?
A. Yeah.
Q. And so from 2004 until 2016, approximately, your full-time job was at the restaurant?
A. Grand Dimitri's, yes.
Q. And what were your specific job duties at the restaurant? Were they manager in charge of everything, or were you, you know, in the kitchen, were you in the front of the house?
A. Well, I'm in charge like pretty much everything. Jamal, he used to do like all the paperwork.
Q. Okay.
A. He used to work like two days a week, and, you know, like do the paperwork and all the other stuff.
Q. So you were the guy who was hands-on every day being the manager?
A. Yes.
Q. You oversaw the kitchen?
A. Yes.
Q. You did the food ordering?
A. Yes.
Q. No liquor license?
A. No.
Q. You directed someone to do the waitresses schedules --
A. Yes.

Page 10

Q. -- or you did them yourself?
A. Well, sometime like we have a head waitress, sometime we don't. So if we had a head waitress she do it, if we don't, I do it. But we don't change the schedule, you know, like recently, so we make a schedule and it's good for the whole -- the whole time, unless, you know, somebody requests time off or somebody quit, you know --
Q. Okay.
A. -- we change it.
Q. And you would also handle any customer complaints or issues that would arise?
A. Yes.
Q. Okay. I'm going to go to 2014 -- the 2013-2014 winter. Your duties were those that you just described, they were the same back then, too, right?
A. What is it, I'm sorry?
Q. Meaning you were a manager of your restaurant at that same time period?
A. Yes.
Q. We're here to talk about a fall Donna Livings had on the property, 25001 Gratiot in Eastpointe. That fall was February 21st of 2014. Are you aware of that incident?
A. Yes, sir.

Page 11

Q. Okay. How did you become aware of that incident?
A. Well, I -- you know, I come in, I used to go the restaurant everyday at 9:00 o'clock. So when I went there on that day, she told me I fell in the parking lot, and, um, I went home and I change my clothes. I said okay, I mean where did you fell? She said in the back building. So I -- she said it's like a lot of water right now, it's puddle of water right now over there. So I said okay, let me take a look, see what's going on. And I went there, it was like a lot of water. The city drain line, it was like a block, like the water doesn't drain. So I look at it, and I said well, it looks like it's got drain line not taking the water. So I went back to the restaurant, I grabbed sticks and I try to like, you know, tried to find the hole for the city water.
Q. So you poked the sticks in the drain?
A. I poke the stick in the drain, and it's like, you know, five minutes everything is done.
Q. So you actually found -- there was maybe some debris or leaves in there, or something like that that clogged the drain?
A. I think it was like the leaves, and there was a little -- like a little ice, because it used to like get very cold and like at nighttime, and like warm weather in

Page 12

the morning. So it's like, you know, how they shovel the ice, they put them against the wall. When it gets warm, you know, the water started dripping.
Q. Runoff?
A. Runoff. And when it freeze at nighttime it's like, you know, a lot of frozen water.
Q. Yes.
A. So I think like the night before, I mean I'm not hundred percent remember, but I think it was like a nice warm weather, so it melt like a lot of the ice, so it's like filling up with water, and the water doesn't go nowhere. And I asked Donna, I said don't you see all the water in there? Why you parking there? I mean the water was like a little bit too high. It was up to the --
Q. Ankle?
A. Yeah, very much. So actually when I drain it, I mean I soak my foot. And it wasn't like cold weather, I couldn't remember it was cold weather on that day.
Q. Did you notice any snow in the parking lot that morning?
A. Um, snow, no. It wasn't snowing before, like I think two days before or three days before.
Q. Not whether it was -- not whether it was snowing or precipitating, did you notice any snow in the parking

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Ayman Shkoukani
March 23, 2017

Page 13

1 lot that morning that she told you she fell?
2 A. No, like where she fell it was water.
3 Q. Was there anyplace in the parking lot where there was
4 snow or ice that you observed?
5 A. Um, I couldn't really remember, no.
6 Q. You remember water, correct?
7 A. Yes.
8 Q. You do not remember if there was snow or ice that
9 morning; is that correct?
10 A. I remember, like I think like the drain line, the city
11 line, it was like covered with ice, you know, leaf
12 plus ice. Because like, you know, when you get the
13 warm weather the top like start melting and the bottom
14 still like frozen, like, you know, it's going to take
15 awhile to melt, but it was like -- I think it was a
16 sheet of ice underneath -- underneath the water. So
17 when she stepped like from her car to the water, it
18 was like a little ice underneath the water. You
19 understand?
20 Q. Yes, I do.
21 How big was the sheet of ice under the
22 water, do you know?
23 A. No, I don't know, but it wasn't like thick, because
24 when I grabbed the stick I broke it and it just --
25 like I said, within two minutes it's all down.

Page 14

1 Q. Do you have any recollection of whether or not you
2 observed any snow or ice, other than the ice you
3 described around the drain, in the parking lot that
4 morning?
5 A. Um, I couldn't remember, no.
6 Q. Okay. What did Donna tell you about her fall? Did
7 she tell you why she fell, or how she fell, anything
8 like that?
9 A. Um, not really. She said it's slippery where I park,
10 and when I ask her, I said I mean it's like full of
11 water, why you park there? Because the first waitress
12 when she come in, which is Debbie, I think she tried
13 to park there, and when she saw it was a lot of water
14 she move her car and she moved back to the side where
15 there's no water. The first waitress.
16 Q. Did Donna park in the area of the parking lot where
17 she was supposed to?
18 A. Yeah. Yeah.
19 Q. Do you see -- I'm going to show you a copy of
20 Exhibit 1 in Miss Livings' deposition. This
21 photograph, do you recognize this area in this
22 photograph?
23 A. Yes, that's pretty much like where -- yeah.
24 Q. Is that where the employees are supposed to park?
25 A. Yeah, I mean the whole thing, like around the whole

Page 15

1 wall.
2 Q. That wall?
3 A. Yeah, but this area in here, this is the drain line.
4 Q. Where the X is circled --
5 A. Yeah.
6 Q. Okay. Is the drain?
7 A. So all the water, you know, when get the water if the
8 drain is not there, like everything is going low.
9 Q. Everything slopes down toward the drain?
10 A. Yeah, very much. So that's like where it was like the
11 water, the puddle of water.
12 Q. Okay.
13 MR. GABEL: Could you just ask where he put
14 his finger when he said this is where they park? I
15 just want to clarify the record for that.
16 MR. BARATTA: Sure. I think he put his
17 finger, correct me if I'm wrong, he was pointing
18 against the wall that we see in the photograph there,
19 the wall -- it's the white brick wall that we see
20 towards the top of the photograph.
21 MR. GABEL: Yeah, more toward the right
22 side --
23 MR. STEINER: Yeah.
24 MR. GABEL: -- of the photo?
25 MR. BARATTA: Correct.

Page 16

1 MR. GABEL: Right to -- it's the one toward
2 the right side of the photo?
3 MR. BARATTA: Correct.
4 MR. GABEL: Thank you.
5 MR. MOLLOY: Away from the building?
6 THE WITNESS: Yes.
7 BY MR. BARATTA:
8 Q. The X circled is where -- roughly where the drain is
9 that you just described?
10 A. Yes.
11 Q. And do you recall, do you see that rectangle here in
12 the photograph? This rectangle --
13 A. Yes.
14 Q. -- that's drawn in?
15 A. Yes.
16 Q. Do you have a memory of where Donna parked her car
17 that day?
18 A. Um, not really, because when I come in she actually --
19 like when she fell she got all her clothes wet, so she
20 went home, change her clothes and come back. So I
21 didn't see like Donna wet or anything.
22 Q. And she finished her shift, right?
23 A. Yes, she worked full shift. That's what I asked, do
24 you need anything? Do you have to go to the clinic or
25 anything? She said no, I'm fine, I don't have

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Ayman Shkoukani
March 23, 2017

Page 17

1 anything.
2 Q. Did she work for you for a long time?
3 A. Yes.
4 Q. About ten years?
5 A. Well, I mean she was working for me since we bought
6 the place, so she was an employee when I bought the
7 place.
8 Q. Okay. So from roughly 2004 to 2014?
9 A. Yeah.
10 Q. Was she a good waitress?
11 A. Yes.
12 Q. Good employee?
13 A. Yes.
14 Q. Are you aware of any witnesses to Donna's fall?
15 A. Um, no, I don't think anybody see her fall.
16 Q. Did you talk to anybody else about Donna's fall?
17 A. Um, what do you mean, like --
18 Q. Like did you talk to Debbie Buck about Donna's fall?
19 Did you talk to your brother about Donna's fall? Did
20 you talk to Jim Sage?
21 A. Not really. Like I say, she make it like there's
22 nothing going on. She fall, she change her clothes.
23 It wasn't like -- it wasn't like a big deal, you know
24 what I'm saying? It was like okay, fell down with the
25 water, I went home and I changed my clothes.

Page 18

1 Q. Do you remember if she worked the next day?
2 A. Yes, she did.
3 Q. Did she work her whole shift?
4 A. Yes.
5 Q. Did she work after that?
6 A. No, that's when she said I think I might go to the
7 clinic and check on my back.
8 Q. And that was her last day of work?
9 A. Yep, it was. It was Friday and Saturday, so she work
10 a Friday and Saturday.
11 Q. Okay. But getting back to my question. You don't
12 recall having any conversations with anyone else
13 besides Donna about Donna's fall; is that correct?
14 A. Um.
15 Q. I mean I know you talked with your attorney.
16 A. Yeah, can you repeat the question again?
17 Q. Sure. Aside from talking to Donna about the fall, do
18 you have any memory of talking with anyone else about
19 Donna's fall?
20 A. Not like in the same time, no. I ask the waitress,
21 you know, what's going on, what happen? And, you
22 know, like they said it's like puddle water there and
23 she park in the middle of it and she say she fell.
24 Nobody see her if she fell, but all the other
25 waitress, when they see the water they kind of move

Page 19

1 like to the other side and park a little bit away from
2 the water.
3 Q. So when you say they, the waitresses, who are you
4 referring to?
5 A. Well, there is, you know, her and Debbie, the one she
6 used to open, they come in at 6:00 o'clock.
7 Q. Yeah.
8 A. I think there's another two waitress, they come in at
9 9:00 o'clock, Maria and Sandy, they come in around
10 9:00 o'clock.
11 Q. Okay.
12 A. Who else? The bus girl she used to work, she come in
13 at 7:00 or 8:00 o'clock, and I go there around 9:00
14 o'clock.
15 Q. Okay. Do you have a Lease Agreement with Sage's?
16 A. We never like did any Lease Agreement. Like when we
17 bought the place, the lease was like very much expire
18 and we never do new lease. We kept saying we need to
19 make a new lease, but we never did a new lease.
20 Q. So no lease?
21 A. No.
22 Q. Was Grand Dimitri's responsible to plow the parking
23 lot?
24 A. No.
25 Q. Was Grand Dimitri's responsible to salt the parking

Page 20

1 lot?
2 A. No.
3 Q. Do you know who's responsibility that was?
4 A. Well, usually Jim Sage do the parking lot.
5 Q. Was there any responsibility on the part of Grand
6 Dimitri's to maintain the outside of the premises as
7 far as snow maintenance or salting or ice removal, or
8 anything like that?
9 A. No, nothing.
10 Q. Okay.
11 A. I mean usually just take care of the front door, just
12 put like snow -- salt, you know, like the sidewalk.
13 Q. Where the customers would come in?
14 A. Yeah, where the customer comes in.
15 Q. Other than salting around the front door, Grand
16 Dimitri's did not perform any maintenance on the
17 outside of the property; is that correct?
18 A. Yes.
19 Q. Do you know who T&J Snow Removal Services is? Do you
20 know who that company is?
21 A. I see them in the parking lot, but I don't have any
22 work with them. I only talk to them or -- I don't
23 have any relationship with him.
24 Q. So you never talked to the guy?
25 A. Not really, no. I don't even have their phone number.

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Page 21

Q. You didn't hire T&J to come and perform snow services on the property?
A. No.
Q. And obviously, then, you never set the terms for T&J as to when snow was to be removed, or ice or salt on the property, you didn't set any of the terms of the contract?
A. No, I didn't have any control of that.
Q. Did you ever pay T&J Snow Removal Company for any services they performed on the property at any time?
A. Never pay, no.
Q. Did Jim Sage ever tell you that you -- you, meaning Grand Dimitri's, needed to hire a snow removal contractor on the property?
A. No.
Q. How long did these drain issues exist in the parking lot that you discussed which were present in 2014?
A. Well, like I say, as soon as I broke the hole it disappeared.
Q. I understand that.
A. Takes like five minutes.
Q. So there was a problem with the drain at least in February of 2014, right?
A. Yes.
MR. STEINER: I'll object just as to the

Page 22

characterization of his testimony, but --
BY MR. BARATTA:
Q. Okay. So did you ever -- strike that.
Do you have any knowledge of any other times where that drain didn't drain water as you described the one time when you saw it in February 14th --
A. Oh, okay.
MR. MOLLOY: Wait for him to finish his question, okay?
BY MR. BARATTA:
Q. Are you aware of any other times that that drain didn't function or backed up?
A. No.
Q. So only this one time?
A. Yes.
Q. Never before?
A. No.
Q. Never since?
A. No, not that I remember, no.
Q. Okay.
MR. STEINER: And that's when you say no, that's correct?
THE WITNESS: No, not that I remember. Like not remember happening.

Page 23

MR. STEINER: Just to keep the record clear, that's correct, those statements that you don't recall?
THE WITNESS: What do you mean?
BY MR. BARATTA:
Q. Tom, what he's asking you is just to say whether I was correct in my assumption. So let me ask it again just so we're clear. I want you to respond by saying correct or incorrect.
A. Okay.
Q. Other than the one time in February of 2014 when you noticed a problem with the drain in this particular parking lot, you are not aware of any other times that this drain had a problem or issue draining water, correct?
A. Correct.
Q. Okay. Are you aware of any other persons that fell in this parking lot at any time in 2014?
A. No.
MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 1.
BY MR. BARATTA:
Q. I'm going to show you what has been marked as Exhibit Number 1.
MR. BARATTA: I've got a copy for you,

Page 24

Steve --
MR. GABEL: Yeah.
MR. BARATTA: -- and Mark.
MR. GABEL: I just want to look at the date. Yeah, that's fine.
MR. BARATTA: Yeah, it's the right date.
MR. GABEL: Thank you.
BY MR. BARATTA:
Q. So Tom, I'm showing you a copy of a letter from Sage's Investment Group, LLC that's dated July 1st, 2014.
A. Yes.
Q. It is addressed to Dimitri's Restaurant. Do you see that?
A. Yes, sir.
Q. Do you recall seeing this letter?
A. What?
Q. Do you recall ever seeing this letter before?
A. Did I see this letter before?
Q. Have you ever seen it before?
A. Oh, yes.
Q. I mean your brother takes care of the bills and stuff?
A. Yeah. Oh, yeah, I get one like every year.
Q. You get one a year, right?
A. Yeah.
Q. And describe for me what it represents to you. What

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Page 25

1 does this letter mean?
2 A. Well, Jim Sage charge for all these stuff on the bill,
3 and he divided them by the square footage for each
4 like tenant over there, and that's how much I supposed
5 to pay him, like the difference in my square footage
6 for the electric, the snow removal, the grass.
7 Q. The taxes?
8 A. The parking lot, take care of the parking lot, the
9 tax, and I think the insurance for the building.
10 Q. Okay. My understanding from looking at this letter is
11 that Dimitri's pre-pays these Common Area Maintenance
12 expenses charges, commonly known as CAM. Are you
13 familiar with that word CAM, C-A-M?
14 A. No.
15 Q. Okay. Well, let's do it this way. My understanding
16 is that Dimitri's pre-pays some of these maintenance
17 charges that are passed on to you as a tenant; is that
18 correct?
19 A. Yes.
20 Q. Do you pay $1,250.00 a month to total 15,000 per year
21 as your estimated maintenance expenses?
22 A. No, this bill -- we pay it once a year. He give me
23 the bill once a year.
24 Q. I know that. I'm asking you a different question, if
25 you know the answer. It indicates in this exhibit

Page 26

1 that Grand Dimitri's pre-pays the maintenance expenses
2 in the amount of $15,000.00 per year.
3 A. Oh, yes.
4 Q. So if I do my math, I think that comes out to
5 $1,250.00 per month. Would you agree with that?
6 A. Yes.
7 Q. Does Grand Dimitri's, in addition to the base rent
8 that it pays Sage's, does Grand Dimitri's also pay
9 1,250 a month towards maintenance expenses?
10 A. Yes.
11 Q. Okay. If the maintenance expenses are less than
12 $15,000.00 per year, would Mr. Sage refund you the
13 difference?
14 A. It never happen.
15 Q. I know, but in theory --
16 A. I guess.
17 Q. -- and when they go over 15,000, you have to come up
18 with money to pay him the difference, right?
19 A. Yes.
20 Q. Okay. Last question on this exhibit for you. No, two
21 more questions.
22 Did you ever receive an invoice from T&J
23 Landscaping which verified or stated the charges for
24 services that T&J charged Sage's?
25 A. No, never.

Page 27

1 Q. Do you know how Mr. Sage came up with the figures for
2 the cost of snow removal and salting on an annual
3 basis?
4 A. No.
5 Q. Okay. Do you have an opinion as to the quality of
6 services the snow removal contractor Mr. Sage hired to
7 perform snow removal services on this property, do you
8 have an opinion as to the type of job that he did?
9 Did he perform his job well? Was it lacking in any
10 way? Do you have any opinion on that?
11 MR. GABEL: Are we talking about the time
12 in question?
13 MR. BARATTA: Um, no, this was just a more
14 general question.
15 BY MR. BARATTA:
16 Q. At any time since you've occupied and owned the
17 restaurant there --
18 A. Okay.
19 Q. -- do you have any opinion as to how this particular
20 landscape contractor plowed the snow, how he took care
21 of the property?
22 A. Um, I mean I think they was doing well. Like if I see
23 problem, like I don't remember like, you know, we have
24 a problem with it.
25 Q. You don't recall having a problem?

Page 28

1 A. No.
2 Q. Do you ever -- did you ever call Mr. Sage to complain
3 about anything?
4 A. Well, I think like one year it was snowing like almost
5 every week, you know.
6 Q. Yeah.
7 A. It was like snowing every weekend, I can remember like
8 at '12 or which year, you know, they was plowing it,
9 but sometimes like it's snowing during the morning.
10 Q. Say that again, I didn't understand you.
11 A. Like it's snowing all day.
12 Q. Yeah.
13 A. When they come in they plow it, like a car parking in
14 there, and when they move, you know, they couldn't
15 like shovel where is the parked car, where the car
16 parking.
17 Q. Right.
18 A. Sometime I call Jim and I say okay, there is -- see if
19 they can't come back and, you know, redo the parking
20 lot. That's only like --
21 Q. What would Jim say under those circumstances?
22 A. He usually says okay, I'll call them.
23 Q. Okay. Did you ever notice in 2014 whether or not T&J,
24 the snow removal contractor, whether or not that
25 contractor applied any salt to the parking lots?

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Page 29

A. No, I don't know.
Q. You don't remember, or you don't know?
A. If they like salt? I couldn't remember, no. I don't remember.
Q. Do you recall that 2014 was the winter where we had record snowfalls?
A. Um.
MR. GABEL: If you know.
MR. MOLLOY: If you remember.
THE WITNESS: I can't remember, no.
MR. BARATTA: No further questions.
MR. STEINER: Hi, sir, my name is Mark Steiner, I represent Sage Investment Group. I have just a few questions for you.
EXAMINATION
BY MR. STEINER:
Q. Did Miss Livings ever miss work for any long periods of time for any reason, that you can recall?
MR. MOLLOY: Ever, in her entire employment?
BY MR. STEINER:
Q. During her career.
A. No.
Q. Did she ever appear injured before?
A. Well, she was complaining like about her back a lot of

Page 30

time.
Q. Can you recall how often she would complain about her back?
MR. BARATTA: At what time frame are we talking about?
MR. STEINER: Well, she only worked for two days after this accident.
BY MR. STEINER:
Q. So let's say before this incident, did she ever complain about her back?
A. Yeah, she used to complain to the waitress, you know, I have a problem with my back, my back hurts, you know.
Q. Did she ever complain to you?
A. Um, not like personal, no.
Q. Do you know who she would complain about her back to?
A. Well, you know, like she used to talk to the waitresses.
Q. Which waitresses?
A. Um, I think Debbie she might, you know, like talk to Debbie, she's like friends with Debbie.
Q. Can you tell me for how long she complained about her back?
A. I couldn't remember. I mean it wasn't like, you know, everyday complaining, you know.

Page 31

Q. Can you tell me about how often? Maybe once a month, once a week, once a year?
MR. BARATTA: I'm going to object based on speculation and foundation.
THE WITNESS: No, I couldn't remember.
BY MR. STEINER:
Q. Okay. Did she say where the pain was located in her back, whether it was lower back, neck?
MR. BARATTA: Same objection. I don't think that this witness testified that he talked to her about her back.
BY MR. STEINER:
Q. Do you know?
A. No, no, I don't remember.
Q. How did you come to this information? Did Debbie tell you about this, or did you just overhear it?
A. After she fell they start talking oh, she has problem with her back before, you know, but that's the only.
Q. And they didn't give you anymore details on that?
A. No, just like they saying she was complaining, like a lot of times she complaining about her back to the waitress, not to me very much.
Q. And, of course, they wouldn't tell you if she treated for those injuries with any physicians or anything, right?

Page 32

A. No.
Q. Do you recall what Miss Livings said the condition of her back was immediately following after the incident?
A. Can you repeat that again?
Q. Okay. So you came in around 9:00 in the morning --
A. Yes.
Q. -- on the day of the incident, right?
A. Yes.
Q. And then you spoke with Miss Livings, right?
A. Yes.
Q. Do you recall what she said about her back at that time?
A. She was fine. I ask if you have anything, she said no, I'm fine, I just changed my clothes.
Q. Okay.
A. And I'm mad because my clothes was wet, you know, that's why she was mad.
Q. Did she ever tell you that she had a back problem after this incident?
A. No.
Q. So she just left work one day?
A. No, she work Friday and she work Saturday.
Q. And then after that second day --
A. After the second day she said well, I think I'm going to go check on my back. That's when she stopped

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Ayman Shkoukani
March 23, 2017

Page 33

coming in.
Q. And then did she ever talk with you about her back after that time?
A. Well, I mean she come in every once in awhile, and she said oh, they do like, you know, physical therapy to my back, and I think they, um, screw it up, you know, just talking basic stuff, pretty much.
Q. Okay. Did she ever describe how the incident happened?
A. Um, I couldn't remember, but I think she said I come out of my car, and soon as I step down I slipped.
Q. Did she ever mention a sheet of ice, or anything like that?
A. What is it, I'm sorry?
Q. Did she ever mention a sheet of ice, or anything like that?
A. Sheet of ice, what's that?
Q. Like the entire back parking lot covered in ice. Did she ever tell you that?
A. Um, I couldn't remember.
Q. Did she ever tell you that the entire back parking lot was covered in packed snow, or anything like that?
A. I really couldn't remember.
Q. Do you know approximately what time she fell?
A. Well, she start working at 6:00 o'clock, so probably

Page 34

that's the time.
MR. MOLLOY: Don't guess, just answer what you know.
THE WITNESS: 6:00 o'clock.
BY MR. STEINER:
Q. Okay. You, of course, mentioned that a drain cover that had the ice on it. Was there anywhere else in the parking lot that had ice --
MR. BARATTA: Objection, foundation, speculation.
BY MR. STEINER:
Q. -- that you can recall?
A. I don't remember.
MR. BARATTA: Asked and answered.
BY MR. STEINER:
Q. I'm sorry?
A. I can't remember.
Q. Where did you park on the day of the incident?
A. Um, you know, I don't remember exactly, but I think we park like all the way to the front where it's like there's no water.
Q. Were you still in the back parking lot?
A. Yes.
Q. Are you able to show on that photo where you parked?
A. Might be like a little bit further in here. Because

Page 35

like the whole wall, that's like where all the employees park.
MR. BARATTA: So you're pointing to the right of the outside of the photograph?
THE WITNESS: Yeah. Probably like, you know, because like I said, I mean that's where the water. So I mean we just avoid the water.
MR. BARATTA: You just indicated that's where the water, by the X, with the circle in it, correct?
THE WITNESS: Yes.
MR. BARATTA: And you said you tried to avoid the water?
THE WITNESS: Yeah, I just avoid it and walk it through to the side.
MR. MOLLOY: That's from Exhibit 1 of Caramagno's dep it says --
MR. BARATTA: Caramagno.
MR. MOLLOY: -- and Livings. Caramagno.
MR. BARATTA: Caramagno, and also Exhibit 1 of Livings.
BY MR. STEINER:
Q. Was there ice, that you recall, where you parked?
A. No.
Q. Was there snow in the parking lot where you parked, in

Page 36

the area where you parked?
A. I couldn't remember.
Q. Do you recall the parking lot being slippery while you walked into the restaurant?
A. Um, when I walk -- like I couldn't remember really.
Q. Okay. Did you walk in through the back door?
A. Yes.
Q. Do you recall having any trouble walking to the back door?
MR. BARATTA: Asked and answered.
THE WITNESS: No.
BY MR. STEINER:
Q. Were there any parking spots available by the time you got there at 9:00 a.m. that wouldn't have been near that drain where there's water?
MR. BARATTA: Object to foundation.
THE WITNESS: There is like a -- yeah, there's a lot of parking spot.
BY MR. STEINER:
Q. In this litigation there's been a Lease Agreement, um, that some have said, namely Jim Sage has said governs your relationship between your business and Sage Investment Group.
MR. STEINER: And let me just mark this as Exhibit 2.

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DEPOSITION EXHIBIT 2.
BY MR. STEINER:
Q. Have you ever seen that document before?
A. Yes.
Q. Have you ever referred to that document before with Jim Sage?
A. Well, it's the old Lease. It's like expire --
Q. Right.
A. -- in 2004.
Q. Right. But have you ever referred to that document with Jim Sage?
MR. BARATTA: Object to the form.
MR. MOLLOY: Object to the form.
THE WITNESS: What do you mean?
BY MR. STEINER:
Q. Have you ever spoken with Jim Sage about that document?
A. No.
Q. Never?
A. No.
Q. Where have you seen it?
A. We try to like make -- we try to tell him we have to make a lease, and we never did renew the lease.
Q. Did that lease ever govern the relationship that you

had with Mr. Sage?
MR. BARATTA: Asked and answered.
THE WITNESS: This Lease, no.
BY MR. STEINER:
Q. Did you ever have a written lease with Mr. Sage?
A. No.
Q. When did you first look at that document?
A. Just when we signed the paper with Jim Sage, you know, the paper. You know, when we bought the place.
Q. Okay. Back in 2004?
A. 2004.
Q. And that's the last time you saw that document?
A. Yes, this one expire and we never renewed it.
Q. When you say renew it, it makes it sound like that lease was effective at some point, but is it -- is it your understanding that once you took over the business that that lease was not effective?
MR. BARATTA: Objection, it calls for a legal conclusion. I think it's all been asked and answered. Go ahead.
MR. MOLLOY: Same. You can answer, if you can.
THE WITNESS: Yeah, it's expired. You know, it expired when we bought the place, but we never get a new Lease Agreement.

BY MR. STEINER:
Q. Okay. How often does Jim Sage visit the Grand Dimitri's location?
A. Not too often.
Q. Are you able to say how frequently he comes there?
A. Um, I mean I usually like take the rent to his place, so maybe like -- I'm not remember, but sometimes I see him like once a month.
Q. Okay.
A. But usually like I give him the rent at his place, so he doesn't come in to pick up the rent from me.
Q. Okay. Do you recall ever seeing the front of Grand Dimitri's on the day of the incident, as in the front parking lot?
A. Did I see the front parking lot?
Q. Right.
A. Yes.
Q. Do you recall any ice or snow in the front parking lot?
A. No.
Q. Now, it's my understanding that there's also a side parking lot. Did you ever see the side parking lot on the day of the incident?
A. Side parking lot, what do you mean?
Q. Is there a parking lot not in the front, not in the

back, but to the side?
MR. MOLLOY: Do you understand his question?
THE WITNESS: No.
BY MR. STEINER:
Q. Okay. So there's only two parking lots to Grand Dimitri's; is that right?
A. Two parking lots.
Q. Is there a front parking lot and a back parking lot?
A. Yeah, all the area like the back of the restaurant.
Q. Uh-huh.
A. The front of the restaurant, by the Gratiot -- by the Gratiot, in the front of the restaurant.
Q. Okay. Have you ever salted around the premises other than just in the front doorway?
A. Just the sidewalk, just the sidewalk and the front door.
Q. And where is the sidewalk?
A. It's in the front, the front of the restaurant.
Q. Have you ever salted the parking lot before?
A. No.
Q. Have you ever considered salting the parking lot if you've ever seen it slippery?
A. No.
Q. On the date of Miss Livings' fall did you notify

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Ayman Shkoukani
March 23, 2017

Page 41

anyone?
A. Not on the same date, because like I said, when she said there is nothing going on, so I figured there's no reason to make, you know, a big deal.
Q. Can you tell me the last time you spoke with Miss Livings?
A. The last time? Um, maybe like a year and-a-half, year, something like this.
Q. So you have no idea what her present condition, meaning her physical condition would be, right?
A. No.
Q. If you saw a dangerous condition on Grand Dimitri's premises, you would have done, um, what you needed to do to remedy that condition, right?
MR. BARATTA: Object to the form.
MR. MOLLOY: Second.
THE WITNESS: Well, if it's like not my responsibility I call Jim Sage.
BY MR. STEINER:
Q. But in a case, um, like this February 21st fall, you did take certain steps to clear the drain, right?
A. Yes.
Q. So there were some situations where you recognized that, um, you needed to maintain certain areas of the parking lot?

Page 42

MR. MOLLOY: Object to form, foundation.
MR. BARATTA: I'm going to object to the characterization of the question.
THE WITNESS: You know, usually I don't do anything with the parking lot, but if I see something handy, and instead of bother Jim Sage I just take care of it. I mean just a little small stuff.
MR. STEINER: Okay. I think that's all I have at this time.
EXAMINATION
BY MR. GABEL:
Q. Sir, on the date --
MR. GABEL: My name is Steve Gabel. I recommend T&J's, the contractor that cared for the outside parking lot.
THE WITNESS: Yeah.
BY MR. GABEL:
Q. On the date of the incident that Miss Livings fell, 2-21-14, do you have any criticisms of T&J?
A. No.
Q. Okay. And as I understand on that day, you didn't see snow six inches or so packed down and all across that back parking lot, did you?
A. Um.
MR. BARATTA: I'm going to object to the

Page 43

form. He's already testified he doesn't recall whether there was any snow or ice on the parking lot on that day.
BY MR. GABEL:
Q. You just tell me what you saw then.
A. It was like a lot of water.
Q. Water?
A. Yeah.
Q. Okay. And you saw some ice and debris, leaves I think is the word you used, around that drain, correct?
A. Around the drain.
Q. Is that all you recall, basically?
A. That's all I remember.
MR. GABEL: Okay. Nothing else. Thank you.
MR. MOLLOY: I don't have any questions.
MR. BARATTA: I just have one or two.
RE-EXAMINATION
BY MR. BARATTA:
Q. Did Miss Livings ever complain of leg pain before this incident?
A. Not that I remember, no.
Q. Did Miss Livings, in any time that she worked for you, did she typically miss her shifts, not show up or miss her work shifts?

Page 44

A. No.
Q. As part of her job as being a waitress at your restaurant, was she required to carry plates over to the tables?
A. Carry like --
Q. Plates of food.
A. Yes.
Q. Did you observe her doing that?
A. What do you mean?
Q. Did you watch her delivering food to the tables? Did you observe her --
A. Yes.
Q. -- look at her performing her duties as a waitress?
A. Yes.
Q. For many years, right?
A. Yep.
Q. Did she ever appear to you to have any difficulty in performing her duties as a waitress?
A. No.
MR. BARATTA: Thank you. All set.
MR. GABEL: Nothing else.
MR. MOLLOY: All set.
MR. GABEL: Thank you, sir.
MR. BARATTA: Thanks, Tom.
THE WITNESS: You're welcome.

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* * *

(The deposition was concluded at 2:49 p.m.)

CERTIFICATE

STATE OF MICHIGAN
COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take; and that I am not related, nor a counsel to either party, nor interested in the event of this cause.

LISA M. FIX, CSR - 3121
Notary Public, Macomb County
My Commission Expires: 4-9-2019

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EXHIBIT F

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DEPOSITION EXHIBIT

EXHIBIT D

LEASE

THIS LEASE is made and entered into on this 1st day of September, 1999, between THE EFFIE BOUKIS LIVING TRUST UAD 9/27/96, by and through its Trustee, EFFIE BOUKIS (the "Effie Trust") and the ANTHONY BOUKIS LIVING TRUST UAD 9/27/96, by and through its Trustees, Effie Boukis, Gregory Boukis and John Athans (the "Anthony Trust") (collectively hereinafter referred to as the "Landlord"), and GRAND RIVERIA RESTAURANT, INC., a Michigan corporation ("Tenant"), on the following terms and conditions:

1. Premises to be Leased. Landlord does hereby let unto Tenant, and Tenant does hereby hire and take from Landlord, the parcel of land described on Exhibit A, with building and appurtenances, commonly known as 25001 Gratiot, Eastpointe, Michigan (the "Premises"). Tenant has inspected the Premises, and agrees to accept the same in its present "as is" condition.

2. Lease Term. The term of this Lease (the "Term") shall commence on September 1, 1999, and shall terminate on August 31, 2004, unless sooner terminated as hereinafter set forth.

3. Option to Renew. Provided that the Tenant shall not be in default hereunder, the Tenant shall have the option to renew this Lease for four (4) consecutive five (5) year terms ("Renewal Terms") upon the same terms and conditions, with the Base Rent adjustment as provided in Paragraph 5. Each of said options shall be exercised by the Tenant giving notice by certified mail, return receipt requested, at least ninety (90) days before the expiration of the then-existing term. The failure of Tenant to exercise any option to renew shall extinguish all subsequent options to renew.

4. Use of Premises. Tenant shall use the Premises only for the operation of restaurant or any other use which Landlord approves in writing. Tenant shall not use the Premises, or permit the Premises to be used, for the doing of any act or thing that constitutes a violation of any law, order, ordinance, or regulation of any government authority or that may be dangerous to life or limb; nor shall Tenant in any manner deface or injure the Premises, or permit any objectionable noise or odor or any hazardous material or contaminant to be emitted or spilled, or permit anything to be done on the Premises tending to create a health hazard or nuisance or to disturb others or to injure the reputation of the Premises.

Tenant shall, at its expense, promptly place, keep and occupy the Premises in compliance with (a) all laws, ordinances, orders or regulations affecting the Premises, its use, its occupancy or any alterations Tenant has made to the Premises; and (b) the recommendations of any insurance company, inspection bureau or similar agency.

5. Base Rent and Late Charges.

(a) During the Term, Tenant hereby agrees to pay to Landlord as annual rent for the Premises the sum of Two Hundred Sixteen Thousand and 00/100 Dollars ($216,000); in

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equal monthly installments of Three Thousand Six Hundred and 00/100 Dollars ($3,600) each for the 1st five (5) year term. Such monthly installments shall be paid in advance on the first (1st) day of each month during the Term. If rent is not received after seven (7) days of the due date a ten percent (10%) charge of the monthly rental due will be added to that month, such charge will be deemed as additional rent. In case of a returned check or non-sufficient check a fee of One Hundred and 00/100 Dollars ($100.00) will be charged, and deemed as additional rent.

(b) If the Tenant properly exercises the Option to Renew as provided in Paragraph 3, the Base Rent for Year Six (6) shall be adjusted for changes in the Consumer Price Index for Year One (1) through Year Five (5) of this Lease. Thereafter, and throughout all Options exercised, the Base Rent shall be adjusted annually for changes within the Consumer Price Index.

(c) For purposes of Paragraph 5(b), the "Consumer Price Index" shall be defined as the Consumer Price Index (CPI-U) of the Bureau of Labor Statistics, United States Department of Labor (1982-84=100), All Items Index for All Urban Consumers - Detroit, Michigan or any replacement therefor. If the Consumer Price Index shall cease to be published, a reasonable substitute index shall replace it for purposes of this Lease. Following each such adjustment, the term "Base Rent," as used in the Lease, shall mean Base Rent as most recently adjusted provided, however, Base Rent, as adjusted, shall not be reduced

If at the beginning of any Lease Year adjusted Base Rent shall not have been calculated, Tenant shall continue paying the Base Rent previously in effect on a timely basis. Upon notification by Landlord of the adjusted Base Rent, Tenant shall immediately pay Landlord the difference between Base Rent paid and that which would have been due had adjusted Base Rent been calculated and shall thereafter continue paying monthly installments of adjusted Base Rent.

(d) The Base Rent provided for in this Section shall be an absolutely net return to Landlord for the Term, free from any losses, expenses or charges with respect to the Premises, including maintenance, repairs, insurance, taxes, assessments or other charges imposed upon or related to the Premises or with respect to any easements or rights appurtenant thereto, except as otherwise expressly provided herein.

6 Additional Rent. All sums in addition to Base Rent shall be reimbursement to the Landlord for the Tenant's share of common area maintenance, repairs, insurance, taxes assessments or other charges imposed upon or related [illegible] (hereinafter [illegible] "Additional Rent"). In addition [illegible] amount of Eight Hundred and 00/100 Dollars ($800.00) [illegible] in the [illegible] (the "Estimated [illegible] Additional Rent for the [illegible] days [illegible] written notice of an accounting of Tenant's share of expenses. During each year after the first year of the [illegible] sum of the [illegible] Estimated Additional Rent shall be adjusted to one-twelfth (1/12th) of the total of the immediately preceding year's actual Additional Rent. The Tenant will remain liable for

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any Additional Rent deficiency, which shall be paid within 30 days of receipt of written notice of an accounting of Tenant's share of expenses of each year.

7. Liens. The Tenant shall keep the Premises free from any liens arising out of any work performed thereon, materials furnished thereto or obligations incurred by the Tenant. The Tenant shall indemnify, defend and hold Landlord harmless against all liability, loss, damage, costs and all other expenses arising out of claims of lien for work performed or materials furnished to or for the benefit of the Tenant.

8. Repairs and Maintenance.

(a) The Tenant shall keep and maintain the Premises, including, but not limited to, all nonstructural, interior and exterior portions of the buildings and improvements located upon the Premises, in good and sanitary order, condition and repair, and will deliver the same to the Landlord at the expiration of the Term in as good condition as when received, except for reasonable use and wear thereof. Landlord shall be responsible for all structural and roof repairs and maintenance.

(b) The Tenant shall also, at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, clean, safe and substantial order and condition, and free from dirt, snow, ice, rubbish and other obstructions or encumbrances, and to the satisfaction of the Landlord, the driveways, sidewalks, parking areas, yards, plantings, pavement, car stops, gutters and curbs in front of and adjacent to the restaurant and, generally, the property comprising the Premises.

(c) Notwithstanding the obligation of the Tenant hereunder to fully care for the Premises, the Landlord may enter upon the Premises and make such repairs or alterations as may in its opinion be necessary or appropriate for the safety, preservation or maintenance thereof; provided, however, that, except in the case of emergency, the Landlord shall give the Tenant ten (10) days notice before taking any such action. If the Tenant shall for ten (10) days fail or neglect to make such repairs, the Landlord or its agents may enter upon the Premises for the purpose of doing so, and all the costs and expenses consequent thereon, with interest thereon at the rate of seven percent (7%) per annum, shall be repaid by the Tenant to the Landlord as Additional Rent due immediately upon receipt of a statement therefor. The receipted payment by the Landlord for the making of such repairs, alterations or improvements shall be prima facie evidence of the reasonableness of such charges therefor and that [illegible] have been paid by the Landlord. Notwithstanding the right of the Landlord to enter upon the Premises to make repairs, The Landlord is not under any obligation to make any repairs, alterations, or improvements of any kind whatsoever, structural or nonstructural, ordinary or extraordinary, whether seen or unforeseen.

9. Alterations and Additions. The Tenant may not alter or add to the Premises without the Landlord's prior written consent, which consent shall not be unreasonably withheld. The Landlord shall have no obligation to make any alteration or addition to the Premises during the Term. All right, title and interest to any alterations and additions to the Premises during the

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Term, except for trade fixtures and removable equipment, shall be the property of the Landlord and shall be deemed to be a part of the Premises, and shall remain on, and be surrendered with, the Premises upon the termination of this Lease, without cost or expense to the Landlord.

10. Utilities. During the Term, the Tenant shall pay for all gas, heat, light, power, water, sewer, telephone or other communication service, janitorial services, garbage disposal and all other utilities and services supplied to the Tenant upon the Premises. The Landlord shall not be liable to the Tenant for damages or otherwise for any failure or interruption of any such service furnished to the Premises.

11. Restoration.

(a) If the Premises is damaged or destroyed, in whole or in part, the Tenant shall repair, restore, replace or rebuild the Premises, or the part thereof so damaged, as nearly as possible to the value, condition and character of the Premises immediately prior to the occurrence of such damage or destruction. The Tenant shall be entitled to an abatement of rent during the construction period.

(b) All insurance proceeds payable as a result of any damage to or destruction of the Premises shall be paid to the Landlord or any mortgagee designated by the Landlord and be disbursed as reconstruction work progresses. If the insurance proceeds are insufficient to pay for all restoration work, then the Tenant shall pay any additional amounts necessary to restore the Premises, prior to disbursement of the insurance proceeds. Upon completion of the restoration, and payment for all restoration work, all remaining insurance proceeds shall be retained by the Landlord or any mortgagee designated by the Landlord.

(c) Notwithstanding the foregoing provisions of this Section, if the damage to or destruction of the Premises cannot be repaired within one hundred twenty (120) days of the damage, either the Landlord or the Tenant may terminate this Lease by giving ten (10) days prior written notice to the other party within thirty (30) days after the damage or destruction occurs. If the Lease is terminated pursuant to this Paragraph, all insurance proceeds payable as a result of the damage or destruction shall be retained by the Landlord or any mortgagee designated by the Landlord.

12. Condemnation. If all or any substantial part of the Premises is taken or condemned by a governmental authority, or shall be conveyed by the Landlord to a governmental authority under a threat of such taking or condemnation, the rights [illegible] of the Landlord and the Tenant with respect to such taking or condemnation shall be as provided in this Paragraph 12. If twenty-five percent (25%) or more of the [illegible] area of the buildings located upon the Premises is taken, condemned [illegible] Premises is rendered unsuitable for the [illegible] described in Paragraph [illegible] as of the date of such taking, condemnation or conveyance, and [illegible] If less than twenty-five percent (25%) of the gross floor area of the buildings located upon the Premises is taken, condemned or conveyed, and the Premises remains suitable for the [illegible] described in Paragraph 4 above, this Lease shall [illegible]

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rent payable by the Tenant shall be reduced for the remainder of the Term in the same proportion which the number of square feet of gross floor area within the buildings located upon the Premises following such taking, condemnation or conveyance bears to the number of square feet of gross floor area within the buildings located upon the Premises prior to such taking, condemnation or conveyance. To the extent that the award made for the taking is available to the Landlord, the Landlord shall, at its own cost and expense, make all necessary repairs or alterations to the Premises so as to constitute the portion of the Premises not taken as a complete unit, and the Tenant shall have no obligation to make any such repairs or alterations. The Landlord shall be entitled to the entire award made for any taking, condemnation or conveyance, except that the Tenant shall not be precluded from pursuing any claim directly against the condemning authority for its loss.

13. **Assignment and Subletting.** Tenant may not assign, transfer or sell this Lease or sublet all or any part of the Premises at any time during the Term of this Agreement or transfer, sell or assign any shares of stock within the corporation without the prior written consent of the Landlord, which consent may not be unreasonably withheld. The sale, issuance, or transfer of any voting capital stock of the Tenant which results in a change in the voting control of the Tenant shall be deemed to be an assignment of this Lease which requires the Landlord's prior written consent. Sale or purchase of capital stock to or from employees or issuance of stock dividends or splits shall not require approval of the Landlord.

14. **Default.** If default is made by the Tenant in the payment of rent, declaration of insolvency or in the performance of any of the conditions or covenants in this Lease, and if such default shall continue for a period of ten (10) days after written notice is given to the Tenant by the Landlord specifying the default, then the Landlord shall have the right to reenter the Premises and remove the Tenant and all persons therefrom and shall have the right to terminate this Lease. If default is made by the Tenant and the Landlord exercises its option to terminate this Lease, in addition to all other remedies now or hereafter provided to the Landlord, the Landlord may proceed to re-let the Premises and collect from the Tenant any deficiency between the rent payable hereunder and the rent received from any replacement tenant.

15. **Termination; Surrender of Possession.**

(a) Upon the expiration or termination of this Lease, whether by lapse of time, operation of law or pursuant to the provisions of this Lease, the Tenant shall:

(i) Restore the Premises to their condition as of the beginning of the Term (other than as contemplated by Paragraph 12), ordinary wear and tear excepted, remove all of its personal property and [illegible] and repair [illegible]

[illegible] and possession [illegible]

[illegible] or trade symbols [illegible] connected with or associated specifically with [illegible]

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the Tenant's business and repair any damages to the Premises caused by such removal.

(b) If the Tenant shall fail or refuse to restore the Premises as hereinabove provided, the Landlord may do so and recover its costs for so doing from Tenant. If the Tenant shall fail or refuse to comply with the Tenant's duty to remove all personal property and trade fixtures from the Premises upon the expiration or termination of this Lease, the parties hereto agree and stipulate that Landlord may, at its election: (i) treat such failure or refusal as an offer by the Tenant to transfer title to such property to the Landlord, in which event the title thereto shall thereupon pass under this Lease as a bill of sale; or (ii) treat such failure or refusal as conclusive evidence, on which the Landlord shall be entitled to rely absolutely, that the Tenant has forever abandoned such property. In either event, the Landlord may, with or without accepting title thereto, keep or remove, store, destroy, discard, or otherwise dispose of all or any part of such property in any manner that the Landlord shall choose without incurring liability to the Tenant or to any other person. In no event shall the Landlord ever become or be charged with the duties of a bailee of any property of the Tenant. The failure of the Tenant to remove any property from the Premises shall forever bar the Tenant from bringing any action or asserting any liability against the Landlord with respect to any property which the Tenant fails to remove.

16. Net Lease. The Landlord and the Tenant agree that this Lease shall be what is commonly known as a "net-net-net" or "carefree" lease, and the Landlord's obligations shall be limited to those it has specifically undertaken herein.

17. Quiet Enjoyment. The Landlord covenants that, upon the Tenant's paying the rent and performing all of the terms, covenants and conditions the Tenant is to perform hereunder, the Tenant shall peaceably and quietly enjoy the Premises hereby demised, free of claims of paramount title or of any person claiming under or through the Landlord, and free and clear of all exceptions, reservations or encumbrances other than those set forth herein, and those the Tenant subsequently approves in writing.

18. Successors and Assigns. This Lease shall be binding upon and inure to the benefit of the parties hereto and their personal representatives, trustees, heirs, successors and assigns.

19. Headings. The headings contained herein are for the convenience of the parties [illegible] in reading this Lease.

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20. Remedies Cumulative; Waiver. All rights and remedies of Landlord hereunder are cumulative, and not exclusive, and shall be in addition to all other rights and remedies provided by applicable law. Failure to exercise or delay in exercising any right or remedy hereunder shall not operate as a waiver thereof, nor excuse future performance. No waiver, discharge or renunciation of any claim or right arising out of a breach of these terms and conditions shall be effective unless in a writing signed by the party so waiving and supported by consideration. Any waiver of any breach shall be a waiver of that breach only and not of any other breach, whether prior or subsequent thereto.

21. Attorneys' Fees. The Tenant shall pay all reasonable attorneys' fees, expenses and court costs incurred by the Landlord in enforcing any provision of this Lease.

22. Choice of Laws; Invalidation of Terms. This Lease shall be governed by and construed in accordance with the laws of the State of Michigan that are applicable to leases made and to be performed in that state. The invalidation of one or more Lease terms shall not affect the validity of the remaining terms.

23. Notices. All notices herein required shall be given in writing upon the parties at the addresses indicated on page 1 hereof. Any notice shall be deemed to have been given when personally delivered or when sent by certified mail, return receipt requested and postage prepaid. The addresses specified for notices herein may from time to time be changed by the written notice of one party to the other.

24. Liability Joint and Several. If the Tenant is more than one person, each of their obligations under this Lease will be joint and several.

25. Amendment. This Lease represents the entire agreement between the parties. This Lease may not be amended, altered or modified except by a writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

IN WITNESS WHEREOF, the parties have executed this Lease on the day and year first above written.

WITNESSES

Gail R. Rowe

Sheryl MacPhee

LANDLORD:

By: Effie Boukis
Effie Boukis

Its: Trustee

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Gary R. Boukis

Sheryl MacPhee

THE ANTHONY TRUST

By: Effie Boukis
Effie Boukis

Its: Trustee

Gary R. Boukis

Sheryl MacPhee

By: Gregory Boukis
Gregory Boukis

Its: Trustee

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By: John Athans
John Athans

Its: Trustee

WITNESSES:

TENANT:

GRAND RIVIERA RESTAURANT, INC.,
a Michigan corporation

By: Effie Boukis

Its: PRESIDENT

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In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

Deborah Buck

March 23, 2017

Court Reporting and Video

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Deborah Buck
March 23, 2017

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,
Plaintiff,
vs. Case No. 2016-001819 NI
HON. EDWARD A. SERVITTO
SAGE'S INVESTMENT GROUP, LLC, a
Michigan limited liability company, and
T&J LANDSCAPING & SNOW REMOVAL, INC., a
Michigan corporation,
Defendants.

The Deposition of DEBORAH BUCK,
Taken at 25800 Northwestern Highway, Suite 400,
Southfield, Michigan,
Commencing at 3:23 p.m.,
Thursday, March 23, 2017,
Before Lisa M. Fix, CSR-3121.

APPEARANCES

CHRISTOPHER R. BARATTA, ESQ.
BARATTA & BARATTA
120 Market Street
Mount Clemens, Michigan 48043
Appearing on behalf of the Plaintiff.

STEVEN R. GABEL, ESQ.
THE HANOVER LAW GROUP
25800 Northwestern Highway, Suite 400
Southfield, Michigan 48975
Appearing on behalf of the Defendant, T&J Landscaping.

MARK W. STEINER, ESQ.
SEGAL MCCAMBRIDGE
39475 13 Mile Road, Suite 203
Novi, Michigan 48337
Appearing on behalf of the Defendant, Sage's.

JAMES MOLLOY, ESQ.
SECREST WARDLE
2600 Troy Center Drive
Troy, Michigan 48007
Appearing on behalf of the Witness.

TABLE OF CONTENTS

WITNESS	PAGE
DEBORAH BUCK	
EXAMINATION BY MR. BARATTA:	5
EXAMINATION BY MR. STEINER:	20
EXAMINATION BY MR. GABEL:	30
RE-EXAMINATION BY MR. STEINER:	36

EXHIBITS

EXHIBIT	PAGE
(No Exhibits Marked)	

Southfield, Michigan
Thursday, March 23, 2017
3:23 p.m.

* * *

DEBORAH BUCK,
was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. BARATTA: The record will reflect this is the subpoenaed deposition of Deborah Buck, to be used for all purposes consistent with the Michigan Court Rules.

My name is Chris Baratta, I represent Donna Livings. How are you?

THE WITNESS: Good. How are you?

MR. BARATTA: Good, thank you.

Have you ever had a deposition before?

THE WITNESS: No.

MR. BARATTA: All right. I'm going to give you just a couple of general ground rules. If you don't understand anything that I'm asking you, let me know that, I'll rephrase the question until you and I are communicating effectively, okay?

THE WITNESS: Okay.

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Deborah Buck
March 23, 2017

Page 5

MR. BARATTA: The woman to your right, she's taking down everything that we say, so a couple things. I'm going to require a verbal response to my question versus a nod or a shake of the head. Uh-huh, uh-uh doesn't come out on paper very well. The other thing is that, um, when I ask you a question, you will frequently know the answer to the question before I finished asking it, but so the record is nice when the transcript comes out on paper, please allow me to finish my question, and in turn I'll allow you to finish your answer so we have a nice transcript, okay?

THE WITNESS: Okay.

MR. BARATTA: Great. If you don't know something, if you don't remember something, that's fine, some people feel like they have to answer every question. You know, like I said, if you don't know, if you don't remember, if you're not sure, tell me that you don't know, you don't remember, you're not sure, um, and then we'll go from there, okay?

THE WITNESS: Okay.

MR. BARATTA: Great.

EXAMINATION

BY MR. BARATTA:

Q. Your full name, please?

A. **Deborah Lynn Buck.**

Page 6

Q. Your address?

A. **15290 Cornell Drive, Clinton Township, Michigan, 48038.**

Q. How long have you lived there?

A. **Um, nine years -- sorry, nine years.**

Q. Who do you live there with?

A. **Myself.**

Q. Any plans on moving anytime soon?

A. **No.**

Q. All right. Your date of birth?

A. **12-20-71.**

Q. Did you graduate from high school?

A. **Yes.**

Q. Which high school?

A. **Fraser High School.**

Q. And any education past high school?

A. **No.**

Q. Are you currently employed?

A. **Yes.**

Q. Where?

A. **Theo's Family Restaurant and Grand Dimitri's.**

Q. Two restaurants?

A. **Yes.**

Q. Are you a waitress at both?

A. **Yes.**

Page 7

Q. How long have you been employed at Theo's?

A. **Nine years.**

Q. How long have you been employed at Grand Dimitri's?

A. **Since Tom, or in that building?**

Q. Well, let's just say since it's been Grand Dimitri's.

A. **Twelve years.**

Q. Twelve years. So we're going roughly to since 2005?

A. **Not sure when it went to Grand Dimitri's. I've been in that building for 26 years.**

Q. So let me help you. About 2004 is when it went to Grand Dimitri's.

A. **2004 then.**

Q. All right.

A. **Thank you.**

Q. And you have been a waitress in that building since when?

A. **Twenty-six years.**

Q. Okay. Okay. So you have gone from owner to owner --

A. **Correct.**

Q. -- maintaining your position as a waitress?

A. **Correct.**

Q. All right. So you currently work for the Shkoukani brothers?

A. **Yes.**

Q. And like how many hours a week do you work there?

Page 8

A. **I'm down to six and-a-half now.**

Q. Most of your time is spent at Theo's?

A. **Correct.**

Q. What's the reason?

A. **Just changed over. Just -- no reason.**

Q. Where is Theo's located?

A. **Thirteen Mile and Hoover.**

Q. Okay. And in 2014 were you working for Theo's?

A. **Yes.**

Q. What was the proportion of hours you were working in any given week, let's say in February of 2014, Theo's versus Grand Dimitri's?

A. **It was, um, I would say almost equal, because I was still there, um, probably about 20 hours at Grand Dimitri's. I'm guessing, but.**

Q. So about 20 hours at each place in that time frame?

A. **Correct.**

Q. That's an approximation?

A. **Yes.**

Q. Not going to hold you to exact hours --

A. **Yes.**

Q. -- your best guess.

A. **Yes.**

Q. Okay. Do you know Donna Livings?

A. **Yes.**

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Deborah Buck
March 23, 2017

Page 9

Q. How long have you known her?
A. Since 2004.
Q. Donna was a co-worker of yours, correct?
A. Correct.
Q. She was also a waitress?
A. Yes.
Q. Do you have an opinion as to how she was as a waitress?
A. She was a very good waitress.
Q. Okay. In the entire time that you knew Donna as a waitress, was she able to perform her job duties?
A. Yes.
Q. Okay. Did you -- we're here today primarily to talk about a slip and fall that occurred on the premises located at 25001 Gratiot Ave. in Eastpointe on February 21st, 2014. You're generally aware of that incident?
A. Yes.
Q. Okay. Did you witness this incident?
A. No.
Q. All right. How did you first learn of the incident?
A. Um, I -- well, I had got to work before Donna, and I had walked in with the chef, him and I walked in together, and, um, probably about ten minutes later Donna had called on the phone to open the front door.

Page 10

Q. And when she called you, was it the morning of February 21st?
A. Yes.
Q. Do you remember like what time it was?
A. I don't recall.
Q. Was it around 6:00 a.m?
A. Approximately -- yeah, approximately 6:00 a.m., because we both start at 6:00, so it was approximately that time.
Q. What did you do in response to that telephone call?
A. I went and opened the front door.
Q. All right. And at that point in time did Donna say anything to you?
A. Yes.
Q. All right. What did she say?
A. She said -- do you want her words or --
Q. Sure.
A. Well, she said, "I just fuckin' fell in the parking lot." I said, "You're kidding?" And she was soaked.
Q. Her clothing?
A. Her clothing.
Q. Her pants or --
A. She was from the waist down about.
Q. Okay. What else did she say, if anything?
A. She said she was gonna go home and change.

Page 11

Q. All right. Did she say or describe how she fell?
A. She said when I got out of the car, she said I went down, that's --
Q. Did you interpret that to mean anything in particular?
A. I interpreted it to mean that she fell.
Q. All right. Did you get into any other specifics as to how she fell, or the mechanism of her fall?
A. I asked her if she was okay.
Q. What did she say?
A. I'm not sure.
Q. All right. So what did Donna do then after you let her in?
A. Well, we had this conversation pretty much in the lobby.
Q. Okay.
A. Um, like I said, she said she was gonna go home and change. I said, you know, you don't have to come back, you know, don't rush back here, you know, 'cuz of the way the weather was as it is and everything. So she said no, I'll be back.
Q. Okay. So to the best of your recollection, did Donna go home and change her clothes and come back to work the rest of her shift that day?
A. Yes.
Q. Do you recall if she worked the next day?

Page 12

A. Yes, from just her telling me and others, yes, she did.
Q. Okay.
A. I was not there Saturday morning.
Q. Do you know if Donna worked at Grand Dimitri's past that next day, which was Saturday?
A. No, she did not.
Q. All right. When was the last time that you spoke with Donna?
A. Um, probably about two, three weeks ago.
Q. How would you classify your relationship with her?
A. We're friends.
Q. Okay. Have you and I ever spoken on the phone?
A. No.
Q. Okay. Well, maybe one time talking about her --
A. Yes, one time when I called to confirm the time change, sorry.
Q. Did we -- we didn't discuss anything else?
A. Not at all.
Q. Thank you.
You arrived before Donna on that morning that she fell?
A. Yes.
Q. Do you recall the condition of the parking lot?
A. Yes.

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Deborah Buck
March 23, 2017

Page 13

Q. What was it?
A. It was, um, a sheet of ice with water on top. Snow, ice, water.
Q. Was that snow and ice that you described, was that covering the parking lot?
A. Yes.
Q. Okay. Was there -- you mentioned that there was, um, water on top of the ice. Do you recall how much water there was?
A. No.
Q. Do you know, if you know, why there was water on top of the ice?
A. No.
Q. Are you aware of any problems with drainage in that particular parking lot?
A. Afterwards, yes.
Q. After what?
A. After the fall I learned that that drain, where we pretty much parked by was blocked.
Q. And who did you learn that from?
A. Um, just from Donna, um, another employee had said the same thing.
Q. Did you have difficulty yourself walking in?
A. Yes.
Q. Did you have difficulty yourself walking into work

Page 14

that morning?
A. Yes.
Q. Did you park where the employees were supposed to that morning?
A. No.
Q. Where did you park?
A. Um, normally we park in the back, which we did. Normally we park closer to the door, but from what I recall there was, um, a mound of snow in that area, so I could not park that way, and I parked about three or four spots down, still to the back, but not in normal -- the spot where I normally park.
Q. Okay. And I don't -- I don't recall. Did you actually arrive to work with someone else?
A. I had pulled in, and then, um, Chef Bob had pulled in pretty much the same time I did.
Q. Yeah. And I asked you the question because I wasn't sure if you and Chef Bob commuted to work together.
A. No.
Q. Are you aware of any witnesses to this incident?
A. No.
Q. You described what you recall as to the condition of the parking lot on the date of this incident. Do you recall how long this condition existed, generally, in the manner in which you described?

Page 15

A. No.
Q. In other words, you don't recall what the lot looked like on the day before Donna fell?
A. No.
Q. Okay. Do you recall what the lot looked like the day after?
A. No.
Q. Are you aware of anyone else slipping, um, in this particular parking lot, or falling in this parking lot at any time within say two weeks either before this incident or two weeks after this incident?
A. I don't recall.
Q. Okay. Do you recall if Tom Shkoukani was made aware of this incident?
A. Yes.
Q. All right. Do you know how he was made aware of it?
A. I believe Donna told him.
Q. Do you know if Tom did anything in response to Donna telling him?
A. I believe he went outside to unblock the drain.
Q. And do you know how he did that?
A. No.
Q. You weren't present?
A. No.
Q. Are you aware of anyone taking any remedial action, so

Page 16

to speak, to clear the water in the lot, or the ice or the snow --
A. No.
Q. -- as you described?
No?
A. No.
Q. Okay. In terms of Grand Dimitri's, are you aware at any time in 2014, are you aware of any employees plowing or salting the parking lot?
A. No.
Q. Do you know who is responsible to plow or salt the parking lot?
A. TJ's Snow Removal.
Q. Okay. Do you know if Grand Dimitri's contracted with them, or whether Mr. Sage contracted with them?
A. From conversations with the guys who worked from the snow removal company, Jim Sage.
Q. Okay. And you said conversations with the guys from T&J. Did they stop into the restaurant once in awhile?
A. Well, when they would do the lot or the landscaping, or whatever it may be, they would come in and get a coffee or a hot chocolate or a carry-out, and, um, here and there they would refer to, you know, Jim Sage wants us to do this, Jim Sage wants us to do that.

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Deborah Buck
March 23, 2017

Page 17

Q. Okay. Did they ever drop off any bills or invoices, to the best of your knowledge?
A. Not while I was there, no.
Q. Can you describe or tell me, to the best of your recollection, how many different people, um, in that 2014 winter you remember seeing who you thought were either owners or employees of T&J?
A. Oh, God, I can't recall.
Q. Was it more than one?
A. Yes. I mean I would say there's probably three or four.
Q. Okay. Do you ever recall observing any of the snowplow trucks from T&J that winter at Grand Dimitri's?
A. Yes.
Q. Do you recall how many different trucks you observed?
A. One.
Q. Okay. That winter, do you recall any salt being laid out on the parking lot?
A. No, not while I was there, no.
Q. And that morning, do you recall seeing any salt on the parking lot?
A. No.
Q. When you came in for a -- I guess it's a day shift, right, or would you call it a morning shift when you

Page 18

start at 6:00 in the morning?
A. Morning shift.
Q. Okay. And the morning shift at Grand Dimitri's would typically go from what, 6:00 a.m. to?
A. 2:00.
Q. 2:00 p.m?
A. (Witness Nodding.)
Q. Correct?
A. Correct.
Q. When you would show up for a morning shift, um, were you supposed to use the employee entrance to enter into Grand Dimitri's?
A. The back door we used.
Q. Did you have a key for the back door?
A. No.
Q. When you typically arrive that winter for your morning shift, would the back door be open?
A. No.
Q. How would you get in?
A. When Chef Bob would come.
Q. And Chef Bob would go through the back?
A. To the front, to the back.
Q. And he would open up the back door for the waitresses?
A. Yes.
Q. And that's where you were supposed to come in?

Page 19

A. Correct.
Q. And Bob would be in the kitchen doing his cooking?
A. Yes.
Q. What time did the restaurant open for biz for customers?
A. At that time we opened, oh, gosh, 6:30, I think it was. I don't recall, because we've changed since then.
Q. I want to take you to a time frame, any time before the incident in 2014, and your experience for approximately say ten years as a co-worker with Donna.
In that ten years before the incident that you knew Donna, did she ever complain to you about her back hurting her?
A. No.
Q. Did she ever complain to you about her leg or legs hurting her?
A. No.
Q. Was she, in your opinion, a good waitress?
A. Yes.
Q. Did you, through the course of your friendship and working experience with her, did you observe her carrying plates or trays of food to the tables?
A. Yes.
Q. And was she able to do that in what you feel was a

Page 20

competent manner?
A. Yes.
Q. Did she appear to have any difficulty in performing her job as a waitress?
A. No.
Q. You're friends with Donna, and you have been before this incident and after this incident, correct?
A. Yes.
Q. What changes, if any, have you noted in Donna since this incident?
A. I don't see her that often, just due to my work schedule, so.
Q. So you're not able to answer that question?
A. No.
MR. BARATTA: I don't have anything else.
THE WITNESS: Okay.
MR. STEINER: Hi, Debbie, my name is Mark Steiner. I represent Sage Investment Group with respect to this matter. I have just a few questions for you.
EXAMINATION
BY MR. STEINER:
Q. In 2014, are you able to say how often you worked with Miss Livings?
A. Yes.

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Deborah Buck
March 23, 2017

Page 21

Q. How often?
A. Two days.
Q. Do you know what days those were?
MR. BARATTA: Is this per week?
BY MR. STEINER:
Q. Per week.
A. Monday and Friday.
Q. How closely do you keep in contact now?
MR. BARATTA: Asked and answered. Go ahead.
THE WITNESS: Every -- I mean just through phone because of my schedule, so.
BY MR. STEINER:
Q. I mean to say --
A. Every three -- three weeks or so. Not very often, but just enough to pick up the phone and carry on a conversation.
Q. When's the last time you saw Miss Livings in person?
A. I don't remember.
Q. Okay. Did you speak with Miss Livings after her deposition?
A. No.
Q. Do you recall Miss Livings ever missing work for a long period of time before this incident?
A. No.

Page 22

Q. You mentioned that you arrived with Chef Bob on the date of the incident, and he would typically unlock the back door by going through the front. Did he do that on the day of the incident, as well?
A. I walked in with him.
Q. So did you walk in through the front door?
A. Through the front.
Q. So you walked from the back parking lot to the front?
A. To the front.
Q. And you didn't slip, did you?
A. No, because I kinda shimmied my way in.
Q. Okay. Did you see a large pool of water near the drain?
A. I didn't pay attention to the drain.
Q. Okay. Was water covering the entire back parking lot or --
A. Where I parked, yes.
Q. Okay. Was there a part of the parking lot where there was not water?
MR. BARATTA: Objection. foundation. You can answer, if you know.
THE WITNESS: I don't know. I just know where I parked it was wet.
BY MR. STEINER:
Q. Okay. Do you recall if there is any part of the

Page 23

parking lot that did not have snow on it?
MR. BARATTA: Asked and answered. Go ahead.
BY MR. STEINER:
Q. You can answer.
A. From what I remember, I remember snow, ice and water pretty much through the parking lot.
Q. Right. And I'm asking if any part of the parking lot did not have that?
A. No, it was covered.
Q. Okay. What about the sidewalk, was that covered, as well?
A. Yes.
Q. Okay. So there was no part -- no surface of the ground that did not have snow, water or ice on it?
A. No.
MR. BARATTA: That's correct?
THE WITNESS: Right. Correct. It was covered.
BY MR. STEINER:
Q. All right. Do you know how much snow there was?
A. A couple inches, maybe.
Q. Do you recall it snowing on the night before the incident happened?
A. I don't remember.

Page 24

Q. Do you recall the last time that it snowed before the incident?
A. No.
Q. Okay. It's my understanding that they keep salt at the premises of Grand Dimitri's. Have you seen that?
A. Yes.
Q. Have you ever used the salt?
A. Once, twice, maybe.
Q. And where did you apply that salt?
A. Just right at the front door.
Q. Did you see anyone else apply salt on the premises?
A. Tom.
Q. And where would he apply it?
A. Front door.
Q. You also mentioned that Tom went back to the drain in the back parking lot and broke up some of the ice around it?
A. I didn't see him, but from what I heard, yes.
Q. Okay. Do you know if that relieved some of the water in the parking lot?
A. I don't know.
Q. When you left the premises that day, do you recall water being in the back parking lot?
A. I don't remember.
Q. Do you recall any snow or ice in the back parking lot?

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Deborah Buck
March 23, 2017

Page 25

A. Yes.
Q. So there was still snow and ice?
A. Yes.
Q. When she called you on -- when I say she, I mean Miss Livings. When Miss Livings called you on her cell phone to open up the front door, do you know why that was locked if Chef Bob had already gone through it?
A. It was minutes after we arrived. I don't know if he opens the book door, and why she chose not to go to the back door. She came to front door. I don't know if it was locked or what at that time.
Q. When she called you, what did she say?
A. Can you open the front door.
Q. Okay. But you had gone through the front door that day, right?
A. With Bob.
Q. And so the door remained locked after you opened it?
MR. BARATTA: Objection, foundation. She said -- I thought she said she didn't know, but go ahead.
THE WITNESS: With the door, the front door being locked?
BY MR. STEINER:
Q. Yeah.
A. Yeah, we were not open. I don't open the door.

Page 26

Q. Okay. But you had gone through that door already, right?
A. And locked it back up.
Q. Locked it back up, okay.
A. Now, whether she went to the back, I don't know.
Q. Okay. Immediately after the fall did she talk about her condition at all?
A. Like I said, I asked her if she was okay, she said I don't know.
Q. Okay. When was the first time that you spoke with her where she indicated that there might be some sort of a medical issue?
A. Saturday.
Q. And did you just receive a phone call from her? How did she contact you?
A. I called her.
Q. And what did she say?
A. That she had gone to the clinic that day.
Q. Did she say anything else?
A. No, nothing too much. I just asked her how she was, she said sore.
Q. Do you have any personal knowledge regarding the terms of the relationship between Grand Dimitri's and Sage?
MR. BARATTA: Object to the form, but go ahead.

Page 27

BY MR. STEINER:
Q. And if you don't know --
MR. MOLLOY: If you know.
THE WITNESS: Well, Jim Sage is the owner of the building.
BY MR. STEINER:
Q. Okay. Besides --
A. Tom is the landlord.
Q. Okay. So besides that basic landlord/tenant arrangement --
A. That's all I know.
Q. -- are you aware --
MR. BARATTA: I'm sorry, did you say Tom is the landlord?
THE WITNESS: I'm sorry, Jim Sage is -- I got it mixed up. Jim Sage is the landlord, Tom is the tenant.
BY MR. STEINER:
Q. Are you aware of any other purpose for the Grand Dimitri's premises, including the back and front parking lot, um, other than for the restaurant business?
A. Wait, can you --
MR. MOLLOY: Do you understand the question?

Page 28

BY MR. STEINER:
Q. Sure. Is the restaurant premises, including the back and front parking lot, used for any other purpose other than for the restaurant?
A. Not that I'm aware of, no, just restaurant.
Q. Have you ever seen Jim Sage at the premises?
A. Yes.
Q. How often does he come around, if you know?
MR. BARATTA: What time frame?
THE WITNESS: Yeah, I don't know, I mean how often he would come. I've seen him.
BY MR. STEINER:
Q. Okay. So every now and then, it's not like a daily occurrence?
A. No.
Q. Do you have any idea what he's there for?
A. No.
Q. When you saw Tom Shkoukani go out and break up some ice around -- I'm sorry, you did not see him?
A. I did not see him.
Q. But had you ever heard of Tom Shkoukani going out to the parking lot other than this circum -- this incident to fix some sort of condition?
A. No.
Q. Did you notify anyone of salt or ice when you arrived

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Page 29

on the premises?
A. Well --
MR. MOLLOY: Objection, form.
THE WITNESS: Huh?
BY MR. STEINER:
Q. On the date of the incident, you mentioned that there was a sheet of ice, right?
A. Right.
Q. Did you tell anyone that morning?
A. I didn't. I mean I believe Donna told Tom right away, and I'm -- I can't -- I didn't say anything.
Q. Okay.
A. I'm just -- I would assume he was aware because that's how the parking lot was that day.
Q. If your -- strike that.
If you see snow or ice build-up in the parking lot, who would you contact about that issue? Would it be Tom?
MR. BARATTA: Objection, assumes facts not in evidence.
BY MR. STEINER:
Q. Who would you report any issues to?
A. Well, Tom, of course. I mean that's the boss, so. I mean it's not like I have the snow company number or Jim Sage's to call them, you know.

Page 30

Q. Okay. In February of 2014, do you remember how often or how many -- strike that.
Do you remember what days you worked in February 2014?
A. No.
Q. Did you work the day before this incident?
A. No.
Q. Did you work the, um, Saturday --
A. No.
Q. -- before?
A. I changed my schedule a lot, so I would be guessing.
Q. Okay. So --
A. I know for sure I was not there Saturday.
MR. BARATTA: I thought the witness testified she worked Mondays and Fridays.
MR. STEINER: I'm talking February 2014, not presently. And that's when she worked with Miss Livings.
MR. BARATTA: Okay.
MR. STEINER: That's all I have right now. Thank you.
MR. GABEL: My name is Steve Gabel. I represent T&J's. I have a few questions for you.
Can I have the exhibit for Mr. Caramagno there?

Page 31

EXAMINATION
BY MR. GABEL:
Q. Okay. You said earlier, and I'm not trying to stand over your back, I'll back up. You said earlier you were going to park somewhere, you couldn't, there was some snow in the area so you parked somewhere else.
A. Correct.
Q. Could you point with your finger and we'll describe for the record? So if you could tell me which photo for Mr. Caramagno. Exhibit 1 you're looking at, and then we can go from there.
A. The back of the building, is that what you --
Q. So you're pointing at the top photo.
Where would you normally park that you couldn't park on that day?
A. Normally, right here.
Q. Okay. So you're pointing --
A. Because here's the door, so it was close. That's where we would normally park.
Q. So you're pointing where the vehicle is shown?
A. Well, I can't tell if there's -- 'cuz this picture, is this the wall, the dumpster, and then the first car how this is.
Q. I'm just -- as you look at this back area --
A. Uh-huh.

Page 32

Q. -- and that's the back area that you normally park, correct?
A. Correct.
Q. You pointed with your finger where the car is shown, correct?
A. Well, if, like I said, this is the wall where the dumpster is, I would park closest right by that wall.
Q. Okay. So that's where the dumpster, and there's a car near it, right?
A. Correct.
Q. Okay. So --
A. I believe.
MR. MOLLOY: Show me in the picture.
THE WITNESS: If that's a car, yes.
MR. GABEL: All right.
MR. BARATTA: He just wants to know, because when we read this --
THE WITNESS: Uh-huh.
MR. BARATTA: -- months from now we're not going to know what you're saying.
THE WITNESS: Okay.
MR. BARATTA: So if you could, and you might have answered it already, just tell him where your finger is pointing on the photograph.
THE WITNESS: Closest to the wall. There

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Page 33

would be a dumpster, then a spot.
MR. BARATTA: Okay.
BY MR. GABEL:
Q. Okay. So for the record, Mr. Caramagno's Exhibit 1, the top photo, there is a vehicle, correct? You see the vehicle?
A. Yes.
Q. Do you see like the white object to the left of it?
A. Yes.
Q. Is that the general area you would park?
A. Yes.
Q. So on the morning of the incident were you not able to park there?
A. No.
Q. Is that correct?
A. Correct.
Q. Okay. So then where did you park?
A. I believe, if this is the window here --
Q. What do you mean -- you got to use words, the word here won't work.
A. If this is a window --
Q. Okay. Along the building?
A. On the building.
Q. Thank you.
A. If this is the window, I pretty much lined up right

Page 34

with that window.
Q. So it would be near where the rectangle is in that photograph?
A. Yes, right in this area right here.
Q. Just to the right of the --
MR. BARATTA: Just to the right of the hand drawn rectangle.
MR. GABEL: That's fine. That's all I need to know. Thank you very much.
BY MR. GABEL:
Q. And you were able to park there successful, correct?
A. Yeah.
Q. Okay. In that photograph where the circle and the X. is, could you describe what you saw there, if you're able to, or would you be guessing?
MR. MOLLOY: On the day of the incident?
BY MR. GABEL:
Q. Sure, on the day of the incident.
A. I would be guessing.
Q. Then don't guess, okay?
Now, you mentioned that over time you would see some TJ's personnel, and you said the words three or four people. Is that during spring, summer, winter, or is it a specific season you're thinking about?

Page 35

A. Just in general.
Q. Generally, okay.
So you're not thinking of the winter specifically?
A. Not --
Q. You got to let me finish my question.
Not in the wintertime specifically?
A. Correct.
Q. Okay. So in the winter time, including the winter of February 2014, if I were to ask you the number of TJ personnel out at that premises, could you tell me, or would you be guessing?
A. Guessing.
Q. Okay. I don't want you to guess.
Now, you don't know T&J's duties specifically, do you, vis-a-vis this property?
A. No.
Q. Okay. And you don't know what they did or did not do specifically in February 2014 vis-a-vis this property?
A. No.
Q. Okay. Now, on the morning of the incident when Donna Livings appeared at the front door of the restaurant, was she crawling?
A. No, I didn't see her -- I saw her at the door.
Q. Did she tell you she crawled to the front?

Page 36

A. She did not tell me that.
Q. Were her clothes wet?
A. Yes.
Q. Did she go home to change?
A. Yes.
Q. And did she tell you that she fell due to the water and that's why her clothes were wet?
A. Yes.
Q. Have you seen her dep transcript at all?
A. No.
Q. Did you discuss your proposed testimony with Donna Livings?
A. No.
MR. GABEL: Okay. I don't have anything else. Thank you.
MR. BARATTA: Nothing.
MR. STEINER: Just one really quick follow-up.
RE-EXAMINATION
BY MR. STEINER:
Q. How long was it from when she left to go change to the time she came back?
A. I would -- I'd say less than a half hour. I don't know. I'd be guessing, but it was not long.
Q. Do you remember what door she walked in --

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A. No.
Q. -- after she came back?
A. No.
Q. She didn't say that she fell a second time, did she?
A. No.

MR. STEINER: Thank you.
MR. BARATTA: You're all set. Thank you.
MR. GABEL: Thank you very much.
* * **

(The deposition was concluded at 3:56 p.m.)

CERTIFICATE
STATE OF MICHIGAN
COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take: and that I am not related, nor a counsel to either party, nor interested in the event of this cause.

LISA M. FIX, CSR - 3121
Notary Public, Macomb County
My Commission Expires: 4-9-2019

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EXHIBIT H

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OBSERVATIONS AT 3-HOURLY INTERVALS

DETROIT, MI
FEBRUARY 2014 KDTW WBAN # 94847

HOUR (LST)	SKY COVER	CEILING 100's of FT.	VISIBILITY (MILES)	WEATHER	TEMPERATURE °F DRY BULB	DEW POINT	WET BULB	RELATIVE HUMIDITY (PCT)	WIND SPEED (MPH)	DIRECTION Tens of Deg	PRESSURE (INCHES, HG) STATION	SEA LEVEL
SUNRISE: 0733				FEB 13				SUNSET: 1803				
01	OVC	075	9.00		16	8	14	71	5	11	29.37	30.11
04	SCT	180	7.00		14	7	12	73	0	00	29.31	30.06
07	SCT	180	5.00	HZ	12	6	11	77	0	00	29.29	30.03
10	FEW	220	7.00		21	10	18	62	0	00	29.23	29.97
13	FEW	230	10.00		28	9	23	44	5	12	29.13	29.86
16	SCT	230	10.00		27	10	22	45	7	09	29.03	29.77
19	BKN	140	10.00		21	12	18	68	6	14	28.97	29.71
22	OVC	045	10.00		21	12	18	68	5	13	28.91	29.63
SUNRISE: 0731				FEB 14				SUNSET: 1804				
01	OVC	032	10.00		20	14	18	78	0	00	28.80	29.52
04	OVC	025	5.00	-SN BR	20	17	19	89	0	00	28.75	29.47
07	OVC	025	3.00	-SN BR	24	20	23	84	6	21	28.81	29.53
10	OVC	015	1.50	-SN BR	27	23	25	85	17	24	28.88	29.61
13	OVC	040	3.00	-SN	29	19	26	66	15	24	28.92	29.65
16	OVC	035	6.00	-SN	27	17	24	66	15	25	28.97	29.69
19	OVC	035	9.00		25	16	22	69	7	28	29.01	29.75
22	BKN	200	8.00		22	14	20	71	6	27	29.05	29.78
SUNRISE: 0730				FEB 15				SUNSET: 1806				
01	OVC	035	7.00	-SN	23	17	21	78	9	30	29.08	29.81
04	BKN	035	10.00		15	8	13	74	10	30	29.14	29.88
07	FEW	035	10.00		8	1	7	73	8	30	29.24	29.98
10	CLR	NC	10.00		11	1	9	64	11	29	29.30	30.04
13	CLR	NC	10.00		18	4	15	54	11	28	29.31	30.04
16	SCT	200	10.00		22	5	18	48	8	29	29.31	30.04
19	SCT	220	10.00		18	5	15	57	7	22	29.35	30.10
22	BKN	220	10.00		10	3	9	73	0	00	29.34	30.09
SUNRISE: 0728				FEB 16				SUNSET: 1807				
01	BKN	220	9.00		11	5	10	77	3	17	29.32	30.06
04	OVC	100	6.00	BR	12	8	11	84	5	16	29.27	30.01
07	OVC	033	3.00	-SN	15	11	14	84	0	00	29.24	29.99
10	OVC	035	1.00	-SN	18	13	17	81	0	00	29.30	30.05
13	BKN	055	7.00		24	15	21	68	9	33	29.33	30.07
16	OVC	035	7.00	-SN	26	15	23	63	9	32	29.41	30.15
19	BKN	035	5.00	-SN	20	15	19	81	11	03	29.54	30.29
22	FEW	200	10.00		15	8	13	74	7	02	29.63	30.39
SUNRISE: 0727				FEB 17				SUNSET: 1808				
01	FEW	200	7.00		9	5	8	84	5	02	29.66	30.41
04	FEW	200	10.00		3	-1	2	83	3	15	29.66	30.42
07	BKN	220	8.00		6	2	5	83	3	07	29.66	30.42
10	OVC	230	10.00		11	3	9	70	11	08	29.63	30.38
13	OVC	230	10.00		18	7	15	62	7	08	29.49	30.24
16	OVC	070	10.00		19	10	17	68	10	07	29.25	30.04
19	OVC	090	10.00		21	11	18	65	11	09	29.10	29.85
22	OVC	012	1.00	-SN BR	23	20	22	88	5	04	28.95	29.69
SUNRISE: 0726				FEB 18				SUNSET: 1809				
01	OVC	012	6.00	-SN BR	25	22	24	88	9	22	28.92	29.65
04	OVC	027	1.00	-SN BLSN	24	18	22	77	18	25	29.03	29.77
07	OVC	038	6.00	-SN BLSN	23	16	21	74	15	26	29.17	29.91
10	OVC	020	9.00		26	18	23	71	9	24	29.28	30.01
13	FEW	035	7.00		31	21	28	67	11	21	29.28	30.01
16	BKN	230	6.00	HZ	33	23	29	66	7	17	29.21	29.94
19	BKN	180	6.00	HZ	34	27	31	76	9	14	29.13	29.86
22	OVC	160	10.00		34	27	31	76	10	16	29.06	29.79
SUNRISE: 0724				FEB 19				SUNSET: 1811				
01	BKN	180	10.00		40	28	35	63	14	19	28.95	29.68
04	BKN	190	10.00		37	28	33	70	8	21	28.90	29.62
07	BKN	160	10.00		34	27	31	76	8	21	28.92	29.63
10	OVC	090	10.00		37	29	34	73	14	27	29.00	29.72
13	BKN	065	8.00		39	31	36	73	14	27	29.11	29.83
16	CLR	NC	10.00		44	29	38	55	13	23	29.20	29.92
19	FEW	250	10.00		39	29	35	67	11	21	29.31	30.03
22	FEW	230	7.00		33	28	31	82	6	17	29.34	30.06
SUNRISE: 0723				FEB 20				SUNSET: 1812				
01	SCT	210	5.00	BR	27	25	26	92	0	00	29.35	30.08
04	OVC	200	2.00	BR	30	28	29	92	0	00	29.33	30.06
07	OVC	190	2.00	BR	30	28	29	92	0	00	29.26	29.98
10	OVC	100	3.00	HZ	34	28	32	79	8	06	29.19	29.92
13	OVC	005	1.50	-RASN BR	34	32	33	92	10	05	29.08	29.81
16	OVC	005	1.50	-RA BR	35	33	34	93	8	08	29.00	29.71
19	OVC	005	3.00	-RA BR	37	35	36	93	9	07	28.89	29.61
22	BKN	045	1.50	BR	37	36	37	96	5	05	28.77	29.49
SUNRISE: 0721				FEB 21				SUNSET: 1813				
01	OVC	100	9.00		46	44	45	93	15	17	28.70	29.41
04	OVC	065	10.00		37	30	34	76	22	21	28.79	29.50
07	OVC	045	10.00		36	29	33	76	21	20	28.83	29.54
10	OVC	065	9.00	-SN	37	27	33	67	30	20	28.83	29.55
13	OVC	040	10.00		36	26	32	67	30	22	28.87	29.58
16	BKN	045	10.00		36	23	31	59	37	21	28.92	29.64
19	FEW	045	10.00		33	19	28	56	25	22	29.00	29.72
22	FEW	160	10.00		32	18	27	56	25	21	29.06	29.78
SUNRISE: 0720				FEB 22				SUNSET: 1814				
01	OVC	060	10.00		35	24	31	64	21	21	29.08	29.81
04	OVC	039	10.00		36	29	33	76	16	22	29.06	29.78
07	CLR	NC	10.00		33	12	26	42	22	24	29.11	29.84
10	SCT	220	10.00		32	11	25	41	17	23	29.20	29.93
13	OVC	180	10.00		37	14	29	39	24	23	29.24	29.96
16	OVC	200	10.00		37	16	30	42	22	22	29.24	29.96
19	BKN	200	10.00		34	19	29	54	14	21	29.25	29.98
22	OVC	200	10.00		34	23	30	64	9	22	29.27	30.00
SUNRISE: 0718				FEB 23				SUNSET: 1816				
01	OVC	180	10.00		32	18	27	56	8	26	29.27	30.00
04	BKN	150	10.00		29	15	25	56	9	24	29.28	30.01
07	BKN	160	10.00		25	14	22	63	8	24	29.33	30.06
10	OVC	110	10.00		26	15	23	63	11	25	29.36	30.09
13	SCT	200	10.00		30	14	25	51	18	24	29.33	30.06
16	SCT	200	10.00		33	15	27	47	13	25	29.31	30.04
19	FEW	180	10.00		27	8	22	45	15	27	29.35	30.09
22	CLR	NC	10.00		22	11	19	63	14	23	29.37	30.10
SUNRISE: 0717				FEB 24				SUNSET: 1817				
01	BKN	045	10.00		21	11	18	65	11	23	29.35	30.08
04	OVC	040	9.00	-SN	22	12	19	66	8	24	29.34	30.07
07	OVC	036	10.00		20	7	17	57	17	27	29.37	30.11
10	OVC	035	9.00	-SN	21	11	18	65	15	24	29.41	30.15
13	OVC	036	10.00		25	12	21	58	16	24	29.41	30.15
16	BKN	040	10.00		25	11	21	55	18	25	29.41	30.15
19	OVC	220	10.00		23	10	19	57	15	24	29.43	30.17
22	OVC	040	10.00		22	9	18	57	13	26	29.44	30.18

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REFERENCE NOTES & SUPPLEMENTAL SUMMARIES

* = Extreme for the month (last occurence if more than one).

T = Trace precipitation amount.

+ = also occurs on earlier date.

FG+ = Heavy fog, visibility .25 miles or less.

BLANK entries denote missing or unreported data.

Resultant wind is the vector sum of the wind speeds and directions divided by the number of observations.

Wind direction is recorded in tens of degrees (2 digits) clockwise from true north. '00' = calm, 'VR' = variable.

Precipitation is for the 24-hour period ending at the time indicated in the column heading.

Ceilometer (30-second) data are used to derive cloudiness at or below 12,000 feet. This cloudiness is the mean cloud cover detected during sunrise to sunset (SR-SS), or midnight to midnight (MN-MN).

WEATHER NOTATIONS

QUALIFIER	WEATHER PHENOMENA		
DESCRIPTOR	PRECIPITATION	OBSCURATION	OTHER
BC Patches	DZ Drizzle	BR Mist	DS Duststorm
BL Blowing	GR Hail	DU Widespread Dust	FC Funnel Cloud
DR Low Drifting	GS Small Hail and/or Snow Pellets	FG Fog	+FC Tornado Waterspout
FZ Freezing	IC Ice Crystals	FU Smoke	PO Well-Developed Dust/Sand Whirls
MI Shallow	PL Ice Pellets	HZ Haze	
PR Partial	RA Rain	PY Spray	SQ Squalls
SH Shower(s)	SG Snow Grains	SA Sand	SS Sandstorm
TS Thunderstorm	SN Snow	VA Volcanic Ash	GL Glaze
VC In the Vicinity	UP Unkown Precipitation		

Intensity (as indicated on pages 4 to 6):
'+' = Heavy '' = Moderate '-' = Light

DETROIT, MI
FEBRUARY 2014

Sky Condition is based on the sum (not to exceed 8) of the sunrise to sunset cloud cover below and above 12,000 feet.

Clear = 0-2 oktas, Partly Cloudy = 3-6 oktas, Cloudy = 7-8 oktas.

A Heating (Cooling) Degree Day is the difference between the average daily temperature and 65 degrees F. The HDD season begins July 1, the CDD season begins January 1.

Snow Depth, Snowfall, and Sunshine data may come from nearby sites that the National Weather Service deems Climatologically representative of this site.

NORMALS ARE FOR THE YEARS 1981-2010

ADDITIONAL NOTES & ERRATA:

```
Station Augmentation-PAID SNOW OBSERVER
  Lat/Lon:42.24558/-83.35056 Elevation:635FT
  Distance:1.5 MI Dir:NW
  Augmented Elements:Snowfall, snow depth
  Equipment:SRG, snowstick, snowboard
```

Date	VISIBILITY (MILES) MINIMUM	MAXIMUM
01	0.25	2.50
02	7.00	10.00
03	7.00	10.00
04	2.00	10.00
05	0.25	10.00
06	5.00	10.00
07	8.00	10.00
08	1.00	10.00
09	0.50	10.00
10	4.00	10.00
11	7.00	10.00
12	0.12	10.00
13	4.00	10.00
14	1.50	10.00
15	6.00	10.00
16	1.00	10.00
17	0.25	10.00
18	1.00	10.00
19	7.00	10.00
20	0.75	5.00
21	9.00	10.00
22	8.00	10.00
23	10.00	10.00
24	7.00	10.00
25	1.00	10.00
26	9.00	10.00
27	1.50	10.00
28	9.00	10.00
AVGS	4.22	9.55

MINIMUM VISIBILTY (MILES) <= .25	<= 3.0	>= 7.0
4	13	11

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EXHIBIT I

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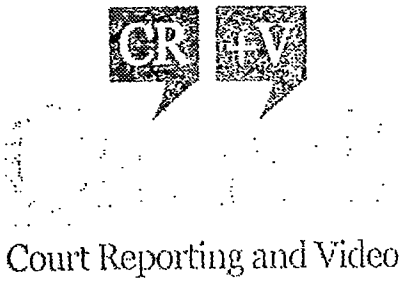
In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

Thomas Caramagno

March 23, 2017



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Thomas Caramagno
March 23, 2017

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,
Plaintiff,
vs. Case No. 2016-001819-NI
HON. EDWARD A. SERVITTO
SAGE'S INVESTMENT GROUP, LLC, a
Michigan limited liability company, and
T&J LANDSCAPING & SNOW REMOVAL, INC., a
Michigan corporation,
Defendants.

The Deposition of THOMAS CARAMAGNO,
Taken at 25800 Northwestern Highway, Suite 400,
Southfield, Michigan,
Commencing at 1:11 p.m.,
Thursday, March 23, 2017,
Before Lisa M. Fix, CSR-3121.

1 APPEARANCES
2
3 CHRISTOPHER R. BARATTA, ESQ.
4 BARATTA & BARATTA
5 120 Market Street
6 Mount Clemens, Michigan 48043
7 Appearing on behalf of the Plaintiff.
8
9 STEVEN R. GABEL, ESQ.
10 THE HANOVER LAW GROUP
11 25800 Northwestern Highway, Suite 400
12 Southfield, Michigan 48075
13 Appearing on behalf of the Defendant, T&J Landscaping.
14
15 MARK W. STEINER, ESQ.
16 SEGAL MCCAMBRIDGE
17 39475 13 Mile Road, Suite 203
18 Novi, Michigan 48337
19 Appearing on behalf of the Defendant, Sage's.
20
21
22
23
24
25

1 TABLE OF CONTENTS
2
3 WITNESS PAGE
4 THOMAS CARAMAGNO
5
6 EXAMINATION BY MR. BARATTA: 6
7 EXAMINATION BY MR. STEINER: 30
8 EXAMINATION BY MR. GABEL: 41
9 RE-EXAMINATION BY MR. BARATTA: 45
10 RE-EXAMINATION BY MR. STEINER: 51
11 RE-EXAMINATION BY MR. GABEL: 52
12
13 EXHIBITS
14
15 EXHIBIT PAGE
16 (Exhibit attached to transcript)
17
18 DEPOSITION EXHIBIT 1 25
19 (Photo)
20
21
22
23
24
25

1 Southfield, Michigan
2 Thursday, March 23, 2017
3 1:11 p.m.
4 * * *
5 THOMAS CARAMAGNO,
6 was thereupon called as a witness herein, and after
7 having first been duly sworn to testify to the truth,
8 the whole truth and nothing but the truth, was
9 examined and testified as follows:
10 MR. BARATTA: The record will reflect this
11 is the deposition of Thomas Caramagno, taken pursuant
12 to Notice, to be used for all purposes consistent with
13 the Michigan Court Rules.
14 My name is Chris Baratta, I represent Donna
15 Livings. How are you today?
16 THE WITNESS: Good.
17 MR. BARATTA: Good. Have you ever had a
18 deposition before?
19 THE WITNESS: Yes.
20 MR. BARATTA: When was the last time?
21 THE WITNESS: I can't remember. Year or
22 two years ago.
23 MR. BARATTA: Okay. And how many
24 depositions have you had before?
25 THE WITNESS: I'm guessing three, four.

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Page 5

MR. BARATTA: All right. Were they all related to T&J Landscape?
THE WITNESS: I don't remember.
MR. BARATTA: Were they personal matters, or were they --
THE WITNESS: No.
MR. BARATTA: -- matters involving your business?
THE WITNESS: Business.
MR. BARATTA: Okay. In case you don't remember the ground rules, if you don't know something, tell me you don't know.
THE WITNESS: Uh-huh.
MR. BARATTA: That's a perfectly acceptable answer, okay?
THE WITNESS: Okay.
MR. BARATTA: A verbal response I'm going to ask for as opposed to a nod, shake of the head, uh-huh, uh-uh, that's not going to come out well on the transcript.
THE WITNESS: Gotcha.
MR. BARATTA: I guess the last thing is that in normal conversation, and you've already done it, you know what I'm going to ask you before I'm finished. Please allow me to just ask my question,

Page 6

answer, then I'll allow you to fully respond so we're not talking over each other so the transcript reads very nicely.
THE WITNESS: Okay.
MR. BARATTA: Thank you.
EXAMINATION
BY MR. BARATTA:
Q. Your full name?
A. Thomas Anthony Caramagno, II.
Q. Address?
A. My home address?
Q. Yes.
A. 11213 Primrose Way, Washington, Michigan, 48094.
Q. And I think your business address is Clinton Township, correct?
A. Correct.
Q. What is that?
A. 35426 Cordelia, Clinton Township, 48035.
Q. What is your date of birth?
A. 7-25-63.
Q. How far did you go in school?
A. High school grad.
Q. Which high school?
A. Warren Woods High.
Q. All right. Any further education beyond that?

Page 7

A. No.
Q. Are you currently employed?
A. Yes.
Q. Where are you employed?
A. T&J Landscaping and Snow Removal, Inc.
Q. Is that your company?
A. Yes.
Q. How long have you had that company?
A. Thirty-five years.
Q. Any other form of employment?
A. I have other companies I own.
Q. What type of companies?
A. Real estate holdings.
Q. Okay.
A. Equipment holdings.
Q. Equipment holdings for the landscape company?
A. All my companies.
Q. I'm not clear.
MR. GABEL: He just wants to know what you mean by equipment holdings, if you can just tell him.
THE WITNESS: I own a corporation that owns any of the pieces of equipment that my companies need, that company rents it to those companies.
BY MR. BARATTA:
Q. So would that include T&J Snow Removal Company?

Page 8

A. Yes.
Q. So any of the equipment that T&J has is actually rented from another company you have which owns the equipment?
A. Correct.
Q. Okay. And then the real estate investment company or companies you have --
A. Uh-huh.
Q. -- correct me if I'm wrong, those are investment properties?
A. Correct.
Q. Are they commercial or residential properties?
A. Both.
Q. Okay. So other than your commercial real estate companies, your equipment rental company, and T&J Landscape, do you have any other form of income?
A. My paycheck is derived by T&J Landscaping.
Q. All right. As of February of 2014, how many employees were employed by T&J?
A. In February?
Q. Yes.
A. Zero.
Q. Just yourself?
A. Correct. My partner and myself.
Q. Who's your partner?

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Thomas Caramagno
March 23, 2017

Page 9

A. James Turay.
Q. Spell that, please.
A. T-U-R-A-Y.
Q. And is he a 50/50 owner?
A. Correct.
Q. He's the J. in T&J?
A. Correct.
Q. So other than you and James, there were no other employees or owners of T&J Landscaping as of February 2014?
A. No.
Q. That's correct?
A. Yes.
Q. How many trucks did T&J have at that time?
A. T&J Landscaping doesn't own any trucks, but we just use the trucks that are needed at that time, which is one or two, you know, for providing what we have to plow.
Q. So I guess I phrased the question poorly in light of your prior testimony.
So one or two trucks were rented by T&J as of February 2014, correct?
A. Correct.
Q. All right. Does James have any ownership in your equipment rental company?

Page 10

A. 50/50 on all of them.
Q. Are you guys 50/50 on the real estate, too?
A. Yes.
Q. You guys lifelong friends?
A. Since high school.
Q. Tell me, if you could, the number of properties that T&J Landscaping serviced as of 2014, February.
A. I'd have to be guessing.
Q. Give me a guess.
A. Thirty.
Q. Okay. Were these all commercial or residential, or a mix of both?
A. Mix of both.
Q. Primarily do you recall what it might have been, what might have been the ratio?
A. Usually I try to keep around 60/40 commercial.
Q. Okay. And to the best of your memory, at this time was the ratio about 60/40?
A. Yes.
Q. Okay. So maybe 18 commercial properties and 12 residentials?
A. Yes.
Q. Something like that?
A. Yes.
Q. We're here today to talk about an incident that

Page 11

occurred, a fall involving Donna Livings. This fall occurred on February 21st, 2014 at 25001 Gratiot in Eastpointe. That's commonly known as the Sajo's Plaza.
Are you generally familiar with that incident involving Miss Livings?
A. Just by the lawsuit, itself.
Q. Okay. And you've talked to your attorney, Mr. Gabel about that?
A. Yes.
Q. I don't want to know anything what you guys talked about. Um, did you -- did you witness this fall?
A. No, I did not.
Q. Do you know of any witnesses?
A. No, I do not.
Q. Do you recall or have any knowledge as to whether you were on the premises on February 20th or 21st of 2014?
A. Just based on my records that I keep.
Q. And what is that answer?
A. The last time I plowed was on the 19th, I believe.
MR. GABEL: This Exhibit 3 from Mr. Sage, is the document you're referring to?
THE WITNESS: Right. Which was on --
MR. GABEL: Go ahead. Go ahead.
THE WITNESS: On 2-18 was the last time I

Page 12

plowed on that property.
BY MR. BARATTA:
Q. Okay.
A. Of 2014.
Q. Do you know if it was you or James?
A. Myself.
Q. Can you describe for me the condition of the lot at that time, if you recall?
A. Define condition.
Q. What the lot looked like, whether there was any accumulation of ice or snow, standing water, anything like that?
A. At the point of -- I mean I can't remember what it looked like on that day.
Q. And that was my question.
A. Right.
Q. Yep.
A. I don't know.
Q. Do you have a memory of what the parking lot at that location looked like in February at any time of 2014?
A. I do not.
Q. Okay. You understand that the -- that this was the winter between '13 and '14 where there was a record amount of snowfall?
A. I'm basing it off what you're saying. I can't

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Thomas Caramagno
March 23, 2017

Page 13

1 remember.
2 Q. You don't recall the winter of record snowfall?
3 A. I remember bad winters, but I can't say, you know,
4 under oath saying that was it, you know.
5 Q. Okay.
6 A. That would be just sheer agreeing. If that's what you
7 say, I'd agree with you.
8 Q. Fair enough. I guess let's take a look at this, then,
9 while we're talking about it. This is -- I'm handing
10 you -- may I call you Tom?
11 A. Yes.
12 Q. Tom, I'm going to hand you what was marked as
13 Deposition Exhibit Number 3 in Jim Sage's deposition.
14 Do you know Jim?
15 A. Yes, I do.
16 Q. And how long have you known Jim for?
17 A. Twenty-five to 30 years.
18 Q. All right. You guys -- how would you classify your
19 relationship with Jim, business associates, friends,
20 anything?
21 A. Friends. Very close friends.
22 Q. Okay. I want to just go through this sheet a little
23 bit. First of all, can you tell me what this sheet
24 is?
25 A. This is my computer history of that property.

Page 14

1 Q. Okay. Are there any other records T&J Landscaping has
2 regarding snow maintenance or salting services
3 performed at the subject property other than what's
4 contained in this one page Exhibit 3?
5 A. Anything that was done to that property in that time
6 frame is this right here.
7 Q. What about billing records, do you maintain those?
8 A. We don't bill them anything. I don't charge him
9 anything.
10 Q. Ever?
11 A. Ever.
12 Q. How does that work? Is it a barter system that you
13 guys have?
14 A. Just good friends. I don't charge my friends. I
15 don't make money off my friends.
16 Q. How many other accounts of the approximately 30 that
17 you had this winter were gratis?
18 A. What's gratis mean?
19 Q. Means free.
20 A. Only my friends, and Jim is my only friend that I plow
21 for free.
22 Q. And I understand Mr. Sage has many properties.
23 A. He has at that time I think it's two.
24 Q. Okay. Were you plowing both of his properties that
25 winter?

Page 15

1 A. Yes.
2 Q. And did you -- did you also provide him with free
3 plowing services at the other property?
4 A. Yes.
5 Q. Okay. If you can tell me the breakdown between
6 plowing services performed at the subject property --
7 when I say subject, you understand it's Sajo's Plaza,
8 right?
9 A. Uh-huh.
10 Q. So can you break down for me, um, who would have done
11 the plowing as between you and James?
12 A. I would have done this property.
13 Q. All right. So hundred percent, 2014 winter it's you?
14 A. Yes.
15 Q. Okay. And the reason no invoices exist is because
16 there are none?
17 A. Exactly.
18 Q. Gotcha.
19 Now, take a look at the bottom of the
20 center of the page. There's some handwriting in
21 there.
22 A. Uh-huh.
23 Q. There's an asterisks, and it says, quote: "Salt by
24 request only by plaza owner." Is that your
25 handwriting?

Page 16

1 A. That is my secretary's.
2 Q. Okay. And was that the arrangement that you had with
3 Mr. Sage concerning this property?
4 A. Yes.
5 Q. Okay. So you would not salt unless Mr. Sage requested
6 you to do so?
7 A. Correct.
8 Q. Okay. If you did salt, would you charge Mr. Sage for
9 the cost of the salt?
10 A. No.
11 Q. Okay. As we're looking at this, this appears to be
12 sort of a report you would generate. I see the line
13 number starting from 1467 going down to 1504. There's
14 no particular significance to the line number, is
15 there?
16 A. No.
17 Q. The dates, though, would reflect the days that you
18 were plowing on the property?
19 A. Yes, or whatever services we did.
20 Q. Okay. So would we find out what services you did by
21 looking at the code?
22 A. There's no code, it just goes by date, basically. It
23 says, if you look at 2-02-14, meaning February 2nd,
24 2014, the D. means just it's a debit, and then that's
25 just because it's a -- I guess an accounting program,

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Page 17

just to create a balance if we charge them something.
Q. Okay.
A. And then it just says what we did to the far right, which is snow plowing. Snow blowing means we did the sidewalks.
Q. Okay. So snow plowing would include what?
A. The parking lot.
Q. All right. Is there one parking lot?
A. Yes, that surrounds the whole complex.
Q. Okay. So snow plowing means parking lot, and then snow blowing is blowing the sidewalks?
A. Correct.
Q. And there are initials to the right of those descriptions, sometimes it says PP?
A. PP means per push. Means he's not a contract customer.
Q. Explain.
A. In the snow plowing industry, there is such a thing as a contract customer or a seasonal customer, and then there's people that are just per push. So he was just classified as a per push because we don't get any money for it, so it's just classified so it's not like one of my contract customers that pays me a seasonal contract.
Q. Gotcha.

Page 18

And then the handwriting that says claim number, is that your secretary's?
A. Yes.
Q. Do you know what that claim number references?
A. I do not. I'm guessing it had something to do with the case.
MR. GABEL: Actually it's not the claim number.
THE WITNESS: No?
MR. GABEL: No.
THE WITNESS: She just must have took it off something.
MR. GABEL: I can tell you it's not.
THE WITNESS: All right.
BY MR. BARATTA:
Q. So essentially the sum total of T&J's record of activity of snow maintenance and salting services would be contained within this Exhibit 3 that we're looking at?
A. Yes.
MR. GABEL: For the period of time shown.
THE WITNESS: Right.
MR. BARATTA: Yes, for the period of time shown. Thank you.
MR. GABEL: Uh-huh.

Page 19

BY MR. BARATTA:
Q. Tom, I don't see any salting on here. Can you tell by looking at this whether or not any salting services were performed on the property?
A. There is no salting done on this property based on this time frame.
Q. Do you have an independent recollection of salting this property at any time from January of '14 through March of '14?
A. If it doesn't say it on here, it was not done.
Q. And it doesn't say it on there, correct?
A. Correct.
Q. Okay. I want to just show you a copy of what's been marked as Exhibit Number 1 in Donna Livings' deposition. There are two photographs there. Essentially it's a photograph of the same area. You recognize what's contained in either of those photographs?
A. Yes.
Q. What is it?
A. It's the back parking lot of the strip mall.
Q. Are you aware of what the back parking lot is used for --
A. Yes.
Q. -- as far as who can park there?

Page 20

A. Uh-huh.
Q. What is it?
A. All the employee parking.
Q. Okay. When you push snow, it's got to go somewhere, right?
A. Correct.
Q. So would there be an area where you would stockpile the snow that you pushed?
A. Yes.
Q. And is it depicted in the pictures we see on Exhibit 1?
A. You can't see it on here 'cuz I don't see any snow issues --
Q. Right.
A. -- on here.
Q. Right, but the location of where you would stockpile snow.
A. Well, where I would push the snow, which, you know, I've explained it, this is the back.
MR. GABEL: When you say this or there, you need verbal description --
THE WITNESS: Explain it.
MR. GABEL: -- so the record is clear, when you walk your way through this --
THE WITNESS: The back edge, or the brick

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Thomas Caramagno
March 23, 2017

Page 21

line of the back of the property.
MR. GABEL: Is on which side of the photo?
THE WITNESS: Would be the north side of the building. That's where my snowplow would angle everything going to the north side of the parking lot up against that wall. Meaning the plow is on an angle, and it, you know, constantly diverts the snow going north, and at the end of the parking lot if you're looking at these, both these pictures, the top part of the picture is further west, the bottom of the page is Gratiot. So when you're deflecting or diverting the snow to the wall, the wall, the snow line will be all along that wall, and then the end of the pile would be at one end of the property and the other pile would be at the corner of Gratiot.
BY MR. BARATTA:
Q. Am I correct in understanding you that you're saying that this wall we see on the right side and also the top of the photograph, this wall is on the north side of the property?
A. Correct.
Q. And then if we look at where the car is parked against the wall, that would be the northwestern section of the property?
A. That car right there is not by a wall, that's a

Page 22

dumpster, I believe.
Q. Show me what you're pointing at.
A. This car here, these cars, this is not the end of the property. The property goes a lot further past that.
Q. Okay. So this car that we see here, that is not the northwestern portion of the property?
A. No, it goes way further than that.
Q. Okay. Can you point or tell me, just point with your finger where the stockpiles of snow would be?
A. Stockpile would be way over here, which would be by the collision -- you know, where the property that's adjacent to Sajo's --
Q. Okay --
A. -- which is quite a bit aways.
MR. GABEL: Hold on. Keep your thumb there. That's the top photo in the middle where the break appears --
THE WITNESS: Yes.
MR. GABEL: -- between the building and the wall to the right.
THE WITNESS: Correct.
MR. GABEL: Thank you. Go ahead.
THE WITNESS: Which is basically 75 percent -- this is the beginning. The front part of the brick line of the property, that's Dimitri's, all right.

Page 23

which is the beginning part of the back alley. I call it, or the back parking lot.
BY MR. BARATTA:
Q. Okay.
A. This is the adjacent property that, you know, abuts up to it where the parking blocks are, which this from here, you know, where the circle is on the top picture.
Q. The X that's circled?
A. Yeah, from that point to there, where the pile gets piled, is probably two-thirds of the length of the property past that point.
Q. So basically from the X --
A. Uh-huh.
Q. -- to the top left portion of the photograph would be the area where the snow was stockpiled?
A. No, top left is over here.
MR. GABEL: No. Hold on.
BY MR. BARATTA:
Q. Can you circle where you would --
A. This is the edge of the property.
MR. GABEL: He' not --
MR. BARATTA: Wait. Before you do anything --
THE WITNESS: I'm sorry.

Page 24

MR. GABEL: Go ahead.
BY MR. BARATTA:
Q. I don't know what this means.
A. This is the end of the property. That is the back of the building. That's where the snow pile is.
Q. Circle where you snow piled.
A. Right here.
MR. GABEL: It's got to be something darker than that.
THE WITNESS: Do you have a highlighter? I can put it on this picture. This picture would be better.
MR. BARATTA: Let's do the bottom picture.
MR. GABEL: Thank you.
THE WITNESS: I mean without physically measuring, you're talking hundreds of feet away from where that circle is.
BY MR. BARATTA:
Q. So that circle on the bottom picture represents where your snow would be stockpiled?
A. No, that circle is where you guys -- I don't know what that circle represents.
Q. No, no, no, the circle you just drew.
MR. GABEL: No, the one you just made --
THE WITNESS: Yeah, which would be the west

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Page 25

1 edge of the property.
2 MR. BARATTA: Okay. We'll just mark this,
3 I guess.
4 MARKED FOR IDENTIFICATION:
5 DEPOSITION EXHIBIT 1.
6 BY MR. BARATTA:
7 Q. Okay. Was there a contract between T&J and Sage's
8 Investment Company for snow maintenance and salting of
9 this subject property?
10 A. No.
11 Q. Nothing written?
12 A. No.
13 Q. Correct?
14 A. Correct.
15 Q. Was there an agreement between you and Mr. Sage as to
16 the terms of T& J's snow maintenance and salting of
17 the subject property?
18 A. There is only a verbal agreement of plowing the snow.
19 Q. What was that agreement?
20 A. All services start after 1.5 inches of snowfalls to
21 start services.
22 Q. So the trigger, so to speak --
23 A. Correct.
24 Q. -- would be a snowfall of 1.5 inches?
25 A. Yes.

Page 26

1 Q. And at that point in time you would come in and plow
2 the property?
3 A. Yes.
4 Q. All right. Would any salting involve Mr. Sage
5 directing you to salt -- strike that. That was a poor
6 question.
7 Did you have any discretion to salt the
8 property independent of Mr. Sage telling you to salt
9 it?
10 A. No, I do not.
11 Q. Okay. Would you, during this winter that we're
12 talking about, would you ever inspect the property to
13 take a look at the lot to determine whether it needed
14 to be plowed?
15 A. No.
16 Q. How would you know that it was time to plow at that
17 1.5 inch trigger?
18 A. When I seen 1.5 inches of snow on the ground.
19 Q. But you wouldn't maintain or have any independent
20 inspections of the property at any time other than the
21 times you were on the property to plow with an
22 accumulation of at least 1.5 inches?
23 A. Correct.
24 Q. Did Grand Dimitri's -- strike that.
25 Do you know who Grand Dimitri's is?

Page 27

1 A. No, I don't.
2 Q. There's a restaurant that's on this property, and it's
3 called Grand Dimitri's. Are you generally familiar
4 with that?
5 A. Yes.
6 Q. It's a family dining style restaurant?
7 A. Yes.
8 Q. All right. Have you ever been in there?
9 A. No.
10 Q. Have you ever talked to anyone who said that they're
11 the owner?
12 A. No.
13 Q. Have you ever talked to anyone who said they were an
14 employee there?
15 A. No.
16 Q. Did Grand Dimitri's ever pay T&J for their snow
17 plowing services?
18 A. No.
19 Q. Did Grand Dimitri's, or anyone from there ever control
20 the scope or the manner in which T&J performed snow
21 removal services on the property?
22 A. No.
23 Q. Do you have any knowledge of any drainage issues or
24 problems on this particular parking lot?
25 A. No, I do not.

Page 28

1 Q. I'm going to ask you a couple of questions now, and
2 then I want you to just assume a couple things in the
3 questions that I'm going to ask you.
4 Assume that T&J is required to plow this
5 lot when the accumulations are 1.5 inches or greater,
6 okay? That's the first assumption.
7 A. Okay.
8 Q. The second assumption is, is that this particular lot
9 has a combination of snow and/or ice that's
10 approximately six inches deep, okay?
11 A. Okay.
12 Q. My question for you is is assuming those two facts, if
13 T&J did their job and they plowed every time the
14 minimum accumulation was one and-a-half inches, do you
15 have any explanation as to how an accumulation or
16 layer of snow or ice could be on that particular lot
17 that would measure approximately six inches deep?
18 A. Are you asking is that possible?
19 Q. I'm asking that if -- first of all, is that possible?
20 A. If I am plowing that parking lot every time it snows,
21 it is impossible to have a six-inch build-up of snow
22 or ice.
23 Q. Okay. If there were a six-inch build-up of snow or
24 ice, what do you think the causes might be from the
25 hypothetical I just gave you?

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Page 29

A. Well, there's no hypothetical. The only way that would happen is if that parking lot wasn't plowed.
Q. So this was the year, I know you don't remember, but it was the year where we had record snowfalls. My question generally on all the commercial lots, the parking lots that you paved that year, do you have any recollection of how close to the ground your plows would be so that when you were finished plowing a lot, I want to know what the depth would be of the snow that remains on the surface.
A. Typically if we plow every snowfall, it's pretty darn close to the surface of the parking lot.
Q. Okay. You don't have any recollection of coming to any of your commercial properties that year, um, with a trigger of 1.5 inches and noticing a large accumulation of snow or ice that was many inches deep?
A. None.
Q. I'm going to have to ask this of you. Any felony convictions or misdemeanor convictions involving an element of theft, dishonesty or false statement?
A. No.
MR. BARATTA: I don't have anything else.
MR. STEINER: I have a few questions for you.
THE WITNESS: Uh-huh.

Page 30

MR. STEINER: My name is Mark Steiner, I represent Sage Investment Group.
THE WITNESS: Okay.
EXAMINATION
BY MR. STEINER:
Q. When you negotiated the contract with Sage Investment Group, did you negotiate that just with Jim Sage?
MR. BARATTA: Object to the form.
BY MR. STEINER:
Q. Or at least the agreement?
A. There was no negotiation. There's no charge.
Q. Okay. But when you discussed the terms of the agreement, did you just discuss that with Jim Sage?
A. The terms of the agreement, meaning when the trigger level starts?
Q. Sure. Any of the terms of your understanding of this relationship.
A. Because Jim has been in the commercial real estate business for years, and I've been in the snow plowing industry for years, you know, he knows and I know that snow services in the majority of every place in Michigan, other than the UP area or up north, services always start an inch and-a-half unless stipulated otherwise.
Q. Okay. So did you ever negotiate that term with him?

Page 31

A. There is no negotiation.
Q. But did you ever discuss that term with him?
A. An inch and-a-half, yes.
Q. And did you speak with anyone else from Sage Investment Group?
A. I only speak to Jim Sage.
Q. Okay. Would you only go out to plow the snow with one and-a-half inches of fresh snow?
A. Every snowfall that goes out, I don't start services unless there's an inch and-a-half snowfall.
Q. Okay. How soon after the snowfall would you be required to go out?
A. I am required to make sure the parking lots are clear before anybody opens.
Q. So it might be in the evening or in the early morning?
A. If it's -- if the snow is during the day, you know, while the place is open, we can't plow it until the complex is closed to plow the lot, you know, so nobody gets plowed in.
Q. So not during business hours?
A. Correct.
Q. When T&J cleared the lot, was there an expectation that you would clear the premises of snow?
A. Define clear.
Q. At least you mentioned that there is essentially -- it

Page 32

would get as close to the parking lot as possible, right?
A. The surface of the parking lot.
Q. If snow was left on the lot, would that fail to meet your expectations?
MR. GABEL: Let me object to form and foundation. First of all, it's impossible to remove all snow, and the word removal is oxymoronic in any circumstance. You use a blade, there's always a residual left. So I'm just going to object to the question as a physical impossibility. Go ahead.
MR. BARATTA: Counselor, are you calling your client's name of his company oxymoronic?
MR. GABEL: No, I'm saying when you use a blade on the ground there's always a residue left, and I think Mr. Caramagno is doing a fine job in naming his company, I'm just saying --
MR. BARATTA: Thank you.
MR. GABEL: -- that as a matter of physics I don't think that's the case. He may answer the question.
THE WITNESS: We -- can you repeat the question?
BY MR. STEINER:
Q. Sure. Is it at least your expectation that when

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Page 33

you're called out to remove snow or plow snow that it would -- you are to clear the premises of snow?
A. I am to clear the snow, basically plow it as any snowfall that falls an inch and-a-half and more.
Q. So if there's an accumulation of we'll say six inches of snow, would you say that that fails to meet your expectations for snow removal?
A. That meets the expectations to plow it.
Q. If after you snow -- after the snow falls and you go out and plow --
A. Uh-huh.
Q. -- and there's still six inches of snow on the surface of that lot --
A. There would not be.
Q. But if there was, would that fail to meet your expectations of --
A. It cannot be.
Q. Okay.
MR. GABEL: Foundation. Go ahead.
BY MR. STEINER:
Q. Is it your understanding that T&J's job is to make the premises safer by removing the snow?
A. My job is to plow snow that falls on that parking lot when it reaches the trigger point of 1.5 inches or more.

Page 34

Q. Removing ice or snow does make the premises safer?
A. I do not remove ice, I plow snow.
Q. Removing snow makes the premises safer, right?
A. I don't have an opinion on that.
Q. If you didn't remove the snow, that wouldn't meet your expectation, or the expectation of your customers, right?
A. I'm sorry --
MR. GABEL: Foundation. Go ahead.
THE WITNESS: -- can you repeat the question? I don't understand.
BY MR. STEINER:
Q. If you did not remove the snow on the premises, that would not meet the expectation of your company or your customers, correct?
A. Correct.
Q. Is it fair to say that when T&J leaves the premises, you leave it as in good as condition as possible?
A. Yes.
Q. Earlier you testified that Sage Investment Group would need to request salt services to be performed. How long has that agreement existed?
A. Always.
Q. Was that a term that was negotiated between you and Jim Sage?

Page 35

A. That was what was stated when we first start taking care of that property when he purchased that property.
Q. Is that common among your other customers?
A. I'm not talking about my other customers. With Jim Sage, that's what our policy is, that's what we set forth for him.
Q. I'm just trying to gauge how normal that is, at least in the industry, if that's common, if it's not common?
A. I can't speak for everybody else out there.
Q. Do you have other agreements like that?
A. As far as what, not salting?
Q. Right, only salting when requested.
A. Yes.
Q. Was there ever a time that you would salt without the expressed permission of Jim Sage?
A. Never.
Q. Has Jim Sage ever requested that you salt?
A. Yes.
Q. Do you recall on how many occasions?
A. I do not.
MR. BARATTA: What time frame? This winter?
MR. STEINER: Right now.
THE WITNESS: Not that winter, no. In that time frame that you have, no.

Page 36

BY MR. STEINER:
Q. And what makes you say that? Is it just based on this document?
A. I'm the one that puts it on there, and I'm the one that does it, and I know for a fact if it's not on the sheet, because you can't alter the history in the computer, and it was not done if it's not on there.
Q. What kind of permission would you need to have in order to do the salting?
A. A verbal phone call.
Q. You don't call Jim Sage every time you go out there, right?
A. No, I do not.
Q. What kind of notice does Jim Sage have that you're going to his premises?
A. When he sees an inch and-a-half snowfall.
Q. So you don't give him a call or anything?
A. No.
Q. So you might be on his premises and he might not know it?
A. I would assume he would know it. It's one of the places he owns, he's there everyday and he sees me plow that one.
Q. But it's possible you might be on there and he doesn't know?

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Page 37

A. I have no idea. I can't speak for him.
Q. When you see a particular premises that might require salting, do you notify Jim Sage of that?
A. I do not.
Q. Why not?
A. It's not my job. I don't own the property, I do what he tells me to do.
Q. So you've never called Mr. Sage and said this premises looks like it needs salting?
A. Correct, I never have.
Q. If a premises appears unsafe because it appears that there's too much ice on the surface of the lot --
A. I do not.
Q. -- you would not notify him about that?
A. I don't go to the property and inspect them, so I couldn't do that.
Q. You mentioned earlier that you only go during off business hours. How far in advance would you need to know, um, that you had to salt the premises?
A. If he was to call me right now I could be out there, you know, as fast as I get to the shop and put the salt in the truck and go out and salt it. So within an hour, hour and-a-half within the time of the phone call.
Q. It's not normally your practice to knowingly leave a

Page 38

premises in a dangerous condition, is it?
A. I never thought -- I can't speak for what -- I don't know what the conditions were here, but if it didn't say -- I plowed it, and other than the days that I was on-site plowing, I don't know what that property looked like.
Q. But at least with respect to February 18th when you left that property, did you believe it was in a dangerous condition?
A. In my opinion?
Q. Right.
A. I can't remember of what it looked like back then. All I can say is based on that history, that on that date, that it shows I think it was the 18th that we're in question about that I plowed, that means it was at least one and-a-half inches of snow before we plowed it.
Q. Would there ever be a situation where you would salt without a prior approval?
A. Never.
Q. And why is that?
A. If that's not our agreement, why would I?
Q. I'm just wondering, if you see a sheet of ice, why you wouldn't contact Mr. Sage or salt the premises?
A. Again, I would reiterate what I've said numerous

Page 39

times, I do not inspect this property. The only time I'm on that property is when I plow it, and that's it.
Q. Okay. But let's say you're on the property to plow it --
A. Right.
Q. -- and you see a sheet of ice that might be dangerous, there's nothing that you do?
A. If I saw something that was dangerous, of course I would tell the person. But at that time, if I didn't salt it, you know, or if there's a phone log saying that I called him and told him to do it, I don't recall that. All I know is I would never leave that site if I thought, you know, it was icy conditions and then I'd call him.
Q. Okay. So --
A. I wouldn't call him on the days that I plow.
Q. Okay. So at least with respect to February 18th, had a sheet of ice existed that was a dangerous condition you would have at least called Mr. Sage?
A. I would think so.
Q. Okay.
MR. GABEL: Let me object. You asked whether if it was a dangerous condition, which was what the witness was responding to. So your follow-up comment I think was inappropriate.

Page 40

MR. BARATTA: You're assuming that --
BY MR. STEINER:
Q. Do you believe a sheet of ice is a dangerous condition?
A. Do I -- in the right area, in the right situation, yeah.
Q. Okay. You're not at all familiar with the terms of an agreement between Grand Dimitri's and Sage Investment Group, are you?
A. No.
Q. Do you ever use independent contractors or anything to salt?
A. Never.
Q. Okay. Have you ever been sued before in a professional capacity?
A. Yes.
Q. How many times, if you can recall?
A. I can't recall.
Q. Can you ballpark it?
A. Two or three.
Q. Any in the last ten years?
A. Yes.
Q. How many in the last ten years?
A. Two or three.
Q. You wouldn't know if anyone else salted the premises.

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Page 41

would you?
A. I have no idea.
Q. You wouldn't know if it was someone else's responsibility to salt the premises, would you?
A. I have no idea.
MR. STEINER: Thank you, sir. I think that's all I have.
MR. GABEL: I just have a couple.
EXAMINATION
BY MR. GABEL:
Q. Just to clarify the photos that were discussed earlier today.
A. Uh-huh.
Q. This is Deposition Exhibit Number 1.
A. Right.
Q. It's two photos on it.
A. Uh-huh.
Q. So in the bottom photo where you put the circle --
A. Yes.
Q. -- is that, just to clarify -- I want to be very specific where it is. Is that intended to be a spot along the -- I think you said northern side where the northern wall is but going farther --
MR. BARATTA: West.
THE WITNESS: It's the northwest corner of

Page 42

the property, which is --
BY MR. GABEL:
Q. Okay.
A. -- quite a big difference. Like the distance from where that circle is with the X at the top picture --
Q. Okay.
A. -- and where that circle is --
Q. On the bottom picture.
A. -- that's two-thirds of the length of the parking lot past that circle with the X.
Q. So what I'm trying to define is the wall to the right --
A. Uh-huh.
Q. -- what direction is that?
A. That is on the north side of the property.
Q. Okay. So the snow, as you said earlier, would that be against the north side but way down where the circle is located?
A. The whole length of the wall --
Q. Yeah.
A. -- will have a pile of snow from the diverted snow from the building going north. It's just that at the end of the run would be a pile there, and at the end of the run going this way toward Gratiot there would be a pile there.

Page 43

Q. Okay. So there's a circle, that's the one end of the run, correct?
A. Correct, the northwest corner.
Q. And if we look at the wall to the right of the photo, this is the bottom photo, and --
A. Which would be the northeast corner.
Q. Yeah. Okay. And that's the other end of the run, correct?
A. Correct.
Q. Okay. That's where the parking lot meets the bottom of the wall here?
A. Correct.
Q. And farther down, right?
A. Oh, yeah.
Q. Okay. In the top photo you put a little blue mark.
A. Yes.
Q. What was that intended to signify?
A. That's to intend that that is the far west edge of the strip mall.
Q. Okay. That's not where you put the snow?
A. No.
Q. Okay.
MR. BARATTA: And Steve, just before we leave there --
MR. GABEL: Uh-huh.

Page 44

MR. BARATTA: -- just so the record is clear.
MR. GABEL: Uh-huh.
THE WITNESS: Uh-huh.
MR. BARATTA: Sir, as we're looking at this photograph, or these photographs, the top represents north, generally, correct? The left --
THE WITNESS: These are both the same picture.
MR. BARATTA: Right. The left side represents west of the photograph.
THE WITNESS: The top of the picture represents the west, the bottom of the picture represents east, the left side of the picture represents south, the right side represents the north of the wall. The wall represents the north side.
BY MR. GABEL:
Q. If you were looking at the wall, you'd be looking to the north?
A. Correct.
Q. Okay.
A. If you're looking to the left, you're looking at Ten Mile, if you're looking down you're looking at Gratiot, if you're looking this way, you're looking a the collision shop.

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Page 45

Q. You say this way. You pointed to the top of the photo?
A. The top of the photo, that's looking far west.
Q. Do you believe you did your work appropriately during the winter in question?
A. Yes.
Q. Okay. In February of 2014?
A. Yes.
Q. Okay. Did Jim Sage ever criticize your work at that time?
A. Never.
Q. Okay. You ever speak to Donna Livings, the plaintiff in this case?
A. Never.
Q. And did you ever make any promises to her?
A. No.
Q. Did you ever make any promises to her about your work and who it was for?
A. No.
Q. Or whether it was for her or not?
A. No.
MR. GABEL: Okay. Nothing further.
MR. BARATTA: Just a couple of follow-ups.
RE-EXAMINATION
BY MR. BARATTA:

Page 46

Q. When you're plowing a lot like the lot we see in Exhibit Number 1, who's benefit are you plowing that for besides Mr. Sage's?
A. Who am I benefiting?
Q. Who's -- well, who's benefiting from you plowing that parking lot?
A. Myself and Jim Sage.
Q. Other than that, is there anybody else who benefits?
A. I guess so people don't have to drive or walk through snow.
Q. Okay. When you plow this lot, do you get out of your truck, typically, to inspect the property, or do you stay in your truck and perform your plowing services?
A. After I'm done plowing the complete parking lot, then I do a circle around to make sure I get everything buttoned up.
Q. Is the circle done by you driving in your truck?
A. Yes.
Q. All right. So not physically getting out and walking around?
A. No.
Q. Okay. If you know, do you have any idea how Jim would calculate the value of your snow maintenance services on this property to pass those costs along to his tenants?

Page 47

A. I don't understand the question.
Q. I know, and I'm not expecting you to know the answer either.
A. Right.
MR. GABEL: If you don't know, you don't know.
BY MR. BARATTA:
Q. Let me ask it again.
A. All right.
Q. Do you have any idea how Mr. Sage calculates the value of your snow maintenance services on this property so that he can pass those costs along to his tenants?
A. You're talking about a monetary value?
Q. Correct.
A. I have no idea.
Q. Okay. I was expecting you to say that.
Do you have any knowledge as to whether or not Grand Dimitri's, the restaurant on this property, is responsible in any way to maintain these premises?
A. I have no idea.
Q. So the last thing I want to just ask you about is salting.
A. Uh-huh.
Q. And I know there wasn't any salting done this winter on this property.

Page 48

MR. STEINER: Objection.
MR. GABEL: In the time frame shown?
BY MR. BARATTA:
Q. In the time frame that's shown on Exhibit 3.
A. Uh-huh.
Q. You've been in the snow removal business -- snow maintenance business for a long time, right?
A. Yes.
Q. Decades?
A. Yes.
Q. In your opinion, what difference does salting a lot make after you plow it?
A. It brings -- well, if the conditions present itself, it will melt whatever --
Q. Remnants?
A. -- glaze or remnants of any snow underneath, it'll melt it down to the surface.
Q. And you said if conditions are right?
A. Correct.
Q. What conditions would those be?
A. If they're like below zero where salt doesn't work.
Q. So if it's above zero?
A. Well, typically, I mean what -- I don't know the exact, you know, degree point, but at certain degree temperatures, like 15 or less, you know, it's harder

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for the salt to work, to activate.
Q. So in the situations where the temperature is like whatever it is, 15 degrees or less, zero degrees or less, where the salt is not very effective --
A. Uh-huh.
Q. -- in your mind, salting doesn't make much of a difference in those extremely cold temperatures; is that fair?
A. Yes.
Q. And when the temperatures are such that the salt is effective in melting ice and/or snow, would salting increase the effectiveness, or affect the quality of your snow maintenance at a particular location?
A. Two different services. You know, one service is plowing, the other service is salting.
Q. Okay.
A. If I salt, then salt does what it's supposed to be doing, it's affecting that service. Plowing affects -- you know, my quality of service for snow plowing is snow plowing.
Q. In your experience, do your clients, um, often governor the extra charge for salting, or not?
A. All preference.
Q. And in your experience, when the weather conditions are right so that salt is effective as a melter, does

that affect the quality of the results of your snow maintenance services?
A. Again, salting doesn't change the quality of the level of service. If I'm plowing, my quality is a hundred percent. If they're paying for salting, if I salt the way I'm supposed to salt I'm getting judged off of salting for salting, I'm getting plowing for plowing.
Q. Maybe that was a bad choice of words. How about effectiveness of your job? Does that affect --
A. Still two different entities.
Q. Okay. So you plow a lot, correct?
A. Uh-huh.
Q. And there's some residual snow left over?
A. I guess it would be considered like a glaze, or whatever, whatever doesn't, you know.
Q. I mean your attorney's indicated that you can't removal the snow.
A. Exactly.
Q. Do you agree with that?
A. I agree.
Q. All right. But --
A. It's not inches.
Q. Right. But when you're done plowing if you apply salt, how does that affect the job when the temperatures are right so that salt melts?

A. If I plow the snow, and if a particular person pays for salting, whatever residual of snow is there after I'm done plowing, it will melt that snow or ice, or whatever seems to be there at that time, down to the surface.
MR. BARATTA: Nothing further. Thank you.
MR. STEINER: Just one quick follow-up.
THE WITNESS: Yes.
RE-EXAMINATION
BY MR. STEINER:
Q. You mentioned that if there was a dangerous condition that you would call Mr. Sage. Has he ever refused your --
MR. GABEL: Hold on.
THE WITNESS: No.
MR. GABEL: Let me object to foundation.
He said if he was on the premises, if he saw something dangerous he may call Mr. Sage. That I think was the testimony. Go ahead.
BY MR. STEINER:
Q. Okay. So if you were on the premises and you saw a dangerous condition and you made a call to Mr. Sage, would you expect him to refuse your recommendation?
A. Not at all.
Q. Has he ever refused any of your recommendations in the

past?
A. Never.
MR. STEINER: Okay. Thank you.
MR. GABEL: Last question.
RE-EXAMINATION
BY MR. GABEL:
Q. Did you -- when you spoke to Mr. Sage about the agreement that you were making here for this premises, if you ever spoke to him, did you ever bring up Donna Livings' name, or anyone in her situation as to them being the intended beneficiaries of your work?
A. No.
MR. GABEL: Okay. Nothing further.
MR. BARATTA: Thanks very much.
THE WITNESS: Thank you.
* * **
(The deposition was concluded at 1:59 p.m.)

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CERTIFICATE
STATE OF MICHIGAN
COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take; and that I am not related, nor a counsel to either party, nor interested in the event of this cause.

LISA M. FIX, CSR - 3121
Notary Public, Macomb County
My Commission Expires: 4-9-2019

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EXHIBIT J

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T&J Landscaping & Snow Removal Inc.
35426 Cordelia
Clinton Twp., MI 48035
(586) 790-3145

HISTORY REPORT FOR CUSTOMER # 6904 PROPERTY NAME: SAJO'S PLAZA HISTORY STARTING AT: 01/01/14

Page 1 DATE PRINTED:08/31/16

Line #	Date	Debits	Credits	Code	Descript		Invoice Assigned
1467	01/01/13			N	Previous Balance		
1469	01/02/14			D	SNOW PLOWING	pp	
1470	01/02/14			D	SNOW BLOWING		
1471	01/03/14			D	SNOW PLOWING	pp	
1472	01/03/14			D	SNOW BLOWING		
1473	01/05/14			D	SNOW PLOWING	pp	
1474	01/05/14			D	SNOW BLOWING		
1475	01/06/14			D	SNOW PLOWING	pp	
1477	01/06/14			D	SNOW BLOWING		
1478	01/17/14			D	SNOW PLOWING	pp	
1479	01/17/14			D	SNOW BLOWING		
1480	01/25/14			D	SNOW PLOWING	pp	
1481	01/25/14			D	SNOW BLOWING		
1482	01/26/14			D	SNOW PLOWING	pp	
1483	01/26/14			D	SNOW BLOWING		
1484	01/27/14			D	SNOW PLOWING	pp	
1485	01/27/14			D	SNOW BLOWING		
1488	02/01/14			D	SNOW PLOWING	pp	
1489	02/02/14			D	SNOW PLOWING	pp	
1490	02/02/14			D	SNOW BLOWING		
1491	02/05/14			D	SNOW PLOWING	pp	
1492	02/06/14			D	SNOW PLOWING	pp	
1493	02/06/14			D	SNOW BLOWING		
1494	02/09/14			D	SNOW PLOWING	pp	
1495	02/18/14			D	SNOW PLOWING	pp	
1496	02/18/14			D	SNOW BLOWING		
1499	03/02/14			D	SNOW PLOWING	pp	
1500	03/02/14			D	SNOW BLOWING		
1501	03/12/14			D	SNOW PLOWING	pp	
1502	03/12/14			D	SNOW BLOWING		
1503	03/13/14			D	SNOW PLOWING	pp	
1504	03/13/14			D	SNOW BLOWING		
	Totals:					Balance:	

DEPOSITION EXHIBIT 3 SMC 6-6-17

* Sajo Is Insured On my plus owner

Claim # 388 2014

** Totals do not include this entry since this is a summary of transactions under the previous billing method

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EXHIBIT K

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In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

James Sage

March 6, 2017

Court Reporting and Video

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,
Plaintiff,
vs. Case No. 2016-001819 NI
HON. EDWARD A. SERVITTO
SAGE'S INVESTMENT GROUP, LLC, a
Michigan limited liability company, and
T&J LANDSCAPING & SNOW REMOVAL, INC., a
Michigan corporation,
Defendants.

The Deposition of JAMES SAGE,
Taken at 36470 Moravian,
Clinton Township, Michigan,
Commencing at 2:00 p.m.,
Monday, March 6, 2017,
Before Lisa M. Fix, CSR-3121.

1 APPEARANCES
2
3 CHRISTOPHER R. BARATTA, ESQ.
4 BARATTA & BARATTA
5 120 Market Street
6 Mount Clemens, Michigan 48043
7 Appearing on behalf of the Plaintiff.
8
9 STEVEN R. GABEL, ESQ.
10 THE HANOVER LAW GROUP
11 25800 Northwestern Highway, Suite 400
12 Southfield, Michigan 48975
13 Appearing on behalf of the Defendant, T&J Landscaping.
14
15 MARK W. STEINER, ESQ.
16 SEGAL MCCAMBRIDGE
17 39475 13 Mile Road, Suite 203
18 Novi, Michigan 48337
19 Appearing on behalf of the Defendant, Sage's.
20
21
22
23
24
25

1 TABLE OF CONTENTS
2
3 WITNESS PAGE
4 JAMES SAGE
5 EXAMINATION BY MR. BARATTA: 5
6 EXAMINATION BY MR. GABEL: 42
7 EXAMINATION BY MR. STEINER: 52
8 RE-EXAMINATION BY MR. BARATTA: 55
9 RE-EXAMINATION BY MR. GABEL: 59
10 RE-EXAMINATION BY MR. STEINER: 60
11
12 EXHIBITS
13
14 EXHIBIT PAGE
15 (Exhibits retained by Mr. Baratta)
16
17 DEPOSITION EXHIBITS 1 - 3 4
18 1- Pleading
19 2- Pleading
20 3- T&J Snow Schedule
21 DEPOSITION EXHIBIT 4 26
22 (Assignments of Lease)
23 DEPOSITION EXHIBIT 5 36
24 (CAM letter)
25

1 Clinton Township, Michigan
2 Monday, March 6, 2017
3 2:00 p.m.
4
5 JAMES SAGE,
6 was thereupon called as a witness herein, and after
7 having first been duly sworn to testify to the truth,
8 the whole truth and nothing but the truth, was
9 examined and testified as follows:
10 MARKED FOR IDENTIFICATION:
11 DEPOSITION EXHIBITS 1 - 3.
12 MR. BARATTA: The record will reflect this
13 is the deposition of James Sage, taken pursuant to
14 Notice, to be used for all purposes consistent with
15 the Michigan Court Rules.
16 My name is Chris Baratta, I represent Donna
17 Livings. How are you?
18 THE WITNESS: Good. How are you?
19 MR. BARATTA: Good, thank you.
20 Have you ever had your deposition before?
21 THE WITNESS: Yes.
22 MR. BARATTA: Okay. When was the last time
23 you had a deposition?
24 THE WITNESS: Seven, eight, ten years ago.
25 MR. BARATTA: All right. So just going

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James Sage
March 6, 2017

Page 5

over a couple of the ground rules in case you've forgotten. The woman to my left, your right is taking down everything we say, so it's important for a couple of reasons that I bring this up. Verbal responses to my questions as opposed to nodding or shaking your head so that the record is clear on your response.

THE WITNESS: Got it.

MR. BARATTA: Good. And then I know when we talk in normal conversation you understand what my question is before I finish my sentence most of the time, but in this case I'm going to ask you to let me finish my question, and then in turn I'll let you finish your answer so the record and the transcript is clear, okay?

THE WITNESS: Got it.

MR. BARATTA: If you don't understand anything that I'm saying, let me know and I'll be happy to rephrase the question until we communicate effectively. Good?

THE WITNESS: Good.

MR. BARATTA: Good. Okay.

EXAMINATION

BY MR. BARATTA:

Q. State your full name for the record, please.

A. First name is Jim, last name Sage, S-A-G-E.

Page 6

Q. What is your full name?

A. My legal name is Jamal, J-A-M-A-L.

Q. Jamal Sage?

A. Yes.

Q. Your address?

A. 10 Capri Lane, Dearborn Heights, Michigan, 48127.

Q. Your date of birth?

A. 5-3-62.

Q. Did you graduate from high school?

A. Yes.

Q. Which high school?

A. Fordson.

Q. And what year?

A. 1980.

Q. After high school did you have any subsequent education?

A. Yes.

Q. Where?

A. A couple years of college at Henry Ford.

Q. Any degree from there?

A. No.

Q. Okay. Other than the couple of years at Henry Ford, any other education?

A. Some pilot lessons here and there, but that's it.

Q. Any certifications?

Page 7

A. Nope.

Q. Okay. Are you currently employed?

A. Yes.

Q. And where are you employed?

A. I'm self-employed.

Q. All right. And are you self-employed as an individual, or do you have a company or companies?

A. I have companies.

Q. Okay. What are they?

A. Um, real estate companies, restaurants.

Q. Is your self-employment pretty much in the realm of restaurants and real estate companies?

A. Yes.

Q. Do you delve into other areas for income?

A. I have in the past, yes.

Q. As we're here currently is it just restaurants and real estate investments?

A. Restaurants and real estate. I do some hard money lending where I buy mortgages. You know, buy mortgages.

Q. Okay. All right. But that's generally those three things are the nature of --

A. Yes.

Q. -- how you earn your money?

A. Yes.

Page 8

Q. Okay. And one of those companies, as I understand it, is called Sage's Investment Group, LLC?

A. Yes.

Q. Is that a sole member LLC?

A. Yes.

Q. Okay. How many employees are in that LLC?

A. None.

Q. When was it formed, do you recall?

A. I don't recall.

Q. More than ten years ago?

A. Yes. I'm not sure, to be honest with you.

Q. Okay. That's fine. That's a fair answer.

A. Yeah.

Q. That's another ground rule. If you know something, great --

A. Yes.

Q. -- but if you don't, just tell me that you don't know something.

A. Yeah. Originally we owned everything under one LLC, and then I want to say about seven, eight, ten years ago we switched everything around and we moved everything to different LLC's.

Q. You followed your lawyer's advice?

A. Oh, yes.

Q. Good.

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Page 9

A. **And accountant's.**
Q. And accountant's right. And more tax returns to file.
A. **Yes.**
Q. Yes. Yes.
So you don't recall if Sage's Investment Group is more or less than ten years old, but do you recall as of 2014 whether or not that company was formed?
A. **Yes.**
Q. It was?
A. **It was, uh-huh.**
Q. Okay. What holdings, as of 2014, did the LLC have?
A. **Just that building.**
Q. Just that building, or just that -- um, I'm going to say strip mall or plaza, for lack of a better term?
A. **The whole strip mall.**
Q. Okay. Now, in the strip mall, let's break it down a little bit, if we could. First we're talking about 25001 Gratiot Avenue in Eastpointe?
A. **Yes.**
Q. All right. Consists of, generally speaking, a parking lot and one building?
A. **No, it consists of a parking lot -- well, 2500 -- we have a few addresses there. 25001 Gratiot is the Dimitri's, and then next to it we have a hair salon, a**

Page 10

pizza place, but those addresses are all Ten Mile --
Q. Okay.
A. **-- so.**
Q. And are those additional places in a separate building?
A. **They're attached.**
Q. They're attached?
A. **One same building, same parcel.**
Q. So how many tenants, if the plaza was fully occupied, would you have there?
A. **About ten.**
Q. Okay. So there's the restaurant and approximately nine other businesses there?
A. **Yes.**
Q. And do you recall how long you've owned that plaza for?
A. **I bought that in 1997.**
Q. Okay. And just so the record's clear, we're talking about Sajo's Plaza in Eastpointe?
A. **Yes.**
Q. Okay. This particular LLC, Sage's Investment Group, doesn't have any other properties or assets?
A. **No.**
Q. All right. We're here to talk about today primarily a lawsuit that Donna Livings has filed against your

Page 11

company, amongst others, for a fall that occurred at the plaza on February 21st, 2014. You generally familiar with the lawsuit?
A. **Um, I heard about it recently --**
Q. Okay.
A. **-- from you, actually.**
Q. Okay. We noticed your deposition today duces tecum, which means to bring some documents with you. So this question may be more appropriate for your counsel, but I'm going to ask you anyway. I asked you to produce today any and all snow removal and deicing contracts in effect for the premises located at 25001 Gratiot for the month of February 2014. Do you have any documents in response to that?
A. **No. No, I don't.**
Q. Okay. Is there a reason why you don't?
A. **I just don't keep receipts, don't keep documents. I mean some of them I do scan in, but --**
Q. Well, these are --
A. **We don't -- you wanted to know in regards to T&J, I believe?**
Q. Well, I assume that T&J is the snow removal contractor for that plaza at the time we're talking about?
A. **Yes.**
Q. And I don't know if there is a written contract

Page 12

between Sage's and T&J, or if there is an oral agreement?
A. **It's an oral agreement. There's no contract.**
Q. Okay. All right. And so the oral agreement with T&J would be regarding snow removal, as well as any deicing or salting services?
MR. GABEL: And let me object to the term removal. I know it's a term of art, we all use it, but object to form and foundation. I think it's snow maintenance, but you may go ahead.
MR. BARATTA: Well, we can use that term --
MR. GABEL: That --
MR. BARATTA: -- if you're more comfortable with that.
MR. Gabel: Correct, I just don't like the word removal because --
MR. BARATTA: 'Cuz it's a verb?
MR. Gabel: No, because it's impossible to remove --
MR. BARATTA: All the snow?
MR. Gabel: -- snow, therefore I'm objecting to form and foundation. Please go ahead and ask him what the nature and extent of it is.
BY MR. BARATTA:
Q. All right. So the Snow Maintenance Contract that you

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have with T&J is oral?
A. Yes.
Q. Any salting or deicing is done by T&J to that plaza as of 2014?
A. Yes.
Q. Are there any other independent contractors who might be responsible for snow maintenance or deicing at Sajo's Plaza in February of 2014?
A. Not that I have hired, but it is the tenants' responsibility to take care of the snow and the icing and cleaning. T&J only does the bulk of it. But in all their leases they're responsible to take care of the icing, they're responsible to take care of the snow, the salting. So it's stated in all their leases.
Q. And we'll get to that in a little bit.
A. And the reason we do that -- can I keep going?
Q. If you'd like.
A. Sure. The reason we do that is I cannot have a company -- we do -- we use T&J Landscaping, or T&J Snow Removal or Snow Plowing, whatever you want to call it, to get the bulk of it out of there. But let's say it snows at 2:00 o'clock in the morning, and then 3:30, 4:00 o'clock in the morning you started getting more snow, you know, they're not going to go

back there on the hour and just clean it up. There's always snow is constantly going to come down, so we leave that up to the tenant. But the majority of the salt and snow we take care of, but it's not our responsibility.
Q. Okay.
A. I do it to make sure that the tenants are doing their responsibility, therefore, what's why we bill them.
Q. Okay. Take a look, if you would, Mr. Sage, at Exhibit Number 1. Do you recognize this document?
After you've had a chance to read it, let me know.
A. Okay.
Q. You finished reading it?
A. Pretty much, yes.
Q. All right. So I'm assuming that you provided this information to your attorney, what's essentially the factual predicate for what's contained in Exhibit 1?
Is that your daughter?
A. No.
MR. STEINER: I will object just, um, to the extent that it's a legal document filed in the course of this lawsuit.
MR. BARATTA: Document speaks for itself. That wasn't my question.

THE WITNESS: This is saying that we said that T&J is not responsible, or is responsible?
BY MR. BARATTA:
Q. This is a document that your lawyers filed saying that T&J is either wholly or partially responsible for the incident in question. And the incident in question involves Donna Livings.
A. Okay.
Q. All right. So a couple of questions on that document there.
It indicates in the document that there is an agreement between T&J and Sage's, and when I say Sage's --
A. Investment Group.
Q. -- you understand that I'm talking about --
A. Uh-huh.
Q. -- your company that's the defendant here?
A. Yes.
Q. So you just indicated that this was an oral agreement that you had with T&J versus a written contract?
A. Correct.
Q. All right. So my question now is, when did you --
First of all, was there ever a written contract for snow maintenance?
A. No.

Q. When did the oral agreement commence between T&J and Sage's regarding snow maintenance at Sajo's Plaza?
A. We've been friends for about 25, 28 years.
Q. Who's we?
A. Me and the gentleman that owns T&J Landscape.
Q. His name?
A. Tom Caramagno.
Q. Okay. I thought it was Dave, but that's fine.
A. Could be one of the partners.
Q. Go ahead.
A. But in every property that I own they maintain, they service it, they clean the snow, they cut the grass, they salt, they fertilize.
Q. So if you had to estimate how long this oral agreement's been in place, and you're right, it was to Tom, between T&J and Sage's, you would say --
A. Twenty-five years, 28 years.
Q. Okay. What are the specific terms, or what were the specific terms as of 2014 regarding snow maintenance or deicing?
A. When it snows, they plow, when it needs salting, they salt.
Q. Is there any minimum amount of snowfall that would trigger T&J's response?
A. No.

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Page 17

Q. Would the decision to plow Sajo's Plaza be left to Tom Caramagno, or T&J, or would you call T&J and instruct them to plow?
A. Would be up to T&J to plow, but generally if we get a half inch or a very light coating of snow they do not come out and plow, it's nothing there to plow. But when there's reason for them to go plow, they do go out there and plow. But then, like I said, it's the tenants' responsibility to --
Q. No. No. No. I don't want to talk about tenants. You're outside the scope of my question. We'll get to the tenants in a couple of minutes.
So it was up to T&J's discretion to plow?
A. Correct.
Q. You mentioned, though, that if there was a minor amount of snowfall that they wouldn't necessarily come out, is that also correct?
A. It's very minor, yes.
Q. And very minor would be, I think you said about a half inch or less?
A. Quarter inch.
Q. Okay. Coating, a small coating?
A. Yeah, a small coating, dusting.
Q. Other than that, your oral agreement with T&J is that if it's anything over a minor amount of snow, it's T&J

Page 18

who has the responsibility to come and plow the lot, correct?
A. Correct.
Q. All right. So what about deicing or salting the lot, is that also up to T&J's discretion?
A. Yes.
Q. Okay.
A. It's up to the tenants. It's not up to the tenants, it's the tenants' responsibility under their terms of the lease. What we do is we do the parking lots, you know, we do salt them, we do plow them, but it's the tenants' responsibility. We do it to make sure it does get done, but as I stated earlier, if it needs to get done over and over again it's the tenants' responsibility.
Q. I'm not clear on your answer at all.
A. Okay. We plow it -- assuming we get a snowfall, okay, like I said earlier, it snows at 2:00 o'clock, 3:00 o'clock in the morning, we get three inches of snow. T&J goes out there and cleans it all up.
Q. And I want to stop you right there.
A. Okay.
Q. Okay? And I don't want to cut you off, but I want to break it down a little bit.
So you've assumed a three inch snowfall --

Page 19

A. Okay.
Q. -- and you've told me that T&J is going out there. I'm assuming that's pursuant to the agreement that you have with T&J, correct?
A. Yes, we just talked about it.
Q. Okay. So you also now are intermingling a tenant's purported responsibility to maintain the lot in regards to snow, and I'm not sure how that correlates or intertwines with the oral agreement that you have with T&J.
A. T&J is supposed to come out and plow, as I stated, at 3:00 o'clock in the morning you get three inches of snow, okay? But then once the parking lot is plowed, it's also the tenants' responsibility to maintain it throughout the day. And I've gotten many calls throughout the day asking if we can get it plowed again if we get another inch or two inches or three inches, or whatever the case might be. But it's up -- it's the tenants' responsibility to take care of. The reason I hired T&J's, to make sure that it's being taken care of, it's being plowed, it's being salted as needed.
Q. So when T&J does that first plow after your hypothetical three inch snowfall, is that something that you pay for, your company pays for?

Page 20

A. Yes. Therefore, but then it's distributed back to the tenants.
Q. Pro rata under CAM, C-A-M?
A. Under CAM charges. But again --
Q. Do the tenants --
Go ahead, I don't want to cut you off.
A. But again, to -- they do get billed for the CAM's from T&J and everyone else as your bill states there.
Q. They get billed from T&J, or from you?
A. No, they get billed from me. I get billed from T&J.
Q. Right.
A. But at the same time, like I said, it's their responsibility to maintain it throughout the day.
Q. When you say maintain it, are you talking about the sidewalks or the parking lots?
A. Everything around their building.
Q. Okay.
A. It's stated clearly in the Lease.
Q. Now, are they obligated to use T&J, the tenants?
A. No.
Q. In particular, Grand Dimitri's?
A. They could use anyone they want to, they just have to notify us, you know, as long as they take care of it.
Q. Why do they have to notify you if they're responsible for maintenance?

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James Sage
March 6, 2017

Page 21

A. They're responsible -- so we don't have T&J get double billed twice for two companies.
Q. But you wouldn't get double billed.
A. I'm going to get billed from T&J from clearing their parking lot.
Q. Right.
A. And they're also -- they're not going to pay me back under the pro rata share because they took care of it.
Q. But you're going to get paid back for the bill that T&J sends you by the tenants.
A. If you are a tenant would you do that?
Q. No. No. No.
A. If you were Dimitri's would you let me bill you, and then you clean the parking lot, as well?
Q. You can't ask me questions, but the answer is no.
A. Okay. Well, I'm just giving you a hypothetical here.
Q. Well, I'm trying to -- I'm just trying to figure it out.
A. I'm trying to answer your question.
Q. T&J comes out the first time in your snowfall -- in your snowfall example and they plow the lot.
A. Okay.
Q. Now you said it's up to the tenants to maintain it the rest of the day?
A. Okay.

Page 22

Q. So they could use any contractor they want after that, right?
A. Absolutely.
Q. They're going to get billed for T&J coming on the property by you --
A. Yes.
Q. -- under CAM?
A. Correct.
Q. Okay. Are the tenants allowed to call T&J to come out additional times?
A. They have T&J's number, yes.
Q. Are they permitted to do so?
A. Yes. And again, to answer your question from earlier, when T&J plows at 3:00 o'clock in the morning, they leave, if it needs to get plowed again they contact them to get it done. But neither myself, nor T&J would be on the parking lot, to see how the parking lot looks the rest of the day after it gets plowed.
Q. You don't inspect Sajo's Plaza, I'm assuming, based on your answer. Do you leave that up to T&J's discretion?
A. As far as snowfall?
Q. As far as checking the lot, inspecting the lot to see whether or not the lot at Sajo's Plaza needs to be plowed in the first place.

Page 23

A. I inspect -- I inspect as needed. I don't go there to make sure -- I have multiple properties, so I don't go to each property -- I go there to make sure it gets plowed, it gets cleaned, yes.
Q. Do you go there before it gets plowed?
A. No.
Q. So you go there after to see that T&J did plow?
A. I do a drive through, and I have tenants that notify me if it does not get plowed.
Q. Right. But the answer to my specific question, you don't go to Sajo's Plaza before to make an inspection for the purpose of determining whether T&J should come out or not?
A. Absolutely not.
Q. That's correct?
A. Correct.
Q. But you said you do go back to the property to look and see what type of a plow T&J did?
A. Occasionally.
Q. Occasionally?
A. Occasionally. I do a drive through -- not specifically on the snowplow, but I do a drive through, check for potholes. I do a drive through, make sure the tenants are keeping up with their maintenance. I do a drive through, make sure there's

Page 24

no garbage in the back buildings. But that's done weekly or biweekly basis, or as needed if I get a phone call.
Q. Now, when T&J comes out the first time in your example of a three inch snowfall, that's pursuant to the oral agreement that you have, that if it's anything more than just a minor coating they need to come out and plow, correct?
A. Correct.
Q. And then I wasn't clear on your answer as far as salting the parking lot. Is that also up to T&J's discretion, or is that your discretion?
A. No, it's up to T&J's discretion.
Q. Okay. And I would assume, if you know, that salting is an additional charge?
A. Correct.
Q. And that, again, would be passed on to the tenants through CAM?
A. Correct.
Q. All right. So I'm going to show you the document marked as Exhibit 2. It's the same pleading as Exhibit 1, except this one involves Grand Dimitri's.
A. Okay.
Q. And after you've had a chance to look at it, my first question is I'm assuming you provided your attorneys

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with this information regarding Grand Dimitri's?
A. **Correct.**
Q. You mentioned earlier that the tenants' responsibility for removing or maintaining snow and deicing is the tenants' responsibility pursuant to their leases.
A. **It's pursuant to their leases to maintain the property for the icing. And I could pull the Lease out and point it out to you. I believe it's under Repairs and Maintenance.**
Q. Your attorney has already forwarded me copies of Leases, but -- and I can show them to you and we can mark them.
A. **Okay.**
Q. But I want to tell you in advance, that they appear to have been expired over ten years ago. So if you have something more current that you can get for me, that would be great, otherwise we'll mark this and go through this.
A. **That's the original Lease.**
Q. All right.
A. **They really have no Lease right now. Those have been --**
Q. Okay.
A. **They've been a month-to-month for quite some time.**
Q. So does Grand Dimitri's have a Lease?

A. **Yes. Can I see if that's a correct one?**
Q. Sure. Let me get this out for you.
MR. BARATTA: Let's mark the whole thing. You want these assignments?
BY MR. BARATTA:
Q. Before we go off the record, what are these assignments? Are they just -- I mean I know Jimmy Giftos is in there. He's been dead for ten years.
A. **Yeah.**
Q. Used to play backgammon with him.
A. **Yep.**
Q. Pretty good player. He was.
A. **He is. God rest his soul. He was a good guy, too.**
(Off the record.)
MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 4.
BY MR. BARATTA:
Q. So I think that's Exhibit 4 in front of you, Mr. Sage, and I don't have a copy in front of me, but I remember looking at it. The first several pages looks to me like they're assignments of leases, and they're going back, if I recall correctly, maybe to like the late '90s. There was an Eddie Boufos or Boufros Trust. There was James Giftos in there. I think your name was in there at some point.

A. **Uh-huh.**
Q. Just tell me generally, sir, what those assignments were.
A. **Well, I bought the building from, um, Boukis.**
Q. Boukis, that was it.
A. **Boukis. And the Lease was -- I believe it was between Boukis and --**
Q. Grand Riviera?
A. **Grand Riviera at the time.**
Q. And who is Grand Riviera?
A. **Grand Riviera used to be -- God, you're making me think now.**
Q. I know. You made me think.
A. **It was a couple of young men that ran the restaurant there, they had the Lease with Boukis over there.**
Q. Question. Was anyone from Grand Riviera either Tom or Jamal Shkoukani?
A. **They -- they bought the building -- they bought the restaurant from Dimitri's. Dimitri's came in and bought it, and then they transferred it to that for them. They're the current owners right now.**
Q. All right. Let's finish up one thing at a time.
So the assignments reflect that you bought the building from Boukis.
A. **Correct.**

Q. And essentially the leases were assigned to you or the company that you owned which purchased the plaza.
A. **Correct.**
Q. That's a general, good statement about what the assignments are?
A. **Yes.**
Q. All right. So you assume, then, the obligations as landlord under the Lease between now yourself and Grand Riviera. Does that sound pretty accurate?
A. **Correct.**
Q. All right. Question. When did Grand Riviera -- strike that.
What was Grand Riviera's name to the public as a restaurant?
A. **Riviera's.**
Q. Okay.
A. **Grand Riviera.**
Q. And how long did Riviera's Restaurant exist for? Until what year?
A. **You are making me think.**
Q. If you don't know, you don't know. If you can give me a ballpark, give me a ballpark.
A. **I know Dimitri's --**
I have to take this.
Q. Go ahead. That's fine.

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(Off the record.)
MR. BARATTA: We took a short break and we're back on now.
BY MR. BARATTA:
Q. You were thinking in your head when the phone rang how long Riviera Restaurant was around for, or when did they cease to exist?
A. **I believe Dimitri's took over about ten years ago.**
Q. And Dimitri's is the Shkoukani brothers?
A. **No, Dimitri's originally was Jimmy Dimitri.**
Q. Okay.
A. **It could be Giftos. It could have been Giftos. I believe it was Giftos, and then it was Jimmy Dimitri, and then they called it Dimitri's, and then these guys took it from them.**
Q. And then when Shkoukani's took it over it became Grand Dimitri's?
A. **Yes.**
Q. So it went from Dimitri's to Grand Dimitri's?
A. **Dimitri's.**
Q. Did you ever have a Lease Agreement with Grand Dimitri's?
A. **No.**
Q. So they have always been month-to-month?
A. **They've always kind of followed the terms of this**

Lease.
Q. Right. But they never signed a Lease, correct?
A. **No.**
Q. That's correct?
A. **Correct. I believe they signed an assignment, accepted an assignment.**
Q. I didn't see that in there. If you could point it out to me, that would be great.
A. **Oh, there's Jim Giftos.**
Q. So you indicated in your Notice of Non-party Fault, or your attorneys did, that Grand Dimitri's has an obligation pursuant to a written Lease Agreement, and actually we've learned today, correct me if I'm wrong, that there is an oral Lease Agreement, not a written?
MR. STEINER: One moment. I'd like to object to foundation. That calls for a legal conclusion.
BY MR. BARATTA:
Q. Okay. I don't think it does, but you can answer the question.
A. **They've always followed the terms and the conditions of the original Lease since they took over.**
Q. Okay. And then a follow-up question. Did they sign that Lease you're referring to?
A. **No, but they have -- I don't --**

Q. In other words --
A. **I'll have to check my records.**
Q. You don't have a copy of a written Lease between Sage's and Grand Dimitri's?
A. **Can you give me a few minutes? I could look in my office.**
Q. Sure, we can.
A. **Can we take a quick break?**
Q. Sure, why not?
(Off the record.)
MR. BARATTA: Back on.
BY MR. BARATTA:
Q. So you were going to go look, Mr. Sage, and you were going to see if there is a written Lease Agreement between Sage's and Grand Dimitri's.
A. **They're is none.**
Q. Okay. Do you know if Grand Dimitri's hired any contractor to remove snow or deice the premises other than perhaps T&J?
A. **No.**
Q. No, you don't know?
A. **No, I don't know.**
Q. Do you know if Grand Dimitri's ever paid T&J for snow maintenance services or deicing services at the plaza independent of your CAM charges?

A. **No, I don't.**
Q. All right. Do you know whether Grand Dimitri's ever set the terms for snow maintenance or deicing services at Sajo's Plaza with T&J?
A. **No, I don't.**
Q. I had asked your attorneys to produce -- I want to represent it was a couple months ago, but it might have been a shorter time period than that, complete copies of any and all bills and/or invoices for snow and/or ice removal at the subject premises. Your response, through your attorney, was that you don't have any responsive documents at this time. And does that still remain true?
A. **Yes.**
Q. Is there any reason why you don't keep any copies of bills or invoices for snow removal services at this plaza?
A. **I keep invoices for all my plazas, but when it comes down to snow removal and landscaping I don't 'cuz sometimes we get bills, sometimes we don't get bills. Like I said, we're friends, we do a lot of things together. There's no general -- you know, he comes in here, he has a house account that we waive it for him.**
Q. Yeah.
A. **I do things for him, you know, but his responsibility**

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is to take care of all my properties.
Q. I get the friendship deal with you and Mr. Caramagno, I understand that, but I guess my question, it's really sort of a concern on your behalf at this point. would be what if the scenario existed where one of your tenants at Sajo's Plaza said I don't agree with this, Mr. Sage, I don't think that you paid X number of dollars for snow removal.
A. Which we do.
Q. Where would you have the backup in order to say to the tenant, well, Mr. Tenant, here it is, here's a copy of the bill, and then this is your pro rata share. You don't consider that a good practice to keep those, or you've never had that situation before?
A. We haven't had that situation.
Q. Okay. You don't have any employees personally who would have removed ice or snow from Sajo's Plaza back in February of 2014, correct?
A. No.
Q. Correct?
A. No. Yes.
Q. It reads funny, that's why I have to do that.
MR. BARATTA: Did you have a copy of this, did you say?
MR. STEINER: Yeah, I think I do.

BY MR. BARATTA:
Q. Your attorney's going to show you a copy of what was marked as Exhibit 2 in Miss Livings' deposition. So if you take a look at the -- if you take a look --
First of all, do you recognize this letter?
A. Yes.
Q. What is it?
A. It's an invoice I send out to all the tenants. No, an invoice I send out to Dimitri's as one of the tenants.
Q. It appears to me, from reading this letter, that you send this letter, or a similarly styled letter to Dimitri's twice per year?
A. No.
Q. Once per year?
A. Once per year.
Q. Okay. Would you retain a copy of the letter that you sent Dimitri's on July 1st, 2014?
A. Yes, I have that particular -- that exact one.
Q. You do?
A. Yes.
Q. All right. Maybe when we take a break in a short while you could get that one.
A. Yes.
Q. Because in looking at this letter I see. um. you know. the expenses. for example, itemized for snow removal

and salting, but it's for the following winter, so I'd like to actually get the correct time period. So that would be -- the correct time period would be July 1st, 2013 to June 30th, 2014. Are you following me?
A. This is --
Q. This is for July 1st, 2014 to June 30th, 2015.
A. Correct. And the date of the bill is July 1st.
Q. The date of the incident we're talking about is 2-21-14.
A. Oh.
Q. So it's not, um, encompassed in this letter.
A. Okay.
Q. It's --
A. Well, this is --
Q. It's five months later. So maybe you can tell me, does this letter --
A. So would you like the one prior to this?
Q. Yes.
A. Yeah. Do you mind if we take a break, I'll go get it for you right now?
Q. Not at all. That would be great. Thank you.
A. So you need the one from 2013 to 2014, right?
MR. STEINER: Yes.
MR. BARATTA: Correct. Thank you.
(Off the record.)

MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 5.
BY MR. BARATTA:
Q. All right. Mr. Sage, you were kind enough to provide us with this letter now. It looks like this encompasses the right period of time -- the right period of time for your CAM charges at Sajo's Plaza. Correct, this encompasses the snow removal for the winter of 2013 and '14?
A. Correct.
Q. All right. Great.
So it looks like the snow removal and salting was about 6,725 --
A. Correct.
Q. -- for the year. There was some lawn cutting. What is General Maintenance, that category? What does that encompass?
A. Parking lot asphalt, roofing repairs, light fixture repair, light bulbs.
Q. Okay. If I'm reading these two letters correctly, the Exhibit Number 5 and 4, I believe it is -- I'm sorry, Exhibit 2 for Miss Livings' deposition and Exhibit 5 here today, it looks to me like Dimitri's pre-pays about $15,000.00 per year for maintenance?
A. That's their CAM charges, proportionate share of the

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Page 37

1 CAM charges.
2 Q. Well, no, 17,390.82 is their share, correct?
3 A. Correct. They prepaid $15,000.00.
4 Q. So when do they prepay that?
5 A. With monthly rent.
6 Q. All right. So you divide 15,000 by twelve, and then
7 in addition to the rent they pay, they pay that as an
8 estimated CAM charge?
9 A. Correct.
10 Q. You provide them with the actual charges once a year,
11 if there's a refund, you pay them back some money; if
12 there's an overage, they owe you some money?
13 A. Correct.
14 Q. Okay. And again, Grand Dimitri's doesn't select T&J,
15 you do?
16 A. Correct.
17 Q. I want to show you what's been marked as Exhibit 3,
18 and I don't know if you recognize that document, or if
19 you -- if that looks familiar to you at all?
20 A. Yes, that's T&J's Snow Schedule, or when they do plow
21 and they don't plow.
22 Q. Okay. Are these the documents that you frequently
23 don't retain or save?
24 A. I don't get these.
25 Q. Oh, but you've seen this before?

Page 38

1 A. I've seen it before, yes.
2 Q. All right. So if you don't get them, where do you see
3 them before?
4 A. Occasionally, you know, I will question something that
5 he's charging me about and they'll bring this out.
6 I've seen it before.
7 Q. So you've gone over it with Mr. Caramagno before?
8 A. Once in a great while.
9 MR. Gabel: Can I see that, please?
10 MR. BARATTA: Sure.
11 BY MR. BARATTA:
12 Q. If by any chance you're able to tell me what this
13 document represents, the line numbers with the dates
14 and the description, if you're not, you're not.
15 A. I mean you are going to have to talk to them about
16 this, but --
17 Q. Okay. I mean you've gone over with Mr. Caramagno, so
18 I don't know if you --
19 A. Yes, it's more of a schedule, I guess, when they
20 actually perform the work.
21 Q. Okay.
22 A. It's their own log, it's their own records.
23 Q. There's a couple of things on here, and I don't know
24 if you know the answer to. Number one, it says code.
25 It looks like I see two codes, one is N., one is D.

Page 39

1 Do you know what those stand for?
2 A. No, I don't.
3 Q. What about snow plowing, after that it says P.P. Is
4 that per push, or something, if you know?
5 A. I'm assuming it's per push, yes.
6 Q. Or per plow?
7 A. Or per plow, yeah.
8 Q. Underneath it says, "Salt by request only by plaza
9 owner." That's handwritten. Do you see that?
10 A. Yes.
11 Q. Is that your handwriting?
12 A. Nope.
13 Q. Do you know who wrote that?
14 A. No, I don't.
15 Q. Do you recognize that handwriting?
16 A. No, I don't.
17 Q. Do you know whether or not that is a -- strike that.
18 According to your testimony, that doesn't
19 reflect the arrangement you had with T&J as of
20 February of 2014, correct?
21 A. This document?
22 Q. No, where it says, "Salt by request only by plaza
23 owner." You testified earlier that it was up to T&J
24 to determine whether or not to salt.
25 A. Correct.

Page 40

1 Q. So it's not up to you, it's up to T&J?
2 A. Correct.
3 Q. Other than any people over at T&J Landscaping that you
4 hire to perform snow maintenance and deicing
5 activities, and I'm talking about the winter of 2014,
6 was there anyone else who was supposed to inspect the
7 parking lot and the property to determine if snow
8 maintenance or deicing was appropriate?
9 A. No.
10 Q. Do you know of any witnesses to Miss Livings' fall?
11 A. No.
12 Q. When did you first become aware of this incident?
13 A. From you when you sent me a Notice.
14 Q. Have you spoken with anyone over at Grand Dimitri's
15 concerning this fall?
16 A. Occasionally.
17 Q. Who have you spoken to about this fall?
18 A. Tom.
19 Q. Shkoukani?
20 A. Yes.
21 Q. And do you remember how many occasions you've spoken
22 to him about it?
23 A. A couple, three times, just to get to know what's
24 going on or what happened, and, you know, just more
25 recently after I heard it from you.

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Q. What conversations did you have with Mr. Shkoukani? Specifically what did he say to you about how this incident occurred?
A. **He said some -- one of his employees, I believe, slipped in the parking lot and there was about six or eight inches of water there retained. And other than -- also he said that she's had prior back injuries according to her friends or employees.**
Q. Anything else you can recall?
A. **Not at this point.**
Q. What do you mean there were six or eight inches of water retained?
A. **That's what he said. He said there was some water in the parking lot, and she parked in a puddle, apparently, and when she got out of her car she stepped in a puddle.**
Q. Okay. Have you spoken with anyone else besides to Tom about this incident, or your attorneys?
A. **No. You.**
Q. Me.
MR. BARATTA: I don't have anything else.
MR. GABEL: Okay. Sir, my name is Steve Gabel, I represent T&J in this case. Nice to meet you.
THE WITNESS: Nice meeting you.

MR. GABEL: I'm going to ask you some questions about the case, and I know plaintiff's counsel asked you some. I'm going to jump around a bit, okay?
THE WITNESS: Are you going to be as long-winded as he is?
MR. GABEL: No, I don't think so. I don't think so.
THE WITNESS: All right. It's taking too long.
MR. GABEL: Can I see the last exhibit that was handed to you, please?
MR. BARATTA: No one's accused me of being long-winded.
EXAMINATION
BY MR. GABEL:
Q. Okay. Hold on to that. Thanks.
So Mr. Caramagno filled out Answers to Interrogatories, those were answers to written questions in this case, and he signed them, and there's a copy here. There's his signature. And then to answer five, I'm just going to read a portion to you --
A. **Sure.**
Q. -- and we'll have some questions and answers about

that. He stated, quote: "However, defendant was to perform snow plowing of the parking lot only at an accumulation of snow of 1.5 inches or greater."
Was that your understanding of the agreement?
A. **Again, they've plowed a lot less than that. That's not 1.5, if it's --**
Q. So on or before the date of the incident here, which is 2-21-14, did you ever have a discussion with Mr. Caramagno in all of your conversations, I know you've known him for two and-a-half decades or more, that the 1.5 inch or more trigger was the trigger for this property?
A. **It's the first I've heard of it.**
Q. You never had any questions or discussions back and forth as to when, if ever, the trigger would be -- or strike that.
Did you ever have a discussion, based on what you said earlier -- at one point earlier in your testimony you said half inch, another point you said a quarter inch. Did you have a discussion about that, or was that just your understanding you had in your mind?
A. **That was an understanding that we both talked about it.**

Q. So you did talk about it?
A. **In certain cases, like a lot of times you got quarter inch, and all of a sudden, you know, it melts away, they don't plow. But sometimes when the temperature's a lot lower, sometimes they just come out if there's a quarter inch or even a half inch, sometimes they come out and just salt.**
Q. When was it that you had the conversation about the quarter inch or half inch trigger that you just mentioned?
A. **Since 1980 -- '90 and now. Pick a date.**
Q. Between '80 and '90 and now?
A. **No, between 1990 and now.**
Q. '90, okay, sir.
Now, I'm going to continue on with the answer.
A. **Sure.**
Q. It says, "And defendant T&J Landscaping was not required to perform salting unless specifically asked to do so by the property owner." Was that your understanding?
A. **That is not correct. They've salted many times with and -- a lot of times that we've had them do it twice where --**
Q. Did you get charged an extra charge when salting would

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occur?
A. Always.
Q. Because salting is a commodity, and it's purchased and it costs more, right?
A. It's $150.00 a ton.
Q. Wouldn't you want to have a little more control over when you get charged for salting, meaning you would be the one to say to salt as opposed to T&J?
A. We've had situations where it's over-salting, and then I've had brick repairs, cement damage because of it, we had to do tuck pointing because of it. So I didn't want over-salting, but yet we wanted salting.
Q. So when we took a look at the -- I think you called it CAM. What does CAM stand for?
A. Common Area Maintenance.
Q. Common Area Maintenance, one was July 1, 2015, and one was the year before.
A. Correct.
Q. So can I take a look at the one for the year before?
So the one that seems to apply to the time of the incident --
MR. BARATTA: I think it's this one.
MR. GABEL: Yeah.
BY MR. GABEL:
Q. Was -- yeah, for the period of 7-1-13 to 6-30-14. For

the snow and salting line item is over $6,700.00 for that line item.
A. Correct.
Q. And then for the following year, the '14-15 year it's about 3,800.
A. Correct.
Q. So for the relevant time period in question, the '13-14 time period, there's a much higher charge, you'd agree?
A. Yes.
Q. Okay. Was it your understanding that that winter was a lot of snow over time?
A. We had records of snow. We had I believe it's 112 inches throughout the year.
Q. Which led to the higher charge on your CAM invoice, correct?
A. Correct.
Q. So nonetheless, putting aside all of that, no matter what, based on the conversation and the questions and answers we've had, there still must be some minimum trigger for T&J to come out?
A. Correct.
Q. Assume for the sake of my question that the day of the incident there was no snow accumulation. Would T&J's be required to come out that day?

A. No.
Q. And assume for the sake of my question that the day before, 2-20-14, there was no snow accumulation, but there was rain, and a thunderstorm, and water precipitation, not snow, but water precipitation, according to weather records. Would that require T&J's to come out?
A. No.
Q. Now, I want you to think back to the answer you said earlier, which was the plaintiff, according to your understanding, parked, exited her vehicle, was in some water and fell.
A. Correct.
Q. Assume for the purpose of my question that there was water within 24 hours from a rainstorm the day before the incident. Would that connect up to what your understanding of the incident was?
A. Do you know how parking lots work?
Q. I'm just asking what you --
A. I'm --
Q. -- the fact that --
A. I'm going to explain to you.
Q. Uh-huh.
A. The cities uses our parking lots, I have multiple buildings, as retaining ponds in many cases. So, for

example, you have -- let's say you have six manholes, or catch basins that are about 12 inches in diameter of the drain. When they head out to the street, they go down about six inches. I just learned that. So what happens is, instead of flooding the streets, and instead of having backing up -- backups on the streets and that, they hold it in your parking lot. So they use the parking lots as retention centers, as retention. So I'm not saying that was the case in this particular --
Q. Uh-huh.
A. -- thing here, but the drains, when you get a lot of rain the drains can only handle so much.
Q. Okay. All right.
A. So from what my understanding as to this case, this lady got out -- she parked in a puddle, okay, where there was water retained, and she got out of her car where there was a four to five to six inches of water, from what I was told by to Tom Shkoukani, and that's what happened.
Q. Okay. So if the weather records show that the day before the incident it did rain, it was a thunderstorm and water came down, that would link up to what you just said, that she stepped into water. That's your understanding?

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Page 49

A. I believe so.
Q. Okay. If we go to the basics of the agreement, and I understand it's a verbal agreement, that in your mind there was a trigger for snow maintenance, pushing and plowing and stuff, right?
A. Correct.
Q. Okay. According to you, salt when you want to, T&J, that's your position, correct?
A. Salt according to their discretion.
Q. According to their discretion.
A. But if we needed it more, they're to do it more.
Q. Okay. And then a charge for each one of those, correct?
A. Correct.
Q. Okay. Was that the totality -- and the location, right? So we have the location down, correct?
A. Absolutely.
Q. And the time period, usually November to end of March, right?
A. Okay.
Q. Okay. Anything else to the agreement? Any other components that we're missing there?
A. Not that I know of.
Q. And that's the totality and the sum and substance of it, right, according to your --

Page 50

A. Right. If it snows, they plow; if it's cold, they salt; if the grass gets higher, they cut it. And they've done a great job, by the way.
Q. I was going to ask whether they're a responsible contractor?
A. Very.
Q. Okay. Do you know whether it was Tom Caramagno, himself, that did the work at that property where the incident occurred?
A. No, I don't.
Q. Okay. But you know Tom, right? You've known him for many years?
A. Yes.
Q. Is he a responsible individual when it comes to these types of activities?
A. Very.
Q. And there's no e-mail, there's no side notes, it's just all verbal, right?
A. Correct.
Q. Okay. And do you know whether -- other than looking at the document there --
In fact, can I take a look at that one that you have?
MR. STEINER: Which one?
MR. GABEL: Sitting right there.

Page 51

MR. STEINER: This one?
MR. GABEL: Yes. Thank you.
MR. STEINER: Sure.
BY MR. GABEL:
Q. So according to this log which is Exhibit 3 today, it goes up to 2-18-14, and then there's no activity between the 18th and the 2nd. Do you know one way or the other when T&J was there, or would you have to rely on this list that's Exhibit 3 today?
A. I couldn't tell you when they were there, when they were not.
Q. Okay.
A. We're three, four years away -- three years ago.
Q. And you don't keep your own separate list --
A. No.
Q. -- do you?
Okay. Now, you said that you talked to Mr. Shkoukani about the incident, and one of his employees had fallen in the parking lot. Did you talk to Mr. Caramagno at all about this?
A. No. No. Why would I?
Q. I'm just asking whether you did or didn't.
A. Okay.
Q. Sometimes we ask who you talked to and what the conversations were. As plaintiff asked about

Page 52

Mr. Shkoukani, so I was talking about Mr. Caramagno.
A. Okay.
MR. GABEL: Okay. I don't have anything else. Thank you.
MR. STEINER: I just have a couple of follow-ups.
EXAMINATION
BY MR. STEINER:
Q. Regarding Exhibit 4, which is the Lease that we've discussed here today. Was it your understanding that the terms of this Lease governed the relationship between Sage Investment Group and Grand Dimitri's?
A. Yes.
Q. Have you ever discussed this Lease with Tom Caramagno?
A. Many times. We wanted them to -- again, we've been friends with him, they're great tenants, so really.
Q. So Tom Caramagno has seen this Lease?
A. Yes.
Q. And it's --
A. He has a copy of it.
Q. It's your understanding that this Lease governs the relationship, right?
A. Yes. And he also, in accordance to the Lease, is what he's paying on the common area charges all listed in there.

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Page 53

Q. Okay. Is it your understanding that the oral agreement between Sage Investment Group and T&J was on behalf of your tenants?
MR. BARATTA: I'm going to object --
MR. GABEL: Objection.
MR. BARATTA: -- on foundation. Calls for a legal conclusion, speculation.
MR. GABEL: Join.
BY MR. STEINER:
Q. You can answer, if you know.
A. **Was it on behalf of my tenants?**
Q. Right. Earlier you testified --
A. **Yes, the contract, or the oral agreement that we've done with T&J is to make sure that my tenants are doing what they're supposed to do.**
Q. Okay.
A. **In accordance to the Repairs and Maintenance paragraph, which I believe is paragraph eight in the lease.**
Q. And that includes Grand Dimitri's?
A. **It includes all the tenants.**
Q. Okay. Including Grand Dimitri's?
A. **Including Grand Dimitri's.**
Q. Is it also your understanding that any of your tenants could hire their own snow removal contractor if they

Page 54

chose to do so?
A. **If they chose to do so.**
Q. With regard to the parking lot, itself, right by Grand Dimitri's, who would use that parking lot?
A. **Grand Dimitri's customers and employees.**
Q. You wouldn't use that parking lot, would you?
A. **No.**
Q. With regard to maintenance on the inside of the property, who's responsible for that?
A. **Grand Dimitri's. I maintain the roof.**
Q. Would it be fair to characterize the letters, or the CAM Agreements that you've sent to Grand Dimitri's as passing through, as in you're passing through the cost to them?
MR. BARATTA: Objection. The document speaks for itself. Go ahead and answer, if you can.
THE WITNESS: They're all our pass throughs, it's what we --
MR. BARATTA: That's what a CAM is.
THE WITNESS: That's what Common Area Maintenance is.
BY MR. STEINER:
Q. And that's simply to make it easier on the tenants?
A. **Correct.**
MR. STEINER: That's all I have.

Page 55

MR. BARATTA: Just a couple of follow-ups.
RE-EXAMINATION
BY MR. BARATTA:
Q. According to your testimony, Mr. Sage, Grand Dimitri's is responsible for maintaining the parking lot, correct?
A. **Correct.**
Q. You select the contractor to maintain the snow and deice the parking lot, correct?
A. **Correct.**
Q. Does Grand Dimitri's -- or strike that.
Your testimony has been that you and Mr. Caramagno selected the discretion as to when the snow maintenance and/or deicing would occur on the parking lot, correct?
A. **No.**
MR. STEINER: Object.
BY MR. BARATTA:
Q. No? You didn't have an oral agreement with Mr. Caramagno and T&J's as to how -- or strike that. As to when?
A. **Rephrase your question one more time.**
Q. You had an agreement with T&J, an oral agreement, whereby you and Mr. Caramagno came to an agreement concerning how the snow was to be maintained and the

Page 56

parking lot deiced during the winter of 2014, correct?
A. **Correct.**
MR. STEINER: Object.
BY MR. BARATTA:
Q. Did Grand Dimitri's have any input in reaching that agreement between Sage's and T&J?
A. **No.**
Q. Okay. Did Grand Dimitri's have any input or say concerning the price that T&J would charge Sage's?
A. **No.**
Q. You mentioned that Grand Dimitri's would be responsible for interior maintenance of their premises, not including the roof?
A. **Correct.**
Q. So the roof is your responsibility?
A. **Correct.**
Q. All right. So if there's a problem with the roof, I'm assuming that Sage's company is going to select a contractor to repair the roof?
A. **Correct.**
Q. If the stove broke in Grand Dimitri's, um, would you select the contractor to repair or --
A. **No.**
Q. -- replace the stove?
A. **No.**

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Q. Did you ever discuss with Mr. Shkoukani when he talked about the rain or the water in the parking lot, did he ever discuss whether or not there was ever any accumulations of snow in the parking lot on that date?
A. **No.**
MR. BARATTA: Nothing further.
THE WITNESS: I believe --
BY MR. BARATTA:
Q. Okay.
A. **Sorry. He did say it was raining.**
Q. At the time of the incident, or raining before the incident?
A. **At the time of the incident. Or there was rain, it was wet, it was not snow.**
Q. Your testimony was, I think, that Donna Livings parked near some standing water, or a puddle of water --
A. **Correct.**
Q. -- when she got out.
MR. STEINER: Well, let me just object to that.
MR. BARATTA: At least that's what I thought, that's paraphrasing, that's not a direct quote.
MR. STEINER: That's not his testimony, that's what he heard from Tom Shkoukani.

MR. BARATTA: Right, he testified that's what he discussed with Mr. Shkoukani.
MR. STEINER: Right.
BY MR. BARATTA:
Q. That there was some standing water or a puddle that Miss Livings parked her car close to, correct?
A. **She parked her car in it.**
Q. Was it your understanding from that discussion with Mr. Shkoukani, that the reason Miss Livings fell was because of standing water or a puddle?
A. **I'm not sure how she fell, that's all I was told.**
Q. So you didn't reach a clear understanding of how Miss Livings fell, correct?
A. **No. Correct.**
Q. From that conversation?
A. **Correct.**
Q. And I think I asked you this, but I'm not sure if the answer was muddled with an objection. Mr. Shkoukani didn't mention whether or not there was snow on the ground on the parking lot at the time Miss Livings fell?
A. **No.**
Q. No, he did not mention that?
A. **He did not mention it.**
MR. BARATTA: I don't have anything else.

RE-EXAMINATION
BY MR. GABEL:
Q. So sir, in your conversations with Mr. Caramagno -- strike that.
For this property there's a lot of people going back and forth. You've got yourself, sometimes you would drive by you said, correct?
A. **Correct.**
Q. You'd have tenants going in and out of there?
A. **Continuously.**
Q. There were employees going in and out of there?
A. **Correct.**
Q. Vendors and customers, right?
A. **Correct.**
Q. Okay. So in all of your conversations with Mr. Caramagno, is it fair to say you never had a specific conversation that the work to be done by T&J's was for Donna Livings, period?
A. **I don't even know who Donna Livings is.**
Q. The plaintiff in this case.
A. **Yes, but --**
Q. You never had a conversation that this work was for Donna Livings, did you?
MR. BARATTA: Specifically?
MR. GABEL: Yeah.

THE WITNESS: The actual snow plowing?
BY MR. GABEL:
Q. Yeah.
A. **No.**
MR. GABEL: Okay. Nothing further.
MR. BARATTA: Do you have anything, Mark? It's actually fast.
THE WITNESS: I'm going have to start back charging you guys here.
RE-EXAMINATION
BY MR. STEINER:
Q. If there was snow after T&J last plowed, whose responsibility would that have been to clean?
A. **The tenant would have to maintain it.**
Q. And if there was standing water, whose responsibility would it have been to clear that standing water?
A. **The tenant.**
MR. BARATTA: I'm going to object based on the vague and ambiguous question. The terms standing water, I don't know what that means in light of this.
BY MR. STEINER:
Q. Well, earlier you had mentioned that Tom Shkoukani had referenced that the plaintiff had parked her car in standing water. Whose responsibility would it have been to clear that standing water?

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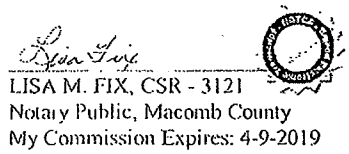
MR. BARATTA: Same objection.
THE WITNESS: The tenant, according to their Repairs and Maintenance in the Lease.
MR. STEINER: Okay. Thank you.
MR. BARATTA: Nothing further.
MR. GABEL: Nothing else. Thank you.
* * **
(The deposition was concluded at 3:15 p.m.)

CERTIFICATE
STATE OF MICHIGAN
COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take; and that I am not related, nor a counsel to either party, nor interested in the event of this cause.



LISA M. FIX, CSR - 3121
Notary Public, Macomb County
My Commission Expires: 4-9-2019

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

Case No. 2016-1819-NI
Hon. Edward A. Servitto

v

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

Defendants.

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DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S, REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

I. Introduction.

Sage's Investment Group, LLC (hereinafter referred to as "Sage's") is entitled to summary disposition on the Plaintiff's premises liability claims as the purportedly "dangerous condition" was uncontestably open and obvious. There is further uncontroverted evidence that

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Sage's did not possess/control the premises and complied with whatever duty Sage's may have owed the Plaintiff. Several Michigan cases have evaluated the same or similar circumstances and those cases rulings are indistinguishable. The Plaintiff has responded with incomplete and non-binding case law in support of her position and accordingly, this Court must grant Sage's summary disposition and dismiss the Plaintiff's claims.

II. Argument.

A. The Open and Obvious Doctrine applies in this case and the Plaintiff's claims must be dismissed as a matter of law.

Several crucial facts establish that the alleged "dangerous condition" was open and obvious as a matter of law:

- **The Plaintiff testified that she knew the parking lot was slippery and saw ice and snow in the parking lot.** (Exhibit B of MSD, pg. 32).
- The Plaintiff had a cell phone and could have reported the slippery conditions prior to getting out of her car. (Exhibit B of MSD, pg. 46).
- The Plaintiff could have parked in the front lot, where chef, Robert Spear, parked and the owners salted the sidewalks. (Exhibit B of MSD, pg. 34, 40).
- After the Plaintiff fell, she was able to traverse the parking lot and Debra Buck and Robert Spear were able to safely enter the building just minutes before the Plaintiff. (Exhibit B of MSD, pg. 34-35, 46).
- After the Plaintiff returned home to change after her fall, she parked in a different area of the parking lot and did not fall when reentering the premises. (Exhibit B of MSD, pg. 46 and Exhibit E of MSD, pg. 16).
- The only objective witness deposed in this lawsuit, Tom Shkoukani, testified that he only recalled snow and ice buildup near the drain in the parking lot and the Plaintiff could have parked in another location. (Exhibit E of MSD, pg. 14).

The objective facts of this case compel this Court to find that the subject snow and ice was open and obvious. Indeed, Michigan courts routinely hold "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67 (2006).

While the Plaintiff's response argues that because there was low-light conditions at the time of the Plaintiff's fall, the presence of water and ice was not open and obvious, that theory

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was expressly rejected by the Michigan Supreme Court in an April 14, 2017 order. Indeed, in *Ragnoli*, the Michigan Supreme Court found that "[t]he trial court correctly held that, notwithstanding the low lighting in the parking lot, the presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch open and obvious such that a reasonably prudent person would foresee the danger of slipping and falling in the parking lot." *Ragnoli v North Oakland-North Macomb Imaging, Inc.*, __ Mich ___; 892 NW2d 377 (2017) (internal citations omitted).

The facts of *Ragnoli* are indistinguishable from the instant case. The plaintiff fell on black ice in the defendant's parking lot. Temperatures on the date of the incident were below freezing, the plaintiff saw snow piled in the parking lot near the dumpster, and the plaintiff saw that the parking lot looked wet and in some places, icy. The plaintiff, however, also testified that the lighting was "dim" and "very low" and on that basis, did not see the ice that alleged caused her fall. The Court of Appeals held that a question of fact existed given the low-light conditions on the premises; however, as noted above, the Supreme Court **reversed** the Court of Appeals decision, holding that summary disposition was indeed appropriate, as a reasonably prudent person would have foreseen slipping in a parking lot when winter weather conditions existed. *See Ragnoli v North Oakland-North Macomb Imaging, Inc.*, unpublished Court of Appeals decision decided April 12, 2016 (docket no. 1445445), *reversed*, 892 NW2d 377.

The Plaintiff in this matter **admitted** that she saw winter conditions and knew that the parking lot may be slippery. (Exhibit B of MSD, pg. 32). She further **admitted that she was able to see the ice** (Exhibit B of MSD, pg. 42), that there was a light at the back door, as well as ambient light coming from the window. (Exhibit B of MSD, pg. 41, 93). The very recent *Ragnoli* Michigan Supreme Court order, as well as the Plaintiff's own testimony establishes that

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the open and obvious doctrine must be applies in this case. The fact that there was low-light is inapposite. The Plaintiff's response only cites unpublished Michigan Court of Appeals decisions in support of her argument. This Court must follow established Supreme Court precedent in this regard.

Furthermore, the facts of this case do not support a conclusion that the alleged ice and snow was effectively unavoidable. The Plaintiff's own brief states that "it was not the 'packed snow' that plaintiff admittedly saw but the water-covered ice, caused by the blocked drain, which led to her fall." (Plaintiff's Brief, pg. 13). The drain was located in only one area of the parking lot and was completely avoidable. Indeed, she could have parked in another location, as Mr. Shkoukani testified in his deposition and as other employees (namely, Debra Buck and Robert Spear) had done (Mr. Shkoukani even asked the Plaintiff why she chose to park in that spot versus another spot). (Exhibit E of MSD, pg. 12, 14).

To the extent the Plaintiff changes her argument that the dangerous condition was the parking lot, an icy parking lot, alone, is not an effectively unavoidable condition. To be effectively unavoidable, "a hazard must be unavoidable or inescapable in effect or for all practical purposes." *Hoffner v Lanctoe*, 492 Mich 450, 468 (2012). "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403 (2014).

This case is indistinguishable from the holdings of *Barch v Ryder Transp Services*, unpublished Court of Appeals decision decided October 20, 2016 (docket no. 327914) and *Walder v St John the Evangelist Parish*, unpublished Court of Appeals decision decided September 27, 2011 (docket no. 298178), *cert. denied* 491 Mich 913 (2012), as explained in

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further detail in Sage's Motion for Summary Disposition. The Plaintiff admittedly was not forced to confront any dangerous condition under Michigan law. While the Plaintiff argues that this case is similar to that of *Lymon v Freedland*, 314 Mich App 746 (2016), that case was decided on the "extenuating circumstances" that a home health aid could not abandon an Alzheimer's/Parkinson's patient for the sake of the patient's own safety. *Id*. 763-64. The Plaintiff in this case is a waitress and this is far more similar to the employment situations of an electrician and delivery driver, as was the case in *Barch* and *Walder*, that collectively held that the Plaintiff could have made alternative arrangements, parked in another spot, or used her cell phone to call for help. *Barch,* supra; *Walder*, supra. The Plaintiff's argument that she could not have gained entry to the front entrance is severely undermined by the fact <u>that she went through the front entrance after she fell</u>. (Exhibit B of MSD, pg. 46). It is simply false to assert that she could not have gained entry through that door had she not fallen.

B. Sage's did not possess/control the premises and if it did, it complied with its duties.

As is explained in further detail in Defendant's Motion, Defendant did not possess/control the premises, given the relevant lease. If, however, the Court is not persuaded by that argument, Sage's complied with its duties to the Plaintiff by hiring a well-respected and regarded snow removal contractor that cleared snow 3 days prior to the Plaintiff's fall (which was the last time it snowed). Indeed, if special circumstances exist such that the open and obvious doctrine does not apply, liability may only be imposed when "the defendant breaches his duty of reasonable care." *Hoffner,* supra at 463. There is simply nothing more that Sage's could have done to avoid the instant accident and accordingly, this Court must grant the instant Motion.

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WHEREFORE, Defendant, Sage's Investment Group, LLC, respectfully requests that this Honorable Court grant the instant Motion for Summary Disposition, dismiss the Plaintiff's claims with prejudice and award such other relief this Court deems equitable and just under the circumstances.

SEGAL McCAMBRIDGE SINGER & MAHONEY

By /s/ Mark W. Steiner

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Dated: June 14, 2017

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by service through TrueFiling & Served on June 14, 2017.

/s/ Robyn Goldberg

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

vs. Civil Action

No. 2016-1819-NI

Hon. Edward A. Servitto

SAGE'S INVESTMENT GROUP, L.L.C., a Michigan Limited Liability Company, T&J LANDSCAPING & SNOW REMOVAL, INC., a Michigan Corporation and GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING, a Michigan Corporation,

Defendants.

_____/

PAGE 1 TO 133

The Deposition of DONNA LIVINGS,
Taken at 120 Market Street,
Mt. Clemens, Michigan,
Commencing at 2:45 p.m.,
Wednesday, February 22, 2017,
Before Gail R. McLeod, RPR, CSR 2901.

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Appearing on behalf of the Defendant T&J Landscaping.

* * * * *

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TABLE OF CONTENTS

DONNA LIVINGS	Page
EXAMINATION BY MR. STEINER:	5
EXAMINATION BY MR. GABEL:	79
EXAMINATION BY MR. BARATTA:	111
RE-EXAMINATION BY MR. STEINER:	122
RE-EXAMINATION BY MR. GABEL:	128
RE-EXAMINATION BY MR. BARATTA:	130
RE-EXAMINATION BY MR. GABEL:	132

INDEX TO EXHIBITS

(Exhibits attached to transcript)

Exhibit	Page
DEPOSITION EXHIBIT 1	111
- Photographs	
DEPOSITION EXHIBIT 2	130
- Statement of Charges	

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Mt. Clemens, Michigan
Wednesday, February 22, 2017
About 2:45 p.m.

DONNA LIVINGS,

having first been duly sworn, was examined and testified on her oath as follows:

MR. STEINER: Could you please state your name for the record?

THE WITNESS: Donna Ann Livings.

MR. STEINER: Let the record reflect that this is the discovery deposition of Donna Livings taken pursuant to Notice and to be used for all purposes under the Michigan Court Rules and Michigan Rules of Evidence.

EXAMINATION BY MR. STEINER:

Q. Ms. Livings, my name is Mark Steiner. We meet briefly before we went on the record here. I represent Sage Investment Group, a company that you sued as a result of an incident that I believe occurred February 21st, 2014. Have you ever had your deposition taken before?

A. No.

Q. Well, I'm sure your attorney has gone over it with you, but I'm just going to go over for the record a couple ground rules with you. First, it's important to keep all of your answers verbal. As you probably are aware,

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there's a court reporter taking down everything that you and I say. It will be transcribed on a sheet of paper, so it's important that you don't nod your head, shrug your shoulders, things like that. In the same vein, it's important to wait to answer your questions or the questions that I ask you until after I've completed the full question and that's simply to keep the record clear, too.

Another rule is this isn't a game to test your memory. If you don't know something, it's okay. Don't guess. If you don't know something, you can just say, "I don't know." That's a perfectly acceptable answer.

I'm going to assume the questions or I'm going to assume that you understood the questions that I ask you if you respond. I'll assume that you answered them truthfully and accurately to the best of your knowledge. Is that fair?

A. Yes.

Q. Okay. If you need a break at any time, just let us know and again, this isn't an endurance contest, so if you need a break, just let us know. Have you taken any medication today that would affect your ability to answer truthfully or honestly?

A. Yes.

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Q. And what medication is that?
A. I take Norco.
Q. Does that affect your ability to tell the truth at all?
A. No.
Q. So you would be able to truthfully and honestly answer the questions I ask you?
A. Correct.
MR. GABEL: May I ask you a question? Did you take Norco close to the testimony today so that your perception is a little off right now?
THE WITNESS: No.
MR. BARATTA: Let me ask her a question.
When was the last time you took Norco? This morning?
THE WITNESS: Yes.
MR. BARATTA: What time about?
THE WITNESS: About 9:00 o'clock.
MR. BARATTA: And what strength was it if you know?
THE WITNESS: 10/325.
MR. BARATTA: Okay. Do you take those every day?
THE WITNESS: Yes.
MR. BARATTA: All right. How many a day?
THE WITNESS: Three. Three times.

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MR. BARATTA: Do you usually take them morning, noon and night?
THE WITNESS: Correct, every eight hours.
MR. BARATTA: But the last time was this morning?
THE WITNESS: Yes.
MR. BARATTA: Thank you.
MR. GABEL: Thank you.
BY MR. STEINER:
Q. What is your present address?
A. 27059 Pinewood Street, Roseville, Michigan, 48066.
Q. And how long have you lived there?
A. Seven years.
Q. Where did you live prior to that?
A. I can't remember the house number, but Raymond, St. Clair Shores, Michigan, 48082.
Q. And do you remember how long you lived at that Raymond Street address?
A. Approximately 10 years.
Q. Do you remember where you lived before that?
A. Detroit.
Q. Do you remember the street --
A. No, actually, I'll correct myself on that. I lived on Little Mack, 28100 Little Mack, St. Clair Shores, 48081.

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Q. And how long did you live there?
A. Two years.
Q. Did you live in Detroit before that?
A. Yes.
Q. Do you remember the street address for that?
A. The house number, no. Payton, and that was Detroit, Michigan. I don't remember the zip code.
Q. And do you remember how long you lived there?
A. 10 years.
Q. Okay. At that Pinewood Street home, do you own that home?
A. No.
Q. Do you rent that home?
A. Yes.
Q. Who do you rent that from?
A. Fairway Rentals.
Q. Do you know how much your rent payment is?
A. 750.
Q. Do you own any real property?
A. No. My car.
Q. Who do you live with at the Pinewood Street home?
A. Just me.
Q. It's my understanding that you have gone by a couple previous names, Donna Lasko, Donna --
A. Czerniawski.

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Q. And Donna McMillan, is that right?
A. Yes.
Q. Have you gone by any other name?
A. No.
Q. Is your date of birth May 2nd, 1960?
A. It is.
Q. Were you born in London, England?
A. I was.
Q. And when did you move to the United States?
A. February of 1974.
Q. May I ask what brought you to the United States?
A. My parents. My father, his job brought him here.
Q. And what's your Social Security number? I'd ask just that the last four digits appear on the record for your privacy.
MR. BARATTA: Why don't we take it all off. Is that okay?
MR. STEINER: That's fine. I think it's in the Answers to Interrogatories anyway. I probably have it, so I just want to confirm.
MR. BARATTA: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. It's my understanding that you've been married four

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1 times; is that right?
2 A. Yes.
3 Q. Was your first husband Mark Lasko?
4 A. He was.
5 Q. And was that from 1978 to 1980?
6 A. Yes.
7 Q. Was your second husband Ray Czerniawski?
8 A. Yes.
9 Q. I'm probably pronouncing that wrong. That was from
10 1983 to 1986?
11 A. Yes.
12 Q. And then were you next married to Mujo --
13 A. Mujo.
14 Q. Mujo Buzdoraj?
15 A. Yeah, Mujo Buzdoraj.
16 Q. Was that from 1989 to 1990?
17 A. Yes.
18 Q. And then Timothy McMillan?
19 A. Yes.
20 Q. And is that from 1996 to 1999?
21 A. Yes.
22 Q. Do any of your previous husbands owe you any spousal
23 support?
24 A. No.
25 Q. What about child support?

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A. No.
Q. Do you have children?
A. I do.
Q. How many do you have?
A. Three.
Q. What are their names?
A. Michael is my oldest, Steven is my middle son and Matthew is my youngest.
Q. When was Michael born?
A. 1977.
Q. When was Steven born?
A. 1983.
Q. And when was Matthew born?
A. 1984.
Q. Are they all financially independent?
A. Of me?
Q. Correct.
A. Yes.
Q. Do you have any grandchildren?
A. I do.
Q. How many do you have?
A. Nine.
Q. Do any live in the area?
A. They all live in the area.
Q. Do you see them regularly?

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A. I do.
Q. About how often do you see them?
A. My oldest son's family, two, three times a week. My youngest son, I actually baby-sit my youngest grandson, so I see him every day and my middle son, a couple times, you know, like every couple of months I see the twins.
Q. Are you currently financially dependent on anyone?
A. No.
Q. Is anyone currently financially dependent on you?
A. No.
Q. Do you have any social media accounts like Facebook, Twitter, Instagram, anything like that?
A. I have Facebook.
Q. Did you ever post anything regarding this incident on Facebook?
A. I have.
Q. Do you recall what that was?
A. Originally when I fell obviously, something to the effect of fell at work today, you know, my back hurts, having to go to Concentra, probably months later something to the effect of Workmen's Comp dropping me and refusing to pay my medical anymore and whenever I've had my surgeries, I've posted that, surgery on Wednesday, hopefully everything goes well, that kind of

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1 thing.
2 Q. You haven't deleted anything off your Facebook, right?
3 A. No, sir.
4 Q. So it's all there?
5 A. Yes, it is.
6 Q. Have you ever been convicted of any crimes?
7 A. Yes.
8 Q. What crimes are those?
9 A. Retail fraud.
10 Q. Anything else?
11 A. I also have a domestic violence.
12 MR. BARATTA: Just for the record, the retail
13 fraud was in 2000.
14 MR. GABEL: Was there an incarceration that
15 ended at a certain point in time?
16 MR. BARATTA: No. It was probation out of
17 St. Clair Shores District Court.
18 MR. GABEL: Do you know when that was
19 terminated?
20 MR. BARATTA: Probably within one year
21 following the guilty plea in approximately 2000.
22 MR. GABEL: Does that sound correct, ma'am?
23 THE WITNESS: Yes.
24 MR. GABEL: Thank you very much.
25 MR. BARATTA: I'll just object to relevance.

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BY MR. STEINER:
Q. And when was the domestic violence charge?
A. September, the last week of September of 2010.
Q. Do you know if that was a felony or misdemeanor?
A. I have no idea.
Q. Do you recall what court that was through?
A. St. Clair Shores.
Q. As a result of either of those, did you owe any money?
A. The domestic violence, I was ordered to go to anger management which I had to pay a fee for. I had to pay a monthly amount to my reporting probation officer and I had my court costs for my attorney and I was ordered to drug test whenever my color came up.
Q. With regard to the retail fraud, do you know what company that --
A. It was from Burlington Coat Factory.
MR. BARATTA: If you'll just give me a continuing objection on relevance and also, the fact that it's almost 17 years old at this point and I don't think it's admissible for purposes of trial. You can ask away.
MR. STEINER: That's fine.
MR. GABEL: I have no problem with that.
BY MR. STEINER:
Q. Have you ever treated for alcohol or substance abuse?

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A. No.
Q. Did you graduate from high school?
A. I graduated 10 years late.
MR. BARATTA: If you have to get up and stretch, do it.
THE WITNESS: Yeah, I'm just moving around. If I have to sit in one position too long, it gets sticky.
MR. BARATTA: I'm sorry to interrupt. Go ahead.
BY MR. STEINER:
Q. So you mentioned you graduated 10 years late. Did you complete a GED?
A. No, I have a diploma. I went to night school. I actually graduated with honors for that.
Q. All right. My records indicate that you went to East Detroit High School for some period. Is that right?
A. Correct.
Q. When did you start East Detroit High School if you know?
A. '75 I want to say.
Q. And when did you leave?
A. Actually, you know what, it was probably a year later. I was pregnant and they would not allow me to continue school.

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Q. What grade were you in if you know?
A. I was in my 11th grade going into my senior year.
Q. Then you mentioned 10 years later, you completed a night program?
A. Yes, 1978, I graduated from Mount Clemens High School Adult Education.
Q. Did you say '78?
A. I'm sorry. '87. Because I was supposed to graduate '77 and I actually graduated '87.
Q. Okay. Did you ever attend college or any secretarial school?
A. No.
Q. Do you have any degrees or certificates in any other area of study?
A. No.
Q. Did you ever serve in the military?
A. No.
Q. Are you currently employed?
A. No.
Q. When was the last time you were employed?
A. February 22nd, 2014.
Q. Are you currently looking for a job?
A. No.
Q. Have you looked for a job since February 22nd, 2014?
A. No.

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1 Q. Have you applied for Social Security Disability?
2 A. Yes.
3 Q. Were you granted Social Security Disability?
4 A. Yes.
5 Q. When did you apply?
6 A. October 2014.
7 Q. Were you granted Social Security Disability the first
8 time you applied?
9 A. I was.
10 Q. Did you hire an attorney?
11 A. I did.
12 Q. Do you recall who that attorney was?
13 A. Randall Mansour.
14 Q. You mentioned you applied in October 2014. When were
15 those benefits granted if you know?
16 A. February 2015.
17 Q. What injury did you claim?
18 A. My back.
19 Q. Do you know what physician diagnosed your back problem
20 such that you were able to get Social Security
21 Disability?
22 A. Martin Kornblum.
23 Q. Did you ever apply for unemployment benefits?
24 A. Yes.
25 Q. When have you applied for unemployment benefits?

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A. When I was terminated from Burlington Coat Factory.
Q. When was that?
A. 2000.
Q. Oh. I'm sorry. I thought you were -- was Grand Dimitre's the last place you worked?
A. Yes.
Q. Do you recall what years you worked at Grand Dimitre's?
A. 10 years.
Q. So 10 years prior to 2014?
A. Yes.
Q. So approximately 2004?
A. Yes. It might even be 11 years.
Q. What was your wage there?
MR. BARATTA: When she left?
MR. STEINER: Right.
THE WITNESS: $2.90 an hour plus tips.
BY MR. STEINER:
Q. Do you know how much you made in 2013? If you need to approximate, you can.
MR. BARATTA: If you don't know, you don't know. They can get your tax returns.
THE WITNESS: Yeah, I -- approximately $11,000.
BY MR. STEINER:
Q. What about 2012?

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A. The same. I mean my wage stayed the same.
Q. Okay. How many hours per week would you work at Grand Dimitre's?
A. Depended. I did have a set schedule, but because I was an opening server, when the lunch crowd would be done, I got to go home.
Q. Some records indicate that you worked approximately 38 hours per week. Is that about right?
A. Correct.
Q. Were you an opening server for the entire time you worked at Grand Dimitre's?
A. No.
Q. How long were you an opening server?
A. Seven years approximately.
Q. What were you before you were an opening server?
A. Afternoons, nights. It was a seniority thing. I worked my way up the ladder.
Q. So opening server was considered a desirable position?
A. Absolutely.
Q. And what were your general job duties?
A. Server, cashier, busser, janitor, whatever was required.
Q. Did it require a certain amount of ability to lift heavy things?
A. Correct.

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Q. Did you ever try to go back to work at Grand Dimitre's?
A. No.
Q. Did any doctor tell you that you could go back?
A. No.
Q. Did any doctor tell you that you could not go back?
A. Yes.
Q. Which doctor is that?
A. The first one was Dr. Valentine I believe his name was. He was the initial doctor at Concentra. The next doctor was Albert Belfi. He was the specialized doctor at Concentra and Martin Kornblum who was my surgeon.
Q. When you were paid by Grand Dimitre's, were you paid in cash or by check?
A. By check.
Q. How far of a drive is it from where you live to Grand Dimitre's?
A. Five minutes.
Q. Before you worked at Grand Dimitre's in approximately 2004, where did you work?
A. I worked at Burlington Coat Factory, Village Market, Grand Dimitre's, but at a different location, different owner.
Q. Okay. From at least 2004 to 2014 when you worked at Grand Dimitre's, was it always the same owner?
A. No.

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Q. Who was the owner when you last worked there?
A. Tom and Jamal Chakani.
Q. Do you know how long they were owners?
MR. BARATTA: I'm just going to object based on foundation, but you can answer if you know.
THE WITNESS: To date? I would say 10 years.
BY MR. STEINER:
Q. So just a couple years after you started, it switched to them?
A. Correct.
Q. Immediately before working for Grand Dimitre's, did you work at Burlington?
MR. BARATTA: That's been answered.
BY MR. STEINER:
Q. I'm just trying to figure out the time line here. Were you unemployed for a period of about three years then?
A. No. I worked at Village Market.
Q. Okay.
A. I worked at Burlington Coat Factory, to Village Market, to Grand Dimitre's.
Q. Okay. When did you leave Village Market?
A. Before I started working for Grand Dimitre's.
Q. So right around 2004?
A. Yes.
Q. When did you start Village Market?

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A. 2001 maybe after my unemployment was done.
Q. Okay. And what did you do for Village Market?
A. I was a cashier, stocker, swept the floor, lottery, stocked the liquor shelves, whatever was required.
Q. Did that job require heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim or anything like that as a result of your employment there?
A. No, sir.
Q. Were you ever injured on the job there?
A. No, sir.
Q. What did you do for Burlington Coat Factory?
A. I was a customer service manager.
Q. What kinds of things would you do there?
A. I was responsible for the front end of the store, the cashiers, the money, taking care of lay-aways and putting them upstairs, all of the paperwork from the cash registers.
Q. Did that job require any heavy lifting?
A. It did.
Q. Did you ever file a Workers' Compensation claim there?
A. No.
Q. Were you ever injured on the job there?
A. I was.

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Q. What did you injure?
A. Actually, my shoulder.
Q. Did you see a doctor?
A. I did, at Concentra.
Q. Do you know what year that happened?
A. '98 I'm guessing, '99 maybe.
Q. Do you know which Concentra clinic you saw?
A. The one in Fraser, 14 and Groesbeck.
Q. What did you do to your shoulder?
A. It was actually like Christmastime and they have the big rolling racks for the clothes that would come out of shipping and we were keeping those up front by the cash register and as people were coming to put their lay-aways in, they would be bagged and the whole thing would be put up on a rolling rack. Then it would be rolled back to the back of the store where we'd put it in lay-away.

All of the hangers that we would use that would come out of receiving was like the plastic kind with the metal hooks, so when you pushed them, they would glide easily down the rack and for whatever reason, the one lay-away that the cashier had did had several plastic hooks on them. So as I put it up on the rack and we're talking coats and jeans and, you know, this kind of thing in the lay-away, as I pushed

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it, the plastic just stopped fast on the rod and it just like put my shoulder out.
Q. Did you treat for a period of time?
A. I did at Concentra.
Q. How long?
A. Approximately six weeks maybe.
Q. Were you off work?
A. No. I still worked.
MR. GABEL: Let's go off the record.
(Discussion off the record.)
MR. STEINER: We'll go back on the record.
BY MR. STEINER:
Q. So you mentioned that you treated for approximately six weeks and you didn't take off work, right?
A. No. I was still working, but I did every day like even if it was my day off, I had to go to Burlington, punch my time card, go to Concentra, then go back to Burlington and punch my time card.
Q. Did that event affect your back at all?
A. No.
Q. I forgot to ask earlier, are you presently married?
A. No.
Q. Earlier, you mentioned that you are currently taking Norco. When was the first time you were prescribed Norco?

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A. September, I believe, of 2014.
Q. Do you know who prescribed that?
A. Dr. Wednesday Hall.
Q. Does he continue to prescribe that?
A. She, and yes, she does.
Q. Where do you get your prescriptions refilled?
A. Wherever I can get them.
Q. Can you give me a list of where you can get them?
A. CVS is my main pharmacy. Norco is one of the hardest medications to get a hold of because it's a narcotic, so when I can't get it at CVS, I will make my way down the street to Walgreens and check there and if they don't have it, I will move on to the next one until I can fill my prescription.
Q. You mentioned there might be a next one. What might that be?
A. I have gotten them at Kroger, CVS, Wal-Mart -- I'm sorry, never Wal-Mart, Walgreens, I don't believe anywhere else.
Q. Okay. Any other medications you're taking?
A. I take Gabapentin.
Q. What's that for?
A. Nerves.
Q. Who prescribes that?
A. Dr. Wednesday Hall.

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Q. What do you mean by nerves? Does it help relax you or what is that?
A. No, no, it's nerves for my back.
Q. Nerve pain?
A. Yes.
Q. So that's just another pain medication?
A. Yes. I'm sorry.
Q. That's okay.
A. And I also take Clonidine.
Q. What's that for?
A. It's actually a blood pressure medication, but I take it for hot flashes.
Q. Who prescribes that?
A. Vena Panthanji. She's my primary care doctor.
MR. GABEL: Can you spell that, please?
MR. STEINER: I have the spelling in here somewhere. It's in the interrogatories.
MR. GABEL: Thank you. I'll get it.
MR. BARATTA: You can't spell that, Steve?
MR. GABEL: I'm good, but I'm not that good.
BY MR. STEINER:
Q. How much are you presently receiving in Social Security Disability?
A. My total payment is $734 a month. I actually receive $615 a month.

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Q. Do you have any other sources of income?
A. No.
Q. Has that amount stayed the same since you started receiving it in February of 2015?
A. The $734 started then. When I was -- got the Medicare August of 2016, that's when it went to the 615 a month because I have to pay for my Medicare.
Q. I see. I know that you filed a Workers' Compensation lawsuit arising out of this incident. Have you ever filed for Workers' Compensation before?
A. No.
Q. It's my understanding that you redeemed that lawsuit. Is that right?
A. I did.
Q. Do you remember how much that was for?
A. The total amount or my amount?
Q. Total amount.
A. 65,000.
Q. How much did you receive?
A. 28,578 I believe.
Q. And that was for injuries arising out of the incident that we're here to talk about today?
A. Correct.
Q. Have you ever filed a lawsuit for any other injury?
A. No, sir.

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Q. Have you ever been a party to any other lawsuit that we haven't discussed already?
A. No, sir.
Q. Did you have health insurance at the time of this incident?
A. No.
Q. Have you ever had health insurance other than the Medicare that we talked about?
A. Ever or just --
Q. Yeah.
A. When I was married to Timothy McMillan, I had Aetna through his employer. When I originally started with Medicaid, that was in I want to say November, approximately, of 2014. Then they gave me the Total Health Care like 30 days after that, so I had the combination of Total Health Care and Medicaid. Then August of 2016 is when the Medicare started, so now I have Medicare with Medicaid as a backup.
Q. May I ask why the Medicare started in August 2016?
A. Because you have to wait I believe it's 30 months or something like that. You have to be on disability for at least two years and a couple of months and then Medicare automatically starts. So mine automatically started August 1st of 2016 and, you know, it was their doing, not mine.

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Q. I see. Okay. It's perfectly okay if you don't know this, but has any medical facility told you that you owe any money to them as a result of the injuries that you sustained in this incident?
A. I owe them nothing.
MR. BARATTA: Did you understand his question? Do you have any patient balances with any doctors? I think that's what he's asking.
THE WITNESS: Nothing. When the redemption was done through Workmen's Comp, they claimed all of the debt that was associated and since then, I've had full coverage, so I've had no bills.
BY MR. STEINER:
Q. Are you aware of a Workers' Compensation lien that's been filed in this lawsuit? If you don't know, that's okay.
A. I believe not, but anything is possible.
Q. Okay. Let's just start generally, how did the incident happen?
A. I was scheduled to work at 6:00 a.m. on the 21st of February. It was a Friday and I got there approximately 5:50, parked my vehicle, went to walk into the door and maybe three steps and I fell straight back.
Q. So you were coming from your Pinewood Street home

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address?
A. Correct.
Q. Then you were heading to Grand Dimitre's which I believe is located on Gratiot Road in Eastpointe, right?
A. Correct.
Q. Is this the usual time that you would go to work?
A. That was my usual time Monday, Thursday, Friday.
Q. What other days of the week did you work?
A. I worked Tuesday 9:30 to 2:00 and I worked Saturday 8:00 a.m. until 2:00 and my days off were Wednesday and Sunday.
Q. Do you remember what day of the week this incident occurred?
A. Friday.
Q. Were there other cars in the parking lot at the time of the incident?
A. One.
Q. Do you know whose car that was?
A. Debra Buck's.
Q. Did you say Debra?
A. Yes.
Q. What does she do?
A. She's a server.
Q. Did she open that day?

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A. Yes. We opened together.
Q. Was she already in the restaurant at that time?
A. Correct.
Q. When I say at that time, I mean at the time of your fall.
A. Yes.
Q. Are you aware of any witnesses to the actual fall?
A. No.
Q. Did you see the snow coming into the parking lot --
A. Yes.
Q. -- on the -- let me just finish the question. Did you see the snow coming into the parking lot?
A. Yes.
Q. Did you know it might be slippery in the parking lot?
A. Yes.
Q. At the time of the incident, did you own a cell phone?
A. Yes.
Q. Who was the carrier?
A. I know who it is. I can't think of the name.
Q. Sprint? Verizon? T-Mobile? AT&T?
A. Nope. Brain freeze. It's the cheap one.
MR. BARATTA: I don't know.
THE WITNESS: I don't know.
BY MR. STEINER:
Q. That's fine. Did you call anyone before you got out of

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your car on your cell phone?
A. No.
Q. Did you call anyone on your cell phone after you fell?
A. Yes.
Q. Who did you call?
A. The restaurant.
Q. The owner?
A. No, the restaurant phone.
Q. Okay. And who answered? Was it Debra that answered?
A. Yes.
Q. Now, where in the actual parking lot did you fall? You mentioned you were about three steps from your vehicle. Are you able to say --
A. I was in the rear of the building in the parking area.
Q. How close to the back door was that?
A. I would have to approximate 75 yards, 70 maybe.
Q. Could you have parked closer to the building?
MR. BARATTA: Hold on a second. I'm not sure that you understood his question. He was asking you, I think, how far your car was parked from the door that you were going into.
Is that correct? And if it's not --
MR. STEINER: Yeah, that's generally -- yes.
THE WITNESS: Yes, it was about 70 yards from my vehicle to the back door.

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MR. BARATTA: Okay.

BY MR. STEINER:

Q. And you fell approximately three feet from your car?

A. Yes.

Q. Could you have parked closer to the door?

A. No.

Q. And why not?

A. Because the parking area was all piled up with snow. That was the first available full parking spot.

Q. How much snow on the ground was there?

A. Approximately six inches, but it was packed snow. It wasn't soft snow.

Q. So it's fair to say that you fell closer to your car than the door that you were going into?

A. Correct.

Q. Was Debra the only one scheduled to arrive at about that time?

A. No. There was a cook, also.

Q. And he just hadn't arrived yet?

A. I have no idea. He parks in the front of the building because that's where his key is.

Q. Okay. What's the cook's name?

A. Robert Spear.

Q. Do you know if he was in the building?

A. I didn't know who was in the building. I just seen

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Debra's car.
Q. But do you know now if he was in the building?
A. When I got inside the building, yes, he was.
Q. Where were you looking when you fell?
A. On the ground.
Q. Could you see the ice?
A. Yes.
Q. Could you see pavement?
A. No.
Q. How much ice would you say you were able to see?
A. The whole parking lot.
Q. What did it look like?
A. A sheet of white ice.
Q. Was the snow on top of that?
A. It was trodden. It was flattened to the ground. There was no fluffy snow, no.
Q. Do you know what caused it to flatten?
A. It being plowed over after it snowed.
Q. So it looked like a truck had been through there already?
MR. GABEL: Object to the form and foundation. She didn't even say whether one -- but you can answer what you saw, what you observed.
THE WITNESS: What was the question again?
BY MR. STEINER:

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Q. You mentioned it looked like the parking lot had been plowed over. Had there been a plow through there if you know?
A. No. You asked me if I seen snow and I said that there was no snow, except flat where it had been plowed. There was no snow on top.
Q. I guess I'm a little confused. There was no snow on top of where?
A. It was solid. There was no soft stuff. It was solid block. It was just one big block of ice and ground trodden -- it's hard to describe.
MR. BARATTA: Her answer was that the whole lot was a sheet of white ice. Her additional answer was there was no fluffy snow. I think she also described the lot as being trodden. I want to say another word may be packed if that's correct.
THE WITNESS: Packed.
MR. BARATTA: But I don't want to testify for my client.
THE WITNESS: Packed would be a perfect interpretation.
BY MR. STEINER:
Q. All right. Did --
MR. BARATTA: Is trodden the word that you used?

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MR. STEINER: I heard flattened to the ground.
THE WITNESS: Yes.
BY MR. STEINER:
Q. Do you know what caused that to flatten?
MR. BARATTA: I'm going to object based on foundation and speculation.
You can answer to the extent that you know.
MR. GABEL: Join. Go ahead.
MR. BARATTA: Do you know -- do you remember his question?
THE WITNESS: Yes.
MR. BARATTA: All right.
BY MR. STEINER:
Q. What caused the snow to flatten to the ground if you know?
MR. GABEL: Same objection. Go ahead.
THE WITNESS: You guys are confusing me.
MR. BARATTA: Don't pay attention to our objections. Unless I instruct you not to answer a question, then don't answer it, but Mr. Gabel will object sometimes. Sometimes I'll object.
THE WITNESS: Okay. Here's the situation. It had been snowing for over a month. Every time it snowed, a snowplow would come and plow the area for

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everybody to walk. The next day, a snowplow would come if it had snowed and plow the area for everybody to walk.

In addition to that, vehicles would be driving through this area for several reasons. One, it was our parking area to park, so that's where we parked; two, it was the alley for the plaza, so trucks and delivery people would be going through the alley to deliver to the plaza. It was a solid sheet of white. Whether it be packed snow or ice I have no idea.

BY MR. STEINER:

Q. So did it look like vehicles had driven through the parking lot?

A. Yes.

Q. Did it look like the parking lot had been plowed?

A. Previous --

MR. GABEL: Asked and answered. You may go ahead.

THE WITNESS: Previously, yes.

BY MR. STEINER:

Q. Do you know about how much snow or ice was on the surface of the parking lot in inches or centimeters?

MR. BARATTA: Are you asking her the depth of the snow and/or ice?

MR. STEINER: Correct, on the surface itself.

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MR. BARATTA: That she was walking on the morning of the incident?
MR. STEINER: Right.
THE WITNESS: Approximately six inches.
BY MR. STEINER:
Q. When you arrived at Grand Dimitre's before this incident, had you ever had snow or ice in the parking lot before?
A. Yes.
MR. BARATTA: At what time?
MR. STEINER: I'm just asking before this incident.
MR. BARATTA: Any specific time frame?
MR. STEINER: No specific time.
MR. BARATTA: In the 10 years that she worked there?
MR. STEINER: Right.
MR. BARATTA: Okay. Go ahead.
THE WITNESS: Yes.
BY MR. STEINER:
Q. In those situations, did you ever report that to anyone?
A. Report what, sir?
Q. That there was snow or ice in the parking lot.
A. No.

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Q. Do you know if salt is kept on the premises?
A. Yes.
Q. Do you know who buys it?
A. The owners, Tom and Jamal Chakani.
Q. Do you know who applies it?
A. The purpose of the salt at the building was for the customer sidewalks in the front of the building and the side of the building.
Q. But they would apply the salt, the owners?
A. For the sidewalk.
Q. In your experience, was the Grand Dimitre's parking lot generally used for Grand Dimitre's employees and customers?
MR. BARATTA: Which lot? Object. Vague. Which lot?
BY MR. STEINER:
Q. The parking lot that you parked in.
A. We were required to park in the back of the building. The employees parked in the back of the building.
Q. Is that generally what that parking lot is used for?
MR. BARATTA: Objection; foundation. You can answer if you know.
THE WITNESS: That is where the employees parked. Some customers would park there, but the majority of the cars back there were employees.

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BY MR. STEINER:
Q. Do you know if that parking lot was used by any other business or anything like that?
MR. BARATTA: Foundation.
MR. STEINER: I asked if she knew.
THE WITNESS: That particular area, no. That area is for Grand Dimitre's.
BY MR. STEINER:
Q. Okay. Grand Dimitre's has a dumpster, right?
A. Yes.
Q. Is it in the back of the building?
A. Yes.
Q. Is it in that parking lot where you were walking?
A. No.
Q. You mentioned you got to the restaurant at approximately 5:50, right?
A. Correct.
Q. Was it light out?
A. It was dark.
Q. Are there lights on the premises?
A. The side of the premises, yes. The front, I have no idea.
Q. What about the back?
A. The back lighting was -- they had a night light over the back door.

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Q. Nonetheless, you were still able to see the snow and ice, right?
A. Well, if you walk into your bathroom and you have a night light, that is how bright that light was. It just did the door. It didn't come out into the parking lot.
Q. I see. But again, nonetheless, you were still able to see the ice, right?
A. Yes.
Q. Do you have any personal knowledge how long the snow and ice had been there on the day of the incident?
A. It had been accumulating every day for two months.
Q. But what about on the parking lot surface itself? You did mention that trucks would come by, right?
A. Yes.
Q. And plow the snow, right?
A. Yes.
Q. So at least to some extent, it didn't all accumulate over two months, right?
A. Yes, it did.
Q. So no one had been there in the two months prior?
A. No, every day or whenever it snowed, a plow would come and plow the new snow. Did we ever see cement? No.
Q. Okay. Do you have any idea the last time a truck came by?

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A. Probably Thursday.
Q. So the night before?
MR. BARATTA: Do you know?
THE WITNESS: Absolutely not. I couldn't tell you specifically when the last time a truck was there. It's an alley.
MR. BARATTA: Tell Mr. Steiner you don't know.
MR. STEINER: Well, I think she already answered the question.
BY MR. STEINER:
Q. What type of shoes were you wearing on the date of the incident?
A. It's funny you should ask. Here they are. I'll even show them to you because I have to get up anyway. These were the shoes that I was wearing.
MR. BARATTA: You answered in the interrogatories, Ms. Livings, they were Skechers, they were a month old at the time of the incident?
THE WITNESS: These are them, yes.
MR. STEINER: Let the record reflect the witness has shown me her black Skechers that have rubber soles. They look like --
MR. GABEL: I'm sorry. If you'd just stand still for a moment.

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MR. BARATTA: Mr. Gabel wants a good peek.
MR. GABEL: Thank you very much.
THE WITNESS: I'll just stand. Go ahead. You can still ask me questions.
MR. GABEL: Chris, would you mind if I got a picture of that?
MR. BARATTA: Her shoes?
MR. GABEL: Yeah.
MR. BARATTA: Not at all. While you guys are snapping photographs, I'm going to get a quick refill on some coffee.
(Short recess.)
BY MR. STEINER:
Q. At the time of the incident, were you holding anything?
A. My purse.
Q. Anything else?
A. I actually brought that, too, just so you could see. No, just my purse.
Q. Do you wear contacts or glasses or anything?
A. Nope.
Q. I want to say that I saw some medical records that indicated that you had some sort of glaucoma or cataracts or something.
A. Cataracts.
Q. Did you have surgery?

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A. I've had two surgeries, one for each eye.
Q. When was that?
A. My first one I believe was 2009 I think.
Q. When was your second one?
A. The second one was December 2015.
Q. Did you have any trouble seeing after either one of those surgeries?
A. No.
Q. Did those surgeries correct your vision?
A. Yes.
Q. Why did you have the second surgery in 2015, just the other eye?
A. Yes, it was the other eye. The first surgery was my left. The second surgery was my right.
Q. Did you have trouble with your right eye leading into 2015?
A. No.
Q. All right. I think earlier, you mentioned that you fell straight back; is that right?
A. Correct.
Q. Do you know on what body part you landed on?
A. Like lower back.
Q. And I know you mentioned that you injured your lower back as a result of this incident. Anything else?
A. I don't understand the question.

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Q. Did you injure anything else besides your lower back?
A. No. I mean I was sore. My arm hit, that kind of thing, but nothing permanent.
Q. So the only injury that you relate to this incident is with regard to your lower back at least for purposes of this lawsuit, right?
A. Correct.
Q. How long were you on the ground following this incident?
A. Five seconds.
Q. And then how did you get to the restaurant?
A. I tried to stand up and was slipping everywhere, so I got down on my hands and knees and crawled across the parking area. I tried to get to the back door. I could not, so I ended up walking the snow drift, plowed area, whatever you want to call it to walk around the building.

I called to the restaurant when I got to the front door where Debra Buck answered. She opened up the front door for me. I went inside. I was soaking wet. I then went home, changed my clothes and came back to work.

Q. Did you work that day then?
A. I did.
Q. Did you tell anyone else about the incident besides

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Debra Buck?
A. Mr. Spear, Maria Isaac at 9:00 a.m. when she came to work, my boss, Tom Chakani.
Q. Anyone else?
A. My customers. I mean, you know, there was no other employees.
Q. You mentioned Mr. Spear was the cook, right?
A. Correct.
Q. Who was Maria Isaac?
A. She was another server.
Q. And then Tom Chakani is one of the owners at Grand Dimitre's; is that right?
A. Correct.
Q. Did you -- strike that.
Did you tell all of these people the same story of how it happened?
A. Yes.
Q. And is it generally what we said just moments ago at this deposition?
A. Yes.
Q. You didn't tell them anything else?
A. Nope.
Q. What did you talk to your boss, Tom Chakani, about?
A. I believe somebody else had told him in the back when he came in the back door, so he came up to me and asked

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me what was going on and I told him that I had fallen on my way into work that morning in the back lot.
Q. Do you know if Mr. Chakani did anything after you told him?
A. He did.
Q. What did he do?
A. He went out the back door, took an ice pick, shovel type thing and went to where the drain was in the back parking lot and started to try to break up the packed driving area.
Q. Did you slip near the drain?
A. I don't know. I couldn't see the drain.
Q. Did he clear the entire back lot?
A. Did he?
Q. Correct.
A. No.
Q. Just near the drain?
A. Correct.
Q. Why did he do it at that location versus another location?
MR. BARATTA: Object to foundation.
THE WITNESS: You'd have to ask him. I don't know.
BY MR. STEINER:
Q. Had he ever done that in the past if you know?

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A. I don't know.
Q. You certainly never told him to do in it in the past though, right?
A. No.
Q. Do you believe it was his responsibility to do that?
MR. BARATTA: To do what?
MR. STEINER: Break off the ice like he did.
THE WITNESS: No.
MR. BARATTA: I'll object to form; foundation; also calls for a legal conclusion.
To the extent you can answer, please go ahead.
THE WITNESS: No, I don't believe it was his responsibility to do that.
BY MR. STEINER:
Q. Do you have any idea if he told anyone else about this incident?
A. I don't know.
Q. All right. So after you changed and came back to work, were you able to generally do your everyday duties?
A. Yes.
Q. Did you complete your shift?
A. I did.
Q. Where did you go after?
A. Home.

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1 Q. What did you do?
2 A. I took some Motrin and laid down.
3 Q. Eventually, did you go seek medical attention?
4 A. I did.
5 Q. Where was that?
6 A. Concentra.
7 Q. Which one is that?
8 A. 14 and Groesbeck in Fraser.
9 Q. What did you tell them?
10 A. That I fell at work.
11 Q. Was that the following day?
12 A. Yes.
13 Q. Do you know what time you went there?
14 A. Approximately 1:00 o'clock, 1:30.
15 Q. Were you scheduled to work on that Saturday?
16 A. I was.
17 Q. Did you call in?
18 A. No, I worked.
19 Q. You worked that Saturday, too?
20 A. I did.
21 Q. Did you report this incident to anyone else?
22 A. Anyone else being who?
23 Q. Anyone else we haven't talked about or -- we haven't
24 talked about?
25 MR. BARATTA: Object to form.

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THE WITNESS: I mean I told my son and his wife. They came in for breakfast on the Friday morning. "Mom, what's wrong with you?" "I fell this morning." I told my customers. I mean I'm a very efficient waitress and when I'm only moving at 80 percent, people ask, "Oh, what's wrong?" "Oh, I fell this morning. My back is kind of hurting." So of course I spoke to other people.

Q. So would you say at least following the incident, you were at about 80 percent at least for that --

A. Following the incident, my pride was hurt more than myself.

Q. So your injuries really didn't develop for some period of time, at least the extent of them?

MR. BARATTA: I'm going to object based on foundation. She's not a doctor.

MR. STEINER: I know, but she knows what she felt.

MR. BARATTA: If you can answer as to the progression of your injuries, whether or not your body was in shock, anything like that, then provide Mr. Steiner with an answer. If you can't, then tell him you don't know.

BY MR. STEINER:

Q. You can also tell me the extent of your pain level as

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well.
A. It hurt. On a scale of one to 10, probably five. I completed my shift. I did my job because that's the kind of employee I am. I went home, took two Motrin and I laid down. As the evening progressed, it got worse. I was unable to sleep all night.
The following day, I went to work because I was scheduled to. When my boss came in, I told him, "I don't know what's going on, but I have been in pain all night. I need to go see a doctor." He told me to go to Concentra, which is what I did.
Q. Okay. So this incident happened on February 21st, 2014. Do you know if it snowed on the night prior?
A. I have no idea. I don't remember.
Q. Do you know if it snowed coming into work that morning?
A. I don't remember. No, I don't believe it was snowing that morning.
Q. Do you have any idea the last time it snowed before this incident?
A. It was snowing every day, Mr. Steiner. It was February.
Q. Well, you just told me you didn't know if it was snowing the day before or if it was snowing that morning so --
A. I have no idea honestly.

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1 Q. Before this lawsuit began, did you know who Jim Sage
2 was?
3 A. Yes.
4 Q. How did you know his name?
5 A. I actually became acquainted with Mr. Sage when I
6 worked at Dimitre's located on 11 Mile and Gratiot in
7 Roseville. I actually worked for Jim Sage for
8 approximately four days and at Grand Dimitre's, Jim
9 Sage was the landlord, so he called often and stopped
10 by a lot.
11 Q. How often would you say he called?
12 A. Oh, I don't know. When he needed to call about
13 something.
14 Q. Did he ever call you directly?
15 A. No.
16 Q. Did you ever speak with him directly?
17 A. Of course. I would have to answer the phone.
18 Q. And he would just ask for the owner or something like
19 that?
20 A. Yes.
21 Q. Do you know what he called about?
22 A. I have no idea. He was the landlord. He would call
23 about whatever he wants.
24 Q. Are you aware of any Sage Investment Group employee
25 being on the premises?

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MR. BARATTA: Object to form. At what time?
MR. STEINER: Just in general before the incident.
THE WITNESS: Before the incident? Mr. Spear used to work for Mr. Sage.
BY MR. STEINER:
Q. Well, it's my understanding Mr. Spear was a cook, right?
A. Yes.
Q. So he was a Grand Dimitre's employee, right?
A. Yes.
Q. Are you aware of any Sage Investment Group employee as an employee for Sage Investment Group being on the premises?
MR. BARATTA: Object to form and foundation. You can answer if you know.
THE WITNESS: Like I said, Mr. Spear worked as a cook for Mr. Sage, also.
BY MR. STEINER:
Q. But in the capacity as an employee for Sage Investment Group, are you aware of an employee being on the premises?
MR. BARATTA: Same objections.
THE WITNESS: I don't understand the question and he's --

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MR. BARATTA: If you don't understand the question, you let Mr. Steiner know. If you don't know who was working for Sage's Investment Company at the time, you let him know that.

THE WITNESS: But he asked and I answered.

MR. STEINER: I understand.

MR. BARATTA: Talk to Mr. Steiner right now. I've stated my objection. If you don't know, you don't know.

BY MR. STEINER:

Q. Let me see if I can rephrase this. Did you ever see any employee from Sage Investment Group in their capacity as an employee for Sage Investment Group be on the premises at Grand Dimitre's?

MR. BARATTA: Object to form and foundation.

THE WITNESS: I'm going to say I don't know.

BY MR. STEINER:

Q. Did you see an employee other than Mr. Spear --

A. Ever?

Q. Let me finish the question. Did you ever see a Sage Investment Group employee on the premises at Grand Dimitre's other than Mr. Spear?

A. I have seen whoever maintains the property.

Q. And who is that if you know?

A. T&J Landscaping.

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Q. But what about a Sage Investment Group employee other than Mr. Spear?
A. I don't even know who works for Sage Investment, so no.
Q. Okay. Do you have any idea if Sage Investment Group knew the condition of the premises on the date of the incident?
A. You would have to ask them. I don't know.
Q. Are you aware of whether Sage would use the parking lot for any purpose other than for Grand Dimitre's business?
MR. BARATTA: Object to foundation.
MR. STEINER: I asked if she was aware.
THE WITNESS: I would assume that Sage Investments allows all of their tenants that are located in that plaza to use the parking lot.
BY MR. STEINER:
Q. Earlier, you mentioned the parking lot was generally used by the customers and employees of Grand Dimitre's, right?
A. Yes, sir.
Q. Were you familiar with T&J before this incident?
A. I am.
Q. Do you have any idea how often they were on the premises? If you don't know, that's fine.
A. Depends on --

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MR. BARATTA: Object to form. Go ahead.
MR. GABEL: If she knows. Go ahead.
THE WITNESS: Depends on what time of year. During the summer, they would come and mow the lawns and do the edging for the front curbing around the property. During the winter, I mean they came when it was necessary to plow.
BY MR. STEINER:
Q. But it's fair to say you certainly did not see them every time they came on the premises, right?
A. Not every time, no.
Q. Do you know if Grand Dimitre's would call them?
A. I don't believe so.
Q. Do you know if the owner knew anyone at T&J, of Grand Dimitre's?
A. Which owner?
Q. The owner of Grand Dimitre's.
A. I don't believe so.
MR. BARATTA: Ms. Livings testified there were two owners for the last decade, 10 years or a couple years she worked there, so which owner?
MR. STEINER: Either owner.
THE WITNESS: Personally, no, they did not know those people.
BY MR. STEINER:

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Q. When you had a workplace safety concern, did you generally report that to Grand Dimitre's?
A. Yes.
Q. In the 24 hours prior to the incident, did you consume any alcohol?
A. No.
Q. What about drugs, either medications or illicit drugs?
A. None.
Q. How soon after the incident did you contact a lawyer?
A. August of 2014.
Q. Okay. Now, your attorney and you provided us with some information in this case, actually a lot of information and I just want to verify that I have all of the medical providers that you've treated with as a result of this incident. So I'm handing you a copy of what is titled Plaintiff's Answers to Defendant T&J Landscaping's Interrogatories. I'm using these simply because they're more recent than the interrogatory answers that I have for Sage Investment Group.
I'm referring to Interrogatory Number 17. Now, if you could, just take a quick look through these and if you want to look through the whole document, that's fine with me, just to verify that it looks familiar to you, but I'm asking specifically to look at 17 and verify that those are the treaters that you

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1 treated with as a result of injuries you sustained as a
2 result of this fall.
3 A. I don't believe I ever went to St. John Moross.
4 Q. Okay.
5 A. That looks like it's about it.
6 Q. Okay. I'm just going to ask you some questions about
7 some of these providers. Earlier, you mentioned your
8 primary care physician and I'm not even going to try to
9 say it, so I'm just going to say Dr. P. Is that okay?
10 A. That's fine.
11 Q. When was the first time you treated with Dr. P?
12 MR. BARATTA: Object to the form.
13 THE WITNESS: January of 2015 I believe.
14 BY MR. STEINER:
15 Q. Do you still currently treat with her?
16 A. I do.
17 Q. Who was your primary care physician before that?
18 A. I did not have one.
19 Q. Did you have a primary care physician at all before
20 her?
21 A. I did during my marriage with Mr. McMillan.
22 Q. Who was that if you remember?
23 A. Actually, I'll take that back. It wasn't a primary
24 care doctor. It was an OB/GYN doctor.
25 Q. Who was that?

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A. I'm trying to think what his name was. He was out of St. John. I don't remember his name.

MR. BARATTA: Pappas?

THE WITNESS: No, John somebody. I don't remember his name.

BY MR. STEINER:

Q. Okay. What led you to treat with -- start treating with a primary care physician in January 2015?

A. I got medical insurance.

Q. Now, Mendelson Kornblum, it's my understanding that that's the office that handled some of your surgery, right?

A. They handled all of my surgeries.

Q. Had you ever treated with Mendelson Kornblum before this incident?

A. No.

Q. Did anyone refer you to Mendelson Kornblum?

A. Yes.

Q. Who was that?

A. Actually, I ran into a customer at -- from whom I had waited on in Meijer and she asked me where I had been. I told her that I fell and she said, "Oh, you need to call my guy," and she gave me his card.

Q. When did you first start treating with Mendelson Kornblum?

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A. August I believe it was, my first appointment, of 2014.
Q. Do you know who paid to have you see them?
A. Initially, my Workmen's Comp people had told me that they would pay for his consult, but would not pay for nothing else.
Q. But it's your understanding eventually all of it was paid through your redemption?
A. Yes, after I sued them.
Q. You're still currently treating with them, right?
A. Yes.
Q. When was the last time you saw them?
A. January.
Q. This year?
A. Yes. I seen him in January and I seen my pain management doctor, Dr. Hall, in February.
Q. What day in February?
A. The 6th, I believe.
Q. Do you have any appointments to see them in the future?
A. Yes.
Q. Do you know when those are?
A. I can tell you. March 30th for Dr. Kornblum and Dr. Hall, I am due to see her on March 10th.
Q. Okay. Oakland Imaging Diagnostic Center, did they just do an MRI or something like that?
A. Yes.

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Q. Do you know when that was?
A. April sometime of 2014.
Q. The Concentra in Fraser you mentioned you went to a couple days after the accident or the day after the accident, right?
A. Correct.
Q. How long did you see them?
A. I want to say three weeks.
Q. Did anyone refer you to them?
A. My boss told me to go there.
Q. What about the Concentra in Warren?
A. I have no idea. I've never been there. I'm sorry. The Warren location is Dr. Belfi. He's the Concentra specialist that I was sent to from the 14 Mile location.
Q. And would that time be in the three-week period that you treated with Concentra?
A. No.
Q. How long did you treat with the Warren one?
A. From, I don't know, the first week of March maybe, second week. It was like second week of March and I stayed with them until I went to go see Dr. Kornblum in August.
Q. Since going to see Dr. Kornblum in August, did you see any other physician other than Dr. Kornblum's office?

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A. Between Concentra and Dr. Kornblum? No, I don't believe so.
Q. What about after you first saw Dr. Kornblum's office, did you ever see another physician?
A. I've actually seen several. They were like things that --
Q. Through the insurance company?
A. Yes, the insurance, IMEs or whatever they were.
Q. Right. Other than those, did you go visit any other physician?
A. No.
Q. Pure Healthy Back, when did you first start treatment there?
A. That was through Concentra.
Q. So between the time of the incident and seeing Dr. Kornblum, you treated at Pure Healthy Back?
A. Yes, and at Flex Therapy or whatever that place was.
Q. Okay. Do you still do physical therapy through Dr. Kornblum?
A. No.
Q. So since you started seeing Dr. Kornblum, he hasn't had you do any physical therapy?
A. Oh, no, I've had physical therapy. I'm just not doing any right now.
Q. Okay. Who did Dr. Kornblum refer you to for physical

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1 therapy?
2 A. Mendelson Kornblum Physical Therapy.
3 Q. Okay. So they handle it all in-house?
4 A. Yes.
5 Q. St. John Macomb, is that where your surgery occurred?
6 A. My surgeries, yes.
7 MR. BARATTA: I don't know if you're aware,
8 Mr. Steiner. I thought I mentioned that she had a
9 recent fusion.
10 MR. STEINER: I think you mentioned that,
11 yeah. That sounds familiar.
12 MR. BARATTA: That's why she's not in PT.
13 BY MR. STEINER:
14 Q. Okay. Let's talk about those surgeries. The first
15 one, who performed the first one?
16 A. Martin Kornblum.
17 Q. Did he perform the second one, too?
18 A. Yes, he did.
19 Q. When did the first one occur?
20 A. He also did a third one.
21 Q. Okay.
22 A. The first one was April 29th, 2015.
23 Q. So you mentioned you started seeing him in August 2014.
24 What did he do in between August 2014 and April 2015?
25 MR. BARATTA: What did who do?

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BY MR. STEINER:
Q. The doctor and you.
MR. BARATTA: In reference to treatment for her?
MR. STEINER: Right.
THE WITNESS: Not much. I would go see him every couple of months. I was seeing Dr. Hall every month for pain management.
BY MR. STEINER:
Q. What did Dr. Hall do for you in those couple months, every couple months?
A. I see her every month. She's pain management. That's where I have to get my pain medication from.
Q. So she would just prescribe you pain pills like Norco?
A. Yes.
Q. And the other ones that we talked about earlier?
A. Yes, the Gabapentin.
Q. Did she do anything else?
A. No, that's all. She's a pain doctor. Actually, I'll take that back. She did. She gave me injections. I did have injections. The steroid whatever kind of injections, I had three of those with Dr. Hall.
Q. Do you know when those occurred?
A. I don't remember. It was last year.
Q. Was it before or --

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A. It was after my second surgery.
Q. Do you know what Dr. Kornblum did in your first surgery?
A. My first surgery, he went through my back and it was supposed to be a couple of pins and that kind of thing. When he got in there, it was not quite as he anticipated and I ended up getting a couple of titanium rods or whatever put in there.
Q. Do you have any idea if those rods will need to be removed at some point?
MR. BARATTA: Objection; foundation.
THE WITNESS: They'll never be removed.
BY MR. STEINER:
Q. Did you get a second opinion before going through with that surgery?
A. No.
Q. How long were you in the hospital after that first surgery?
A. My surgery was on the Wednesday and I believe I left there Friday, two days.
Q. Following that surgery, how often would you follow up with Dr. Kornblum?
A. Following that surgery, I had another surgery the following week.
Q. Okay. Was that planned?

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A. Yes. It was my second surgery.
Q. Okay. And Dr. Kornblum performed that, right?
A. Yes.
Q. And what did he do in that surgery?
A. Actually, I had two surgeons there. I had a general surgeon who was Dr. Harris I believe his name is. They went through my stomach and attached more bars, so Dr. Harris ended up having to move everything out of the way and Dr. Kornblum did his thing on my back.
Q. So that was installing more rods in your back?
A. Yes, more hardware.
Q. How long were you in the hospital following that surgery?
A. I went in on May 6th for the surgery and I believe that was a Wednesday, so I think I didn't get out until Saturday on that one, so that was three days.
Excuse me one second.
(Discussion off the record.)
BY MR. STEINER:
Q. How long did you follow up with Dr. Kornblum after that surgery?
A. I believe it was two weeks. He wanted to see me in two weeks. Since both surgeries were only a week apart from each other, you know, it was like I really went, had the surgery, stayed there a couple days, came home

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a couple days, went back for a couple of days, so I believe it was like two weeks after.
Q. And how many appointments have you had with Dr. Kornblum since that second surgery?
A. Approximately 10.
Q. Is it like once every couple months or something like that?
A. Yes. Sometimes him, sometimes his PA. I don't always see him.
Q. And then did he schedule you for physical therapy at that time?
A. My physical therapy was six months after my second surgery is when I started.
Q. How long were you in physical therapy for?
A. I want to say like two months.
Q. Then following that, did you just continue to see Dr. Hall for the pain management?
A. No, I've never been able to stop getting pain management.
Q. I understand. I'm saying after your physical therapy was completed after those couple months, what did you do?
A. We had to stop physical therapy. It was never really completed because of the pain level that I was in.
Q. So from about eight months after your second surgery,

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1 you stopped treatment until your third surgery; is that
2 right?
3 A. Correct.
4 Q. When was your third surgery?
5 A. December 21st of 2016.
6 Q. And Dr. Kornblum performed that surgery?
7 A. He did.
8 Q. What did he do?
9 A. I call it adding wings. He extended the metal bars to
10 fuse --
11 Q. To fuse these --
12 A. The vertebrae, yes.
13 Q. Did Dr. Kornblum mention whether or not he thought the
14 surgery after the second surgery was successful?
15 A. He felt that the surgery went well and we would have to
16 wait to see how I recovered.
17 Q. Okay. Has Dr. Kornblum expressed that he believed this
18 third surgery went well as well?
19 A. He's very happy with the third surgery, yes.
20 Q. Has your pain gotten better since you've gone through
21 these surgeries?
22 A. Eventually, yes.
23 Q. Are you required to use crutches, a brace, walker,
24 anything like that?
25 A. I have a brace at home and I also have -- I'm not sure

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what it's called, but it's a bone stimulator that I have to wear every day for 30 minutes. It's like a battery operated unit.
Q. But you don't use any walking aids, right?
A. No.
Q. What is your back brace called, if you know?
A. It's a back brace. It has metal rods in there. It's a black, heavy-duty ortho back brace.
Q. Where did you get it?
A. The supply store. I had to go in there and get measured for it.
MR. BARATTA: Binson's.
THE WITNESS: Binson's.
BY MR. STEINER:
Q. Was that prescribed to you by Dr. Kornblum?
A. Yes.
Q. How often do you wear it?
A. When I need to.
Q. How often is that?
A. Depends on what I'm doing. Sometimes I don't have to wear it at all and if I'm doing my housework, then yes, I do it, you know, to try and keep my back still.
Q. So it's as needed?
A. Yes.
Q. Did Dr. Kornblum prescribe that bone stimulator?

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A. Yes.
Q. Where did you get that?
A. His office.
Q. And do you have any idea what that does?
A. It's supposed to stimulate bone growth.
Q. Okay. Do you still use it?
A. Every day for 30 minutes.
Q. When did you first start using it?
A. Three weeks after my third surgery.
Q. So recently?
A. Yes, in January.
Q. Have you ever heard that you've had arthritis in your back before?
A. Yes.
Q. And when is the first time you heard that?
A. Dr. Belfi told me when I had the MRI done.
Q. When was that?
A. April.
MR. BARATTA: Asked and answered. Go ahead.
THE WITNESS: April of 2015. I'm sorry. 2014.
BY MR. STEINER:
Q. Has any doctor told you that you've had degenerative conditions?
A. Yes, Dr. Belfi and Dr. Kornblum.

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Q. Being a waitress, you mentioned that you had to bend over and carry heavy objects, right?
A. I didn't mention that I bent over, but yes, I do carry five, six plates on my arm which tends to be heavy.
Q. Did you ever have problems with your back before?
A. Of course. My back ached. I'm on my feet all day for six to eight hours.
Q. How long had that been a problem?
A. I'm 56, so I've had three children, I've had backaches for 20 years, nothing that has kept me from working.
Q. Has any doctor told you that you are permanently disabled from working?
MR. BARATTA: Objection; asked and answered. She testified regarding applying for and being granted first time Social Security Disability.
THE WITNESS: I already answered it so --
BY MR. STEINER:
Q. So it's your understanding that you cannot work?
MR. BARATTA: Asked and answered.
Go ahead. Donna, you can answer.
THE WITNESS: At this time, the doctors have stated that I am unable to work due to my back condition.
BY MR. STEINER:
Q. Do you believe you'll be able to work in the future?

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A. That's the future. I have no idea what's going to happen tomorrow. I only know what's happening now, so no.
Q. Are you optimistic that you might be able to work again?
MR. BARATTA: Objection; relevance.
You can answer, Donna.
THE WITNESS: My income is $615 a month. Do you think I would like to go back to work? Yes.
BY MR. STEINER:
Q. Did you ever take any pain medication for any reason before this accident?
A. Nope. Occasional Motrin.
Q. Any prescription?
A. No.
Q. Prior to this incident, did you ever have any problems with your back that required medical treatment?
A. Nope.
Q. Any pain that we haven't already discussed in your back?
A. No.
Q. On the date of this incident, were you treating for any medical conditions?
A. No.
Q. On the date of this incident, were you taking any

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medication?

A. No.

Q. Presently, are you doing anything other than medication to alleviate your pain?

MR. BARATTA: Asked and answered. She wears a back brace, she's got a TENS unit and she takes Norco.

MR. STEINER: Okay, those are three things that she did mention.

BY MR. STEINER:

Q. But is there anything other than --

A. My doctor doesn't want me to do anything at this time except heal.

Q. Okay. So nothing else?

A. No.

Q. Do you recall any particular incident after this fall that aggravated the pain in your back?

A. Everything I do aggravates the pain in my back.

Q. Like what type of activity?

A. Standing, walking, sitting, sleeping, bending. It's constant pain every day.

Q. After this incident, did you ever have a slip and fall?

A. Nope.

Q. Any automobile accidents after?

A. Nope.

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1 Q. Any visits to the emergency room other than related to
2 this incident after the accident?
3 A. I've actually been to urgent care since this accident.
4 Q. For what?
5 A. I had an infected tooth that required antibiotics and
6 that was a week ago Friday, so whatever date that was.
7 Q. What urgent care was it?
8 A. Roseville Urgent Care.
9 Q. After this incident, have you done any surgeries
10 unrelated to this incident?
11 A. Nope.
12 Q. Have you ever visited a chiropractor?
13 A. Once.
14 Q. When?
15 A. Let's see. My son is 33, so 33 years ago.
16 Q. Do you remember who that was through?
17 A. A chiropractor that was on Ten Mile and I-94 in
18 Eastpointe.
19 MR. BARATTA: Lupo.
20 THE WITNESS: No. Nowicki or something like
21 that in the strip mall right there.
22 BY MR. STEINER:
23 Q. Before this incident, had you had a slip and fall?
24 A. No.
25 Q. Before this incident, had you had an automobile

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1 accident?
2 A. No.
3 Q. Before this incident, had you been hospitalized for any
4 reason other than for your children?
5 A. Yes, I had a laparoscopy and I had a partial
6 hysterectomy.
7 Q. What's a laparoscopy?
8 A. It's where they go through your naval with a scope and
9 check it out to see what needs to be done.
10 Q. What was that in relation to?
11 A. I had endometriosis.
12 Q. When was that?
13 A. It actually started in like '96, '97, the pains all
14 started.
15 Q. What hospital?
16 A. St. John Moross. So actually, you know what, that's
17 when I went to St. John Moross.
18 Q. Before this incident, did you ever see a physical
19 therapist?
20 A. Yes, when I injured my shoulder in 2000, I seen the
21 Concentra physical --
22 Q. Any other incident?
23 A. Not that I can recall.
24 Q. Before this incident, did you ever have an MRI, CT
25 scan, anything like that?

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A. No.
Q. Have we pretty much covered all your treatment for after the accident?
A. I believe so. Everything was pretty much done and ordered through Concentra or through Mendelson Kornblum and a couple of visits to Dr. Panthanji.
MR. STEINER: Let me just go through my notes real quick off the record. I think I'm just about done.
(Short recess.)
BY MR. STEINER:
Q. Before the incident, did you have any hobbies, activities, stuff you liked to enjoy?
A. Of course.
Q. What types of stuff would you do?
A. I was actually on a bowling team with a couple of the girls from work. It hadn't been for a couple of years because everybody just kind of stopped wanting to go. I used to go dancing. My grandsons -- I have nine grandchildren. So three of my grandsons play soccer, so I mean we always used to screw around with the soccer ball.
At the time of the incident, I had twin granddaughters that were a year old that I was responsible to take care of them that I couldn't even

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do that because I couldn't lift up anything. It was like I couldn't do nothing. All the time, "Nana, come" -- "I can't come." "Nana, come" -- "No, I can't do that either."

Q. With respect to the bowling, had it been a couple years before this incident that you --

A. Yes.

Q. So with respect to the dancing, how often did you go dancing before this incident?

A. I actually hadn't been for probably a couple of years either, you know. But it's all things that I can't do anymore. I can't wear high heels. I wore three, four-inch high heels all the time, so now if I dress to go anywhere, I have to wear flats because I can't even dress correctly.

Q. Earlier, you mentioned that you do baby-sit one of your grandchildren at least every day, right?

A. Yes. Well, three, four times a week depending on what the mom and dad's schedule is.

Q. Okay. Is that to accommodate a work schedule or something like that?

A. Yes. My son and his fiance work.

Q. Do they pay you or anything?

A. No. It's my grandson. Do they pay me? No.

MR. BARATTA: She should pay them.

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THE WITNESS: Correct. Because I go to their house.
BY MR. STEINER:
Q. Okay. And you still see the other grandchildren as well?
A. Yeah, all the time. I have a great-grandchild coming next month.
Q. Congratulations.
A. So we'll have another baby in the family.
MR. STEINER: Congratulations. Thank you. That is all I have.
EXAMINATION BY MR. GABEL:
Q. My name is Steve Gabel. I represent T&J Landscaping and I'm going to ask you some questions about the incident we're here for today. Same ground rules apply. Okay? You have to answer out loud which I'm going to ask you to answer out loud. Okay?
A. Okay.
Q. All the other ground rules Mr. Steiner discussed with you apply to me as well. Okay?
A. Okay.
Q. We just took a break for a second. Do you need to take another break before we go ahead?
A. I actually do.
(Short recess.)

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MR. GABEL: We're back on the record.
BY MR. GABEL:
Q. Ma'am, I'm going to jump around a little bit because Mr. Steiner asked a lot of questions and I'm going to do my best not to go over those questions. I may, but I'm going to do my best not to do that. Okay? What is your weight currently?
A. Right now?
Q. Yes.
A. 163.
Q. And as I understand it, it was around the 140s or so around the time of the incident, right?
A. Correct.
Q. For whatever you posted on social media, we're going to ask you please do not delete that and we may follow up with your attorney, but whatever it was, commentary you mentioned, those photos, just leave it there.
A. No photos just --
Q. Thank you. Do you do Twitter?
A. No.
Q. Do you do Instagram?
A. No. I can barely do Facebook.
Q. All right. So you mentioned this chiropractor who was in Eastpointe. Is that the only chiropractor you would have seen in the last 20, 25, 30 years?

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1 A. In the last 34 years and that was the only time. It
2 was 34 years ago.
3 Q. Was it one visit or a series of visits?
4 A. I believe I went about five times.
5 Q. You tell us, what was the condition you went there for?
6 A. When I had my middle son, I had an epidural and it was
7 just to the point when I came out of the hospital, my
8 friend, because my back was aching and --
9 Q. So you're pointing to your low back?
10 A. Yes.
11 Q. Was that what you complained about for the five visits?
12 A. Yes.
13 Q. So epidural is typically an injection into the low back
14 area to decrease pain, so you have your hand on the low
15 back?
16 A. Correct.
17 Q. And that's the area you complained about?
18 A. I'm just standing here.
19 Q. I understand. But that's the area you complained
20 about, correct?
21 A. Yes.
22 Q. To the chiropractor?
23 A. Yes.
24 Q. What did he do, manipulate the back in some way?
25 A. Yes.

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Q. How did he do that?
A. He had taken x-rays and then he put me on the bed thing and adjusted my spine I guess.
Q. Did he give you a diagnosis?
A. No.
Q. What were the pharmacies you went to prior to this incident? I know you mentioned a few, but I'm going back in time in the five years before this incident.
A. Five years before the incident?
Q. Correct.
A. I really was never sick. I can recall one visit where I had an upper respiratory infection.
Q. Just tell me the name of the pharmacy, the name of the place you went to, the establishment.
A. I would have to say Walgreens at 12 Mile and Harper because that was closest to my home.
Q. On 12 Mile?
A. Yes. It sits right on the corner.
Q. Near Harper?
A. On Harper.
Q. I identify these by street and cross street and city, so that's what I'm going to do. On 12 Mile, correct?
A. Yes.
Q. Near Harper?
A. Sir, it's on Harper. It sits right on the corner.

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Q. At the corner. What's the city?
A. St. Clair Shores.
Q. Is there another one you went to besides that location?
A. I would have to say CVS that sits on -- it's on Harper by 13 Mile Road.
Q. Again, what city is that, St. Clair Shores?
A. Yes.
Q. Was there another one besides those two locations you just mentioned?
A. Prior to the incident?
Q. Yes, in the five years or so.
A. I don't believe so.
Q. You mentioned you would go to Kroger I think after this incident. Did you ever go to a Kroger pharmacy before this incident?
A. No.
(Discussion off the record.)
BY MR. GABEL:
Q. So were there any other pharmacies other than the two you told me about in the five years before the incident?
A. I don't believe so, no.
Q. Did you have an existing standing prescription, refillable prescription at these two places?
A. Prior to the incident?

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Q. Correct, in the five years before.
A. No.
Q. Any pain medications you filled at these two locations --
A. No.
Q. -- you have to let me finish the question -- in the five years before?
A. No.
Q. Are you right or left-handed?
A. Right, but I do use my left.
Q. But you're right-hand dominant?
A. Yes.
Q. Prior to this incident, had you seen a psychologist, psychiatrist or social worker?
A. No.
Q. As I understand from your records, you smoke cigarettes.
A. I do.
Q. And one record said you smoked 20 cigarettes. Is that per day?
A. Yes.
Q. And you tell me. I don't know. Is that equivalent to one pack per day or more?
A. Yes.
Q. One pack per day?

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A. Yes.
Q. Has any doctor told you that you should not do that because it's generally not good for you, reduces the amount of oxygen in your bloodstream?
A. Yes.
Q. Did a doctor tell you that it reduces the amount of oxygen in your bloodstream that could inhibit healing?
A. Yes. But --
Q. Hold on. So do you today still smoke cigarettes?
A. I do.
Q. Is it the same amount, one pack per day?
A. Depends on what I'm doing.
Q. How often do you smoke one pack per day?
MR. BARATTA: Since when?
BY MR. GABEL:
Q. Currently, how often do you smoke one pack per day?
A. Probably every day.
Q. Okay. Are you under any -- strike that.
Before this incident, in the five years before, were you under any written medical restrictions?
A. No.
Q. Did you have any medical restrictions on your driver's license?
A. No.

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Q. Did you have corrective lenses stated on your driver's license?
A. I don't believe so.
Q. Before this incident, you were telling us about some of the hobbies and I know they were prior. You told us about the bowling within five years prior. You told us about dancing in the five years prior and obviously caring for your grandchildren. Is there anything else in the five years prior in addition to working that you would do?
A. I sew. I have a sewing machine, so I'm always making things. In fact right now, I've just -- we have my great-grandson's baby shower on this coming Sunday, so I've done like the flower arrangements, but it takes me double the time. You know, if I want to paint my toes, it takes me two hours because I have to do a little bit, then stop.
Q. So other than the sewing, do you think you kind of covered what your general hobbies were?
A. Yeah. I'm just a crafty kind of person, always have been, making curtains and --
Q. I'm going to move toward the incident now and again, Mr. Steiner has asked you a lot of questions, so I'm going to jump around a little on that topic. Actually, prior to the incident, approximately one year before

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the incident, did you have a slip and fall in the parking lot that we have been talking about here?
A. It wasn't a slip and fall per se. It was I slipped.
Q. You slipped, but you did not fall?
A. Right.
Q. Was this in the parking lot we have been talking about?
A. Correct.
Q. Were you exiting a vehicle?
A. Yes.
Q. Were you out of the vehicle?
A. Yes.
Q. Was it in the wintertime?
A. Yes.
Q. Did you catch yourself on something so that you didn't need to fall?
A. My door, the car door.
Q. Did you hurt anything as a result of that?
A. My ankle.
Q. As I understand, the ankle hurt for a couple of days or a couple of weeks was it?
A. I didn't work for about three days.
Q. Did you continue to have an ankle problem after that?
A. No. I wore an air brace to work for several days because my ankle and my whole foot was just black where I had hit it on my car.

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Q. Did anybody give you a diagnosis as to what happened in that incident?
A. I didn't even go to the doctor.
Q. How did you get the air brace?
A. I had it. I have three sons that played football, soccer, wrestling. I have lots of stuff like that.
Q. So you didn't get a diagnosis because you didn't go to a medical doctor?
A. Correct.
Q. You didn't get any medical treatment for that; is that true?
A. No.
Q. That's true?
A. Yes.
Q. Did you have any -- was it the right or the left ankle?
A. My left.
Q. Did you have any instability of the left ankle continuing on over the course of the year after that occurred?
A. No, it did nothing, just unbruised and I was good to go.
Q. So it healed after several days because you used the air cast --
A. Yep.
Q. You have to let me finish my question -- and then you

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1 were okay in your opinion?
2 A. Yes. It took a week to 10 days for the swelling, the
3 black and blue to go down.
4 Q. When that happened, did you feel any problems in your
5 back at all?
6 A. No.
7 Q. Do you recall when you had the last name McMillan
8 having an incident at Meijer?
9 A. An incident at Meijer?
10 Q. Did you ever fall at a Meijer location?
11 A. No.
12 Q. You did not fall and hurt your arm or fall or hurt
13 yourself in any way at a Meijer?
14 A. No.
15 Q. Okay. When was it you were married to Mr. McMillan?
16 A. We got married February 14th of '97.
17 Q. And then you gave us the end date. I apologize. When
18 was that?
19 A. September 2000 I think.
20 Q. You told us about a domestic violence incident and so
21 I'm not going to particularly ask about that, but what
22 I want to know is were you hurt as a result of the
23 incident?
24 A. No.
25 Q. You did not fall as a result of that incident?

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A. No.
Q. Did you hurt your back at all as a result of that incident?
A. No.
Q. What was the date of that again?
A. The first week of October of 2010.
Q. Did you have to seek any medical care and treatment as a result of that matter we just described?
A. No.
Q. Prior to this incident, did you ever seek care and treatment for drug or alcohol abuse?
A. No.
Q. So you said you arrived at the parking lot 5:50 a.m., correct?
A. Yes.
Q. Now, had you ever spoken to anyone from T&J's Landscaping prior to this incident?
A. Yes.
Q. When did you speak to anyone from T&J's?
A. They would come into the restaurant, so we'd give them drinks or they would order food sometimes.
Q. Now, when you talked to them, would this just be social talk?
A. Yes.
Q. You would not discuss the ins and outs of their work

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activities, would you?
A. No.
Q. So is it fair to say that you do not know the scope of any work they were to do, if any, at this location?
A. No.
Q. Is that true, you would not know?
A. I would not know.
Q. If we were to ask you whether you knew when they did any work at all in the winter of 2013 to 2014, would you know that exactly without guessing?
A. No.
Q. If we were to ask the means and methods of the work and exactly how they did it and what they did and who was there, would you know anything about those details without guessing?
A. No.
Q. You did not have any agreement with T&J's, did you?
A. No. Could I talk to my attorney for one second?
MR. BARATTA: Sure. There's no question.
(Short recess.)
MR. GABEL: We're back on the record.
BY MR. GABEL:
Q. You do not know exactly when T&J's would have last been on the premises, would you?
A. I do not know.

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MR. BARATTA: You mean last before the date of incident?
MR. GABEL: Correct.
BY MR. GABEL:
Q. That was the question, last before the moment of the incident. You do not know that, do you?
A. No.
Q. I want to ask you about the lighting. So at 5:50 a.m., was the sun still below the horizon?
A. Yes, it was dark.
Q. It was not twilight yet, correct?
A. No.
Q. That's correct?
A. Correct.
Q. But you described some lights. Were there any other lights? Was there light from any other source, ambient light, light from light posts at all?
A. Just the --
MR. BARATTA: Other than the door light she described?
MR. GABEL: Correct. She stated that already. I understand.
BY MR. GABEL:
Q. Anything in addition to what you have said? Were there any car lights, ambient light from light posts you

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1 haven't mentioned?
2 A. The back window that is in the rear of the building,
3 some form of night light came through that, but it
4 didn't go past the window if that makes any sense. It
5 was just illuminating the window on the inside of the
6 building.
7 Q. Did you carry a flashlight with you or a little
8 personal light?
9 A. No.
10 Q. So there was enough light for you to navigate from your
11 car if you wanted to to the building? It wasn't
12 totally black?
13 A. No, it wasn't pitch black.
14 Q. I want to ask you about the conditions there at the
15 time of the incident right before you fell. Okay?
16 A. Yeah.
17 Q. You told us what you said about snow and its condition.
18 I heard that. I'm going to ask you a few other things.
19 Do you know exactly what the temperature was at that
20 time?
21 A. It was in the negative numbers.
22 Q. Do you know whether it was above freezing in the 24
23 hours before the incident?
24 A. It was not.
25 Q. Do you know whether it had rained at all in the three

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days before the incident?
A. I don't recall.
Q. Do you know the exact amount of accumulation, if any, of water, not snow, but water in the three days before?
MR. BARATTA: Foundation.
MR. GABEL: Only if she knows of course.
THE WITNESS: I don't know.
BY MR. GABEL:
Q. Do you know the exact amount of accumulation of snow without guessing within the three days before?
A. No.
Q. If we were to ask you the minimum and maximum within the three days before, would you know that?
A. No.
Q. You provided some photos at some point during the course of the litigation. Mr. Baratta was kind enough to provide those. They're really dark. Do you know the source where they are sitting? Are they on a phone? A digital camera?
A. The reason why they are --
MR. BARATTA: Answer his question.
THE WITNESS: I thought the question was -- okay.
BY MR. GABEL:
Q. Do you know the source? Are they on a digital camera,

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on a phone or something else?
A. They were on my phone.
Q. Are they on the phone you currently have?
A. Not anymore.
Q. Have you stored them on a computer, the cloud or E-mail anywhere?
A. No, I copied them, gave them to my attorney and then deleted them from my phone.
Q. So you copied them. How would you copy them?
A. I sent it to I believe Walgreens and I had copies made.
Q. Did you E-mail them to Walgreens?
A. I must have. I believe -- I didn't do it. I'm not like really tech savvy on that kind of stuff.
Q. So who did that for you to get it to Walgreens?
A. I think my daughter-in-law I believe.
Q. Who is that? What's her name?
A. Jessica.
Q. Last name?
A. Livings.
Q. Now, why would they appear dark? Do you know without guessing? If you're going to guess, don't tell me. They seem really dark.
A. Because it was dark.
Q. Were they taken the morning of the incident, 5:50 a.m. and slightly beyond?

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A. No.
Q. Were they taken days later?
A. They were taken months later.
Q. So months later. Okay. What was the purpose of taking the photos if they were taken months later?
A. Mr. Baratta asked me if I had any pictures of the time of the incident which I did not and rather than trying to explain this wall, that wall, this window, I went there at 5:50 in the morning and tried to shoot the whole area with a different shot.
Q. So you were using it just for the general description of the area, correct?
A. Correct.
Q. And then you had a list which described things. Was the list -- what was the list about? Can you describe that?
A. The list was showing where exactly each picture was located on the building and where my car was parked at the time of the incident.
Q. Okay. It did not depict the condition at the time of the incident? It was just to give some description to Mr. Baratta and perhaps anybody else interested at a later point in time?
A. Correct.
Q. All right.

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MR. BARATTA: I believe the list was an index provided.

MR. GABEL: That's correct. We have that. I get that.

BY MR. GABEL:

Q. I'm just asking what it was and you've answered that. So this incident was 2-21-14, correct?

A. Correct.

Q. Do you recall at all whether the temperature actually got up into the forties within the day of and the two days before the incident?

A. I don't believe so. It may have, but I don't believe so.

Q. All right. Do you even know whether it rose up as high as 50 within the time frame I described?

A. Absolutely not.

Q. And when you said that your interactions with T&J's would be about more social things and not the work they did, my question is after the incident, is that also true, you did not talk to T&J's about the work they did after the incident?

A. Correct. I've never seen them.

MR. BARATTA: Since?

THE WITNESS: Yes, since the incident, I've never seen any of them.

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BY MR. GABEL:
Q. And you haven't spoken to them either, right?
A. Correct.
Q. Does the name Tom Caramagno sound familiar?
A. I think he might have been one of the delivery guys.
Q. So you say delivery. What's the delivery, delivery for what?
A. Food. I mean Caramagno's, I really don't know what they delivered, but they were delivery people.
MR. BARATTA: Do you know who Mr. Caramagno is?
THE WITNESS: No.
BY MR. GABEL:
Q. If I was to ask you whether or not you know whether he's with T&J's, would you know that?
A. No.
Q. If I was to ask you what Mr. Caramagno did or did not do relative to this premises around February of 2014, would you have any idea?
A. No.
Q. Did you go to a gym before this incident?
A. I had signed up at Planet Fitness.
Q. When did you sign up there?
A. 2011 January.
Q. Were you still going there as of 2014?

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A. No.
Q. When did you stop?
A. It was a year membership and I really didn't even go.
Q. So you stopped somewhere around January of 2012 perhaps at the latest?
A. Correct.
Q. Did you go to any other gyms other than what was talked about in the five years prior to the incident?
A. No.
Q. So the Planet Fitness was in what location?
A. You can go to any location.
Q. But the one you signed up at?
A. 11 Mile and Schoenherr. It's Warren I guess.
Q. You told us about the cataract surgeries, one on each eye, I guess, two surgeries. Did you have any problems with your vision prior to the incident?
A. No. You know, I should probably backtrack on that. It wasn't that I had a problem. I did wear contacts, but at some point in time, my optometrist said I needed my cataract done.
Q. Where did you get the contacts from?
A. I was getting them at Sam's Club in the optometry area.
Q. What location?
A. 13 Mile, Roseville.
Q. Okay. After that incident you told me about the year

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before this incident we're here for today and what we're here for today, did you have any discussions with anyone at Grand Dimitre's or with anyone else about the condition of the premises?
A. We complained all the time to Tom.
Q. Tom Chakani?
A. Yes.
Q. That's the owner of the restaurant?
A. Yes, that the parking lot needed to be done correctly, you know.
Q. And you don't know what he did or didn't do --
A. I have no idea.
Q. -- with those comments you made, do you?
A. Some mornings our customers would do it for us.
Q. But you don't know what Mr. Chakani did with that information you gave him?
A. No.
Q. And you don't know whether anyone was a recipient of any of that commentary you made?
A. No.
MR. BARATTA: I don't understand the question.
BY MR. GABEL:
Q. Meaning if you told Mr. Chakani what you thought about the premises, you don't know whether he gave that

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1 information to anyone to do anything?
2 A. I don't know.
3 Q. Okay. Was it actively snowing at the time of the
4 incident?
5 A. No, I don't believe so.
6 Q. If I was to ask you the temperature at the time of the
7 incident, would you know?
8 A. No.
9 Q. Were you on time to start work that day?
10 A. I was early.
11 Q. You were early. Okay. Which foot slipped if you
12 remember?
13 A. Which --
14 Q. So for the incident we're here for today, which foot
15 slipped; do you know?
16 A. I don't recall.
17 Q. How did you come down on the ground? Do you recall
18 that?
19 A. Straight on my lower back.
20 Q. And was the ground as you described packed down type
21 snow?
22 A. Correct.
23 Q. When you called in to Ms. Buck, what did she do?
24 A. Opened up the front door to let me in.
25 Q. Did you get up under your own power?

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A. I tried to get up and it was just too slippery, so I ended up going on my hands and knees across the parking lot.
Q. So you crawled to what exactly?
A. The snowbank, the building.
Q. Where you fell, there was no snowbank, was there?
A. No.
Q. It was flat as you described, correct?
A. Correct.
Q. So there was no EMS that day, was there?
A. No.
Q. And you did your shift, correct?
A. Yes. You have glasses. Why don't you wear them?
Q. They're actually not for reading.
MR. BARATTA: You can't ask him any questions.
MR. GABEL: No, you know what? The lighting is low in here. I'm -- no complaints. I'm not complaining.
THE WITNESS: They're sitting right there. Why isn't he wearing them?
MR. GABEL: That's okay. I'm not complaining. I'm doing great.
(Discussion off the record.)
BY MR. GABEL:

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1 Q. So, ma'am, after the incident, did you see any
2 psychologist, psychiatrist or social worker?
3 A. No.
4 Q. And did you see any chiropractors after the incident?
5 A. No.
6 Q. Do you remember filling out the Social Security
7 Disability form? The application you fill out, do you
8 remember filling that thing out?
9 A. For disability?
10 Q. Yes, your Social Security Disability.
11 A. Actually, I believe my attorney filled that stuff out.
12 I just went and signed it.
13 Q. One of the first questions is why, you know, why are
14 you applying. Do you know what you said?
15 A. I referred to the slip and fall, what had transpired
16 that day.
17 Q. Since the incident, have you been diagnosed with any
18 new illnesses or diseases that we haven't talked about?
19 A. No.
20 Q. Since the incident, have you had any new injuries that
21 we haven't talked about?
22 A. No.
23 Q. Since the incident, have you done -- I'm going to go
24 over a couple things you told us -- any bowling at all?
25 A. No.

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Q. Dance?
A. No.
Q. Sew?
A. Yes.
Q. You still deal with your grandchildren, right?
A. Yes. My kids, too.
Q. Have you been on any vacations at all since the incident?
A. No.
Q. Have you gone up north at all since the incident or to the west side of the state?
A. No.
Q. Have you been to any major family events, any weddings, anything like that since the incident?
A. No, I don't think so.
Q. Now, you said earlier under questioning from Mr. Steiner that you thought a truck might have come by on a Thursday, but then I think you said you were guessing. So were you guessing with that answer?
A. Actually, no. Thursday was delivery day. We had trucks there every day.
Q. So that may have been a delivery truck?
A. I'm sure it was.
Q. Now, you don't know without guessing whether that was a T&J's vehicle, do you?

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A. No.
Q. You told Mr. Steiner about some of your conditions prior to the incident. Did anyone ever use the word to you "stenosis" prior?
A. No.
Q. But they did use the word "degenerative"? I think you talked to Mr. Steiner about that, right?
A. Not prior.
MR. BARATTA: I think that's what you testified to.
BY MR. GABEL:
Q. Do you remember somebody telling you that?
A. The first person to tell me that was Dr. Belfi.
Q. He told you he thought you had a degenerative type condition, correct?
A. Correct.
Q. That's fine. So at the parking lot where the incident occurred, you said the snow was flattened. How big of an area was that if you can tell us?
MR. BARATTA: The snow?
BY MR. GABEL:
Q. Let me be more specific. You said that, several times, that the snow was flattened, pushed down I think was your word.
A. Yes.

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Q. How big of an area? Could you say in terms of yards, feet, portions of a football field? Could you describe that at all to us how big an area that was around you?
A. The area that I was walking in?
Q. Right, from the point where you fell where you described it as flattened, how big an area was that?
A. If you look out that window, it was at least to that house.
Q. Can you describe that in feet perhaps?
A. Like I said, it was like 70 feet to where I had to walk --
MR. BARATTA: You said 70 yards.
THE WITNESS: Did I say 70 yards?
MR. BARATTA: You did.
THE WITNESS: Okay.
MR. BARATTA: Do you want to change that?
THE WITNESS: Yes. It was like 70 feet from --
BY MR. GABEL:
Q. In any direction from you?
A. No, from where -- where I got out of my car to where I had to enter, it was about 70 feet.
Q. So let me ask my question. From where your body ended up, if you were to look around you, 70 feet in all directions, is that what the condition was, flattened

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1 type snow?
2 A. Not 70 feet all around because there was a brick wall
3 behind me.
4 Q. Right. Other than that?
5 A. Yes, I mean the whole complete area from the driveway
6 coming in which was another 70, 80 feet to the 70 feet
7 that I had to go to the 190 feet going along the
8 building, everything was white, packed snow.
9 Q. Other than where there was a wall, correct?
10 A. Correct. There was a wall this way and the building
11 walls, but that's where the snow plows were all --
12 snowplowed the snow up.
13 Q. Well, when you say snowplows plowed the snow up, that
14 was beyond 70 feet, correct?
15 A. That was above the 70 feet against the buildings.
16 Q. But not where you fell?
17 A. Correct.
18 Q. So can you tell me, were there any other medical care
19 providers other than what you told Mr. Steiner since
20 the incident?
21 A. Everything that I've had done since the incident was
22 either through Concentra or through Mendelson Kornblum.
23 I have nothing outside of that other than my primary
24 care.
25 Q. But there's nothing else, right? There's no other

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place you went that we haven't discussed for care and treatment?
A. I don't believe so other than the urgent care that I went to 10 days ago.
Q. Tell us that. What's that urgent care?
A. I had an infection.
Q. Is that your --
A. My tooth, yes.
Q. Okay. Other than that, as it relates to this incident, anything related to the back, were there any other medical care providers that you haven't told us about, anything else?
A. No.
Q. Any other pharmacies that we haven't discussed?
A. I don't believe so.
Q. So the CVS that you told Mr. Steiner about after this incident, can you tell me the street that one is on?
A. It's 11 Mile and Harper.
Q. City?
A. St. Clair Shores.
Q. And the Walgreens you told him about, what street is it on?
A. There's one at 12 Mile and Harper.
Q. What city?
A. St. Clair Shores.

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Q. Is there another one?
A. I've gotten them at the Walgreens down here on Gratiot.
Q. On Gratiot?
A. I think that's --
MR. BARATTA: Probably Clinton Township.
THE WITNESS: Clinton Township.
BY MR. GABEL:
Q. On Gratiot. What's the closest cross street?
MR. BARATTA: Metro Parkway.
BY MR. GABEL:
Q. Is that correct?
A. No.
MR. BARATTA: Or 15 Mile Road?
THE WITNESS: No, it's right here by the hospital.
MR. BARATTA: So the hospital is up on Groesbeck and Harrington.
THE WITNESS: So just like north of Harrington. That's like the only street that I know.
BY MR. GABEL:
Q. Is it on Gratiot near Harrington?
A. Yes.
Q. Is that here in Mount Clemens?
A. I believe it's Clinton Township.
MR. BARATTA: Is it Gratiot or Groesbeck?

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THE WITNESS: No, it's Gratiot right here.
MR. BARATTA: Gratiot and Harrington, that is probably Clinton Township.
BY MR. GABEL:
Q. Any other Walgreens?
A. I don't think so.
Q. How about the Kroger, can you tell me the street that's on?
A. Kroger, I've had two locations, one in Eastgate shopping center.
Q. What street is that, Gratiot?
A. Frazho and Gratiot, yes.
Q. On Frazho?
A. No, just north of Frazho.
Q. So Gratiot north of -- Gratiot near Frazho?
A. Correct.
Q. City?
A. I believe it's Roseville.
Q. Are there any other pharmacies other than the ones we've gone over all together?
A. I've gotten Norco at the Kroger in Farmington Hills on 11 Mile and Middlebelt.
Q. 11 Mile and Middlebelt in Farmington Hills?
A. Yes, Kroger.
Q. Where else?

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A. I think that's it.
Q. Today, are you under any written medical restrictions?
A. Not written. Verbal.
Q. Tell me what the verbal commentary is from your doctors.
A. Not to lift more than five pounds.
MR. BARATTA: Are you all right?
MR. GABEL: Yeah. I don't have anything else.
MR. BARATTA: Can we mark this? I have a few questions.
DEPOSITION EXHIBIT 1
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
EXAMINATION BY MR. BARATTA:
Q. Mrs. Livings, I'm going to show you what's been marked as Deposition Exhibit 1 and I think I'm going to concentrate on the bottom photograph on this page. Do you see that photograph?
A. I do.
Q. Do you recognize what's contained in that?
A. Yes.
Q. What is it?
A. The back wall of the property.
Q. Okay.

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A. And the building at the back of the restaurant.
Q. Is that where you fell?
A. In this area here, yes.
Q. Does this picture generally depict the area where you fell on February 21st?
A. Yes.
Q. Okay. We see some blacktop or asphalt?
A. Yes.
Q. If we go back to February 21st, 2014, looking at all the area of the asphalt in this bottom photograph, do you recall whether it was snow covered as you described the snow?
A. Completely snow covered.
Q. So all the asphalt we see in this bottom photograph and I guess the top for that matter because they're from virtually identical places, that would have been covered in snow, correct?
A. Correct.
Q. You mentioned very early in the deposition when Mr. Steiner talked about the incident that you parked in the first available spot. Can you describe what you mean by that?
A. On a normal day?
Q. No. On this day, this morning at 5:50 a.m., you indicated you parked your car in the first available

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spot. Do you recall that?
A. Correct.
Q. All right. Can you tell me what you meant by that?
A. From the wall here where the dumpster is, the dumpster is behind this wall, so from that wall there, it was one, two, three, I believe the fifth parking area was where I parked because one through four was a solid snow mound up to the wall.
Q. Now, when you say snow mound, are you talking about stock piles of snow that a snowplow would push in the back of a lot somewhere?
A. Yes.
Q. Okay. I want you to draw or delineate for me -- let's do it this way so it's nice and easy.
A. Delineate?
Q. Bad choice of words. I'm sorry. I want you to draw for me a little rectangle about this big where you parked your car in the top photograph that morning.
A. It would be right here.
Q. Okay. Now, can you see the employee entrance door that you were heading into that morning in looking at either of these photographs?
A. No.
Q. Can you give me an approximate idea of where it is? Just point with your finger.

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A. Back in here.
Q. Would it be closer to this light-colored truck we see?
A. It's behind that truck.
Q. Okay. So the entrance would be somewhere behind this light-colored truck we see in the photograph, the vehicle that's on the left of the two that we can see?
A. Yes.
Q. All right. So then when you said 70 yards and you changed it to 70 feet, the distance from your car approximately to this door you're estimating is about 70 feet?
A. Yes, I think maybe 70 feet.
Q. You were on your way to work for your scheduled shift that morning?
A. Yes.
Q. Is this the only entrance that was available and open for you to use that morning?
A. Yes, the employee entrance.
Q. Now, you described I think one of these gentlemen were asking you to estimate the depth of the hard packed snow that you described in your deposition. I think you said -- refresh me.
A. About six inches.
Q. About six inches. Okay. But you also said that you had seen or knew that T&J had been on the premises and

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plowed this lot we see in Exhibit 1, correct?
A. Yes.
Q. So if you know --
MR. GABEL: Let me just object. I think she said she didn't know exactly when they were last there.
MR. BARATTA: Right. I didn't mean to imply she did in my question.
BY MR. BARATTA:
Q. Just the fact that they had plowed let's say sometime prior to your incident in February of 2014, were you aware of that?
A. Yes.
Q. The guys would come in and ask for a drink, maybe get something to eat?
A. Yes.
Q. And in the front of 2014, do you remember the snowplow guys coming in on more than one occasion?
A. No.
Q. Do you have any idea how there could be six inches deep worth of snow in the lot if they had plowed?
A. Okay. Prior to the incident?
Q. That's a bad question. I'm trying to figure out how to ask it.
The snow is covering the lot?
A. Yes.

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Q. The snow is six inches deep and it's hard packed. My question is if you know and only if you know, if someone had been in there to plow the lot, how come the snow was that deep?
A. When the lot was plowed, it was never plowed to the ground and salted.
Q. I'm going to stop you there. When you say it was never plowed down to the ground, are you talking about February of 2014 or are we talking about a different time period?
A. It was an accumulation over a time period.
Q. It was a bad winter, right?
A. Correct.
Q. Record snow?
A. Yes.
Q. So go ahead.
A. Originally, like when the snow first started, they plowed. Everything went up against the wall. Then the snow would come, but they wouldn't come until, you know, 10:00 o'clock in the morning, so all of the cars and everything coming in would start packing the snow down. So when they would come to plow, they would only plow whatever was brushed up, so the rest was -- then the next two days, whenever it snowed again, it would snow and cars are coming in and you kept getting these

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ruts packing this stuff down. They never scraped to the bottom, so it just kept accumulating over time.
Q. So you're describing a gradual process over a course of the winter?
A. Correct.
Q. Thank you. Prior to your incident, are you aware of anyone else slipping and falling in this lot that we see here in Exhibit 1?
A. Yes.
Q. Who?
A. On February 20th, Thursday.
Q. The day before?
A. Yes.
Q. Who?
A. Dave, the owner's brother-in-law who is a cook.
Q. Okay.
A. He fell as he was entering the building.
Q. Do you know if Dave was hurt?
A. He hurt his elbow.
Q. Do you know if he sought medical treatment for that?
A. I have no idea.
Q. Did you talk to Dave about his slip and fall?
A. Yes.
Q. What did Dave say to you?
A. He was pissed. He was trying to open up the door and

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there was so much piles of mounds of snow around the door, as he stepped on it to go in the door, he ended up going down.
Q. Are you aware of anyone else who slipped and fell in this lot prior to your incident during the winter of 2014?
A. Not prior.
Q. What about after your incident?
A. After, on the 23rd, Sunday.
Q. Of February?
A. Yes.
Q. Okay.
A. Tom Chakani fell in the back parking lot on his way to his vehicle.
Q. Do you know if Tom was injured?
A. I have no idea because I didn't work anymore. I didn't see him.
Q. How did you hear about it then?
A. Debra Buck told me.
Q. Do you know if Tom -- did I ask you if you know if Tom was hurt?
A. Yes, you did, but I have no idea. She said he hurt his arm.
Q. So brother and brother-in-law both hurt their arm or elbow you pointed to?

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A. Yes.
Q. Do you know any of the facts surrounding Tom's fall?
A. Just that he slipped on the ice when he was going to his car. There's more.
Q. There are more people who fell?
A. The same week.
Q. Go ahead.
A. I'm not sure if it's Tuesday or Wednesday --
Q. Of the next week?
A. Yep.
Q. Go ahead.
A. Maria Isaac.
Q. Who is that?
A. A server. She fell in the parking lot, bruised up all her knees, black and blue where she went straight down on her knees.
Q. How did you find out about that?
A. Debra Buck.
Q. Did Debra indicate whether or not this woman sought medical treatment?
A. I don't think so, but she did show Debra the bruises where she fell outside and Tom was again told he needed salt out there because Maria was actually on the sidewalk walking to her car when she fell. She like slipped off the sidewalk into the street.

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Q. Are you aware of anyone else who slipped in this lot?
A. That Friday, a customer fell.
Q. Was it in this lot we see here in Exhibit 1?
A. She actually slipped -- they both slipped down in this area here.
Q. You're pointing to the left of the photos we see in Exhibit 1?
A. Yes.
Q. Can you say that again?
A. Yes.
Q. No, your answer again. You were. We were talking over each other. I just want it clear on the record. Tell me about the circumstances of this lady falling to the left of the photo.
A. She was walking to her vehicle and she slipped on the pavement and ended up going into the road.
Q. And you heard about this from?
A. Debra Buck.
Q. Any other slip and falls you're aware of on the property during this winter?
A. A customer.
Q. Another customer?
A. Yes, on that Friday.
Q. And how did you obtain this information?
A. Debra Buck.

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Q. Tell me what you understand about that.
A. That she had fell in the parking lot on her way to her car in the actual parking lot.
Q. Are we talking about two customers who fell to the left of the photograph?
A. One is the server. Maria works there. There was a customer who fell, also, and it's my understanding that there was an incident report on that for the customer on the Friday.
Q. Did you ever discuss with any of the Chakani brothers whether or not it was their obligation to remove snow or de-ice the parking lot on these premises?
A. He discussed with me.
Q. He being?
A. Tom.
Q. Okay.
A. The way that the property works is it's broke up into square footage. Each business has their own square feet. Mr. Sage's company takes care of everything in the property. They do any repairs. If there's a sewer problem, they bring in the contractors. It's their company that does the snow, the grass, all of that. He pays for all of that --
Q. Mr. Sage or Mr. Sage's company?
A. Yes, Mr. Sage's company.

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Q. Okay. What else did Mr. Chakani say about that?
A. They receive, I believe, quarterly billing, maybe six-month billing on whatever their square footage is that they are responsible for and they pay that accordingly.
Q. And what was the reason that you were discussing this with Mr. Chakani?
A. He shows us his business all the time. He showed us the actual bill and for that particular one that I had seen, the whole parking lot was blacktopped. So he got his billing for that portion of his square footage which was the whole around the building and in fact the store next door to Grand Dimitre's is also part of our square footage. So he has to pay for that little area, also, but we don't have access to it. It's rented out.
MR. BARATTA: I don't have anything else. Thank you.
RE-EXAMINATION BY MR. STEINER:
Q. Just a real quick follow-up. When was this discussion with Tom Chakani regarding the business model that he had with Jim Sage?
A. I'm sorry. I don't understand the question.
Q. When was your discussion with Tom regarding this business model where certain businesses are responsible for a certain square footage?

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RECEIVED by MSC 7/8/2020 5:41:14 PM

A. All the time. I worked there for 10 years. There really wasn't a bill that I didn't see or the girls didn't see. They were always left out on the bar area.
Q. Okay. But that's you looking at bills. When was this conversation that you had with Tom?
A. Whenever he had the blacktop put in.
Q. When was that?
A. A couple years before I wasn't working there.
Q. So it was prior to your fall by a couple years?
A. Yes.
Q. It's your understanding that Grand Dimitre's would pay for these services?
A. It was part of their lease agreement.
Q. And do you have any idea the contents of that lease agreement?
A. As far as I understand, it was a 20-year lease that they have.
Q. But do you know the terms of who may be responsible for what?
A. No. I just -- no, not specifically.
MR. BARATTA: Was your question does she know what the specific pro-rata allocation is for this tenant?
MR. STEINER: The terms of the lease agreement with this tenant.

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BY MR. STEINER:
Q. Do you have any idea of the specific contents of that agreement?
A. My understanding is if the hot water heater goes, if there's a hole in the roof, if there's anything to do with this specific building, Tom and Jamal Chakani took care of that inside the building. Anything that was outside of the building, they paid whatever Jim Sage told them they owed.
Q. Did you ever see that agreement?
A. Yes, I said I seen the bill.
Q. Not the bill, the agreement.
A. No. It's not my business.
Q. Okay. So when you say that's your understanding, it's based on secondhand knowledge through Tom?
A. It was based on the bill that he received in the mail from Sage Industries or whatever -- Investments.
Q. Right, that Tom paid?
A. Yes, when he received the bill.
Q. Do you know whether Tom ever talked with T&J, any employees?
A. If he happened to be at the cash register whenever they came in, of course. He would take their order and, you know, social conversation.
Q. Do you know if he ever talked business with them? If

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you don't know, that's fine.
A. I don't know.
Q. I know we discussed following your complaint to Tom that you didn't know what Tom did with that information, but what about with regard to any of these other incidents that Jessica Buck relayed to you, do you know what Tom did with that information?
A. Her name is Debra.
Q. I'm sorry. Debra Buck.
A. I just don't want you to get mixed up. I have no idea because I was not working at that time.
Q. Do you know if Debra Buck reported that to Tom?
A. You would have to ask her. No, I don't know.
Q. And you certainly wouldn't know if Sage Investment Group would ever have notice of any of these incidents?
A. Absolutely not.
Q. Okay. Did you ever go back to Grand Dimitre's, I know not as a waitress, but to go visit the premises following your injury?
A. Yes.
Q. How many times?
A. Every time I went to Concentra, I would have to take my do-not-work slip back to Dimitre's because I was day-to-day. Originally, when I went on the Saturday the 22nd, they told me to come back Wednesday the 25th

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or whatever. I'm just guessing on the dates. So I had to take my initial report and give it to my employer, no work until Wednesday, then I'd go back on Wednesday and they'd say no work until Saturday and then I'd go back on Saturday. So I mean I was a day-to-day they said, you know, so that's what we went with.

Q. Was it not until Dr. Kornblum that he recommended Social Security Disability?

A. Dr. Kornblum did not recommend --

Q. Was it through Concentra then? I'm sorry. I don't recall.

MR. BARATTA: What's your question, who recommended that she file for Social Security Disability?

MR. STEINER: Right.

THE WITNESS: My -- I'm trying to think of his name. Jason.

BY MR. STEINER:

Q. Jason who? I'm sorry.

A. I'm trying to think. In August when I contacted Concentra and I told them I wanted a second opinion. The information that I was receiving from Concentra was not going along with the pain. They kept saying muscular, muscular and I'm like this is not muscular.

In August, I was threatened by Workmen's

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RECEIVED by MSC 7/8/2020 5:41:14 PM

Comp. They told me, "If you go see this other doctor, your case could change as far as what we are willing to pay anymore." I said, "Do what you got to do because I have to get a second opinion." So at that point is when I contacted an attorney, Jay Trucks & Associates out of Clare, Michigan, and how I got their name was I just went on the computer, that name popped up and that's who I talked to.

After talking to my attorney, Jason, I can't remember his last name, but he said, "What's going on?" I told him. He said, "Why have you waited this long?" I said, "I didn't even know I had a 28-day" -- I could have went to another doctor 28 days after my incident. I did not know that. So he was the one who suggested I file.

Q. You also mentioned that you started visiting Dr. Kornblum in August 2014, right?

A. Yes.

Q. Was he the one that made the recommendation to the Social Security Disability that you were disabled?

MR. BARATTA: You mean was he the physician who testified?

MR. STEINER: Right.

THE WITNESS: Ultimately, his reports is what was turned over to Social Security that led to that

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RECEIVED by MSC 7/8/2020 5:41:14 PM

1 going through I believe.
2 BY MR. STEINER:
3 Q. Okay. And none of your prior physicians?
4 A. I don't believe Concentra had anything to do with it.
5 MR. STEINER: I think that's all I have.
6 Thanks.
7 RE-EXAMINATION BY MR. GABEL:
8 Q. Ma'am, on Exhibit 1 that you were talking about, could
9 you put an X and a circle in the spot that you fell?
10 MR. BARATTA: That's one of my two questions.
11 BY MR. GABEL:
12 Q. Could you do that?
13 A. Yeah. I would have to say it was like -- like right
14 here.
15 Q. And circle it. Okay. Thank you. Good. So you were
16 walking in the rectangle over to that spot, correct?
17 A. Yes.
18 Q. Okay. We talked before about T&J's and whether you
19 knew or didn't know when they were to come out. So you
20 don't know what would trigger them to come out, do you?
21 A. No.
22 Q. We talked about you thought that the snow was not
23 scraped down. You don't know whether or not T&J's
24 could have scraped down to this asphalt, do you,
25 without guessing?

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A. Can you repeat the question, please?
Q. Yes. You don't know whether T&J's could have scraped down to the ground the snow, correct, without guessing?
A. The day of the incident, no, they would not.
MR. BARATTA: No, do you know whether or not -- listen to his question.
THE WITNESS: I know. It's like --
BY MR. GABEL:
Q. I'm talking about the snow season of 2013 to 2014 and in the weeks leading up to your incident, do you know whether T&J's could have scraped down to the ground without guessing?
A. They could have, yes.
Q. You're not a snowplow operator, are you?
A. No.
Q. You don't know whether the blade would have been able to get under the packed snow that you described, do you?
A. It would not have been able to, no.
Q. It would not have. Okay.
A. No.
Q. And you don't know whether or not the fact that cars had driven over the snow would have impeded the blade, right, from going down to asphalt level, correct?
A. Correct.

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Q. And even assuming for the sake of discussion that the blade got down to asphalt level, you recognize that every bit of snow cannot be removed, correct?
A. Correct.
Q. Because in Michigan there's always residue of snow, correct?
A. Correct.
Q. And even if there's residue of snow, it can become packed again and become slippery? You understand that?
A. Correct.
Q. And you understand the temperature fluctuation in Michigan, even if the blade gets down to asphalt level, there can be a refreeze and a slippery condition? You know that, correct?
A. Correct.
Q. And again, as it relates to exactly what they did or did not do in the winter of 2013-2014, you do not know what T&J's did, correct?
A. Correct.
MR. GABEL: Okay. No further questions.
MR. BARATTA: Mark this, please, Exhibit 2.
DEPOSITION EXHIBIT 2
WAS MARKED BY THE REPORTER
FOR IDENTIFICATION.
RE-EXAMINATION BY MR. BARATTA:

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Q. We've marked Deposition Exhibit 2. I'm going to try and make it as quick as I can. The letters that you said, the correspondence you said you saw from Mr. Sage to the Chakani brothers where you described that they would owe certain things that were done on the property and they would owe their share of it, do you recall that testimony?
A. Yes.
Q. I'm going to show you what's been marked as Exhibit 2. Do you recognize that?
A. I do. Well --
Q. Have you ever seen that letter, that specific letter before?
A. Not this specific letter.
Q. Okay. Have you ever seen a letter from Sage Investment Group, LLC similar to that letter?
A. Yes, many of them.
Q. Okay. That letter indicates that there are some charges it looks like from Detroit Edison, T&J Landscaping, general maintenance, B.F. Domzalski it looks like insurance and then taxes.
A. Correct.
Q. Do you see that?
A. Yes.
Q. And then you see there's a Dimitre's restaurant with

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the square footage indicated, pro rata square feet, how much they owed and what they prepaid?
A. Yes.
Q. Did Mr. Chakani ever indicate that he prepaid for some common area maintenance on the property?
A. No.
Q. But you've seen letters like this before --
A. Yes.
Q. -- wherein Mr. Sage or his company demanded money for expenses related to maintenance of the subject property?
A. Yes.
MR. BARATTA: I don't have anything else.
MR. STEINER: I think I'm all set.
RE-EXAMINATION BY MR. GABEL:
Q. You haven't seen any documentation from T&J's, have you?
A. No.
MR. GABEL: Nothing further.
(The deposition was concluded at 6:10 p.m.; signature of the witness was not requested by counsel for the respective parties hereto.)

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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Gail R. McLeod, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth, that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party nor interested in the event of this cause.

_____

Gail R. McLeod, CSR 2901
Notary Public,
Macomb County, Michigan

My Commission expires: September 23, 2017

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RECEIVED by MSC 7/8/2020 5:41:14 PM

A

a.m 30:20 31:11 47:2 90:13 92:8 95:24 112:24
ability 6:23 7:3 20:23
able 7:5 18:20 33:13 35:10 42:1,7 49:20 68:18 72:25 73:4 129:16,19
Absolutely 20:19 43:4 97:16 125:16
abuse 15:25 90:11
acceptable 6:12
access 122:15
accident 62:4,5 73:12 75:2,3 76:1 77:3
accidents 74:24
accommodate 78:20
accounts 13:12
accumulate 42:18
accumulating 42:12 117:2
accumulation 94:3,9 116:11
accurately 6:17
ached 72:6
aching 81:8
acquainted 53:5
Action 1:6
actively 101:3
activities 77:13 91:1
activity 74:19
actual 32:7 33:11 121:3 122:9
adding 69:9
addition 38:4 86:9 92:24
additional 36:13
address 8:10,18 9:5 31:1
adjusted 82:3
admissible 15:20
Adult 17:6
Aetna 29:11
affect 6:23 7:3 25:19
Afternoons 20:16
aggravated 74:17
aggravates 74:18
ago 47:18 75:6 75:15 81:2 108:4
agreement 91:17 123:13,15,25 124:3,10,12
ahead 16:10 37:9 37:17 38:18 39:18 44:3 49:12 57:1,2 71:19 72:20 79:23 116:16 119:7,11
aids 70:4
air 87:23 88:4 88:23
Albert 21:10
alcohol 15:25 58:5 90:11
alleviate 74:4
alley 38:7,8 43:6
allocation 123:22
allow 16:24
allows 56:14
ambient 92:16,25
amount 15:11 20:23 28:3,16 28:16,17 85:4 85:6,11 94:3,9
and/or 38:24
anger 15:9
ankle 87:18,19 87:22,24 88:15 88:17
Ann 5:9
answer 6:5,13,24 7:5 22:5 35:23 36:12,13 37:8 37:20,21 40:22 49:11 51:19,22 53:17 54:16 72:20 73:7 79:16,17 94:21 104:19 120:11
answered 6:17 22:13 33:9,9 38:17 43:10,17 46:19 55:5 71:19 72:13,16 72:19 74:5 97:6
answers 5:25 10:19 58:16,19 133:12
antibiotics 75:5
anticipated 66:7
anybody 88:1 96:22
anymore 13:23 78:12 95:4 118:16 127:3
anyway 10:19 43:15
apart 67:23
apologize 89:17
appear 10:14 95:20
APPEARANCES 2:1 3:1
Appearing 2:9,18 3:9
application 103:7
applied 18:1,8 18:14,25
applies 40:5
apply 18:5,23 40:9 79:16,20
applying 72:14 103:14
appointment 61:1
appointments 61:18 68:3
approximate 19:19 33:16 113:24
approximately 8:19 14:21 19:11,22 20:7 20:14 21:18 25:6,13 29:14 30:22 34:3,11 39:4 41:16 50:14 53:8 68:5 86:25 114:10
April 62:2 64:22 64:24 71:18,20
area 12:23,24 17:14 33:14 34:8 37:25 38:2,5,6 41:6 41:7 46:14,16 48:10 81:14,17 81:19 96:10,12 99:22 105:19 106:1,3,4,6 107:5 112:3,4 112:10 113:6 120:5 122:14 123:3 132:5
arising 28:9,21
arm 46:2 72:4 89:12 118:23 118:24
arrangements 86:14
arrive 34:16
arrived 34:19 39:6 90:13
arthritis 71:12
asked 36:4 38:17 41:5 47:25 55:5 56:12 60:21 71:19 72:13,19 74:5 80:4 86:23 96:6 133:11
asking 30:8 33:19 38:23 39:11 58:24 97:6 114:20
asphalt 112:7,10 112:14 128:24 129:24 130:2 130:12
associated 30:11
Associates 127:5
assume 6:14,15 6:16 56:13
assuming 130:1
AT&T 32:20

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

attached 4:13 67:7
attend 17:10
attention 37:19 50:3
attorney 5:22 15:12 18:10,12 58:11 80:16 91:18 95:7 103:11 127:5,9
August 28:6 29:17,19,24 58:10 61:1 62:23,24 64:23 64:24 126:20 126:25 127:17
automatically 29:23,23
automobile 74:24 75:25
available 34:9 112:21,25 114:16
aware 5:25 30:14 32:7 53:24 54:12,21 56:8 56:12 64:7 115:11 117:6 118:4 120:1,19

B

B.F 131:20
baby 79:9 86:13
baby-sit 13:4 78:16
back 10:23 13:20 18:18,19 21:1 21:3,5 24:16 24:16 25:11,17 25:19 27:3 30:24 33:15,25 40:18,19,25 41:11,23,24,25 45:19,22,24 46:1,5,14,22 47:24,25 48:2 48:7,8,13 49:19 51:7 59:23 63:12,16 65:20 66:4 67:9,10 68:1 70:6,7,8,22 71:13 72:5,6 72:22 73:9,17 73:20 74:6,17 74:18 80:1 81:8,9,13,15 81:24 82:8 89:5 90:2 91:21 93:2 101:19 108:10 111:24 112:1,9 113:11 114:1 118:13 125:17 125:23,25 126:3,5
backaches 72:9
backtrack 99:17
backup 29:18
bad 113:16 115:22 116:12
bagged 24:14
balances 30:7
ball 77:22
bar 123:3
Baratta 2:3,4,4 4:5,8 7:12,16 7:18,21,24 8:1 8:4,7 10:16,21 14:12,16,20,25 15:17 16:4,9 19:14,20 22:4 22:13 27:19 30:6 32:22 33:18 34:1 36:12,18,24 37:6,10,13,19 38:23 39:1,10 39:13,15,18 40:14,21 41:4 43:3,7,17 44:1 44:7,9 48:21 49:6,9 50:25 51:15,19 54:1 54:15,23 55:1 55:7,15 56:11 57:1,19 59:12 60:3 64:7,12 64:25 65:3 66:11 70:12 71:19 72:13,19 73:6 74:5 75:19 78:25 85:14 91:19 92:1,19 94:5 94:16,21 96:6 96:22 97:1,23 98:10 100:21 102:15 105:9 105:20 106:12 106:14,16 109:5,9,13,16 109:25 110:2 111:7,10,15 115:6,8 122:16 123:21 126:12 127:21 128:10 129:5 130:21 130:25 132:13
barely 80:22
bars 67:7 69:9
based 22:4 37:6 51:15 124:15 124:16
bathroom 42:3
battery 70:3
bed 82:2
began 53:1
behalf 2:9,18 3:9
Belfi 21:10 62:13 71:16,25 105:13
believe 5:19 21:8 26:1,18 28:20 29:20 30:17 31:4 45:3 47:24 49:5,13 52:16 57:13,18 59:3 59:13 61:1,17 63:2 66:19 67:6,14,22 68:2 72:25 77:4 81:4 83:12,22 86:3 95:10,12,15 97:1,12,12 101:5 103:11 108:3,15 109:24 110:18 113:6 122:2 128:1,4
believed 69:17
bend 72:1
bending 74:20
benefits 18:15 18:23,25
bent 72:3
best 6:17 80:5,6
better 69:20
beyond 95:25 107:14
big 24:11 36:10 105:18 106:1,3 106:6 113:17
bill 122:9 123:2 124:11,12,16 124:19
billing 122:2,3 122:11
bills 30:12 123:4
Binson's 70:12 70:13
birth 10:5
bit 80:3 86:17 130:3
black 43:22 70:8 87:24 89:3 93:12,13 119:15
blacktop 112:7 123:6
blacktopped 122:10
blade 129:16,23 130:2,12
block 36:10,10
blood 27:11
bloodstream 85:4 85:7
blue 89:3 119:15
body 45:21 51:20 106:23
bone 70:1,25 71:5
born 10:7 12:9 12:11,13
boss 47:3,23 52:8 62:10
bottom 111:18 112:10,14 117:2

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

bowling 77:16 78:5 86:6 103:24
brace 69:23,25 70:6,7,8 74:6 87:23 88:4
Brain 32:21
break 6:20,22 48:9 49:7 79:22,23
breakfast 51:2
brick 107:2
briefly 5:16
bright 42:4
bring 121:21
broke 121:17
brother 118:24
brother-in-law 117:15 118:24
brothers 121:10 131:4
brought 10:11,12 44:17
bruised 119:14
bruises 119:21
brushed 116:23
Buck 46:19 47:1 101:23 118:19 119:18 120:18 120:25 125:6,9 125:12
Buck's 31:20
building 33:14 33:17 34:20,24 34:25 35:2,3 40:6,7,8,18,19 41:11 46:17 93:2,6,11 96:18 102:5 107:8,10 112:1 117:17 122:12 124:6,7,8
buildings 107:15
Burlington 15:16 19:1 21:20 22:12,19 23:13 25:16,18
business 41:3 56:10 121:18 122:8,20,24 124:13,25
businesses 122:24
busser 20:21
buys 40:3
Buzdoraj 11:14 11:15

C

call 32:25 33:3 33:5 46:16 50:17 53:12,14 53:22 57:12 60:23 69:9
called 46:18 53:9,11,21 70:1,6 101:23
calls 49:10
camera 94:19,25
capacity 54:20 55:13
car 9:20 31:19 33:1,20 34:3 34:13 35:1 87:16,25 92:25 93:11 96:18 106:21 112:25 113:18 114:9 119:4,24 121:3
Caramagno 98:4 98:10,17
Caramagno's 98:8
card 25:17,18 60:23
care 23:17 27:14 29:15,16 59:8 59:17,19,24 60:8 75:3,7,8 77:25 90:7,10 107:18,24 108:1,3,5,11 121:19 124:7
caring 86:8
carrier 32:18
carry 72:2,3 93:7
cars 31:16 40:25 116:20,25 129:22
case 58:12 127:2
cash 21:13 23:19 24:13 124:22
cashier 20:21 23:3 24:22
cashiers 23:17
cast 88:23
cataract 99:14 99:20
cataracts 44:23 44:24
catch 87:14
cause 133:17
caused 35:17 37:5,15
cell 32:16 33:1 33:3
cement 42:23
center 61:23 110:10
centimeters 38:22
certain 14:15 20:23 122:24 122:25 131:5
certainly 49:2 57:9 125:14
CERTIFICATE 133:1
certificates 17:13
Certified 133:6
certify 133:8
Chakani 22:2 40:4 47:3,11 47:23 48:3 100:6,15,24 118:13 121:10 122:1,7,20 124:6 131:4 132:4
change 106:16 127:2
changed 46:21 49:19 114:9
charge 15:2
charges 4:19 131:19
cheap 32:21
check 21:13,14 26:12 76:9
child 11:25
children 12:2 72:9 76:4
chiropractor 75:12,17 80:23 80:24 81:22
chiropractors 103:4
choice 113:16
Chris 44:5
chris@baratta... 2:8
Christmastime 24:10
CHRISTOPHER 2:3
cigarettes 84:17 84:19 85:9
circle 128:9,15
CIRCUIT 1:2
circumstances 120:13
city 82:21 83:1 83:6 108:19,24 110:17
Civil 1:6
claim 18:17 23:7 23:22
claimed 30:10
Clair 8:16,24 14:17 15:7 83:2,6 108:20 108:25
Clare 127:6
clear 6:8 48:13 120:12
Clemens 1:21 2:6 5:1 17:5 109:23
client 36:19
clinic 24:7
Clinton 109:5,6 109:24 110:3
Clonidine 27:9
close 7:9 33:15
closer 33:17 34:5,13 114:2
closest 82:16 109:8
clothes 24:11 46:21
cloud 95:5
Club 99:22
Coat 15:16 19:1 21:20 22:19

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

23:13
coats 24:24
code 9:7
coffee 44:11
college 17:10
color 15:13
combination 29:16
come 24:11,19 37:25 38:1 42:5,14,22 57:4 78:3,3,3 90:20 101:17 104:17 115:13 116:3,19,19,22 125:25 128:19 128:20
coming 24:13 30:25 32:9,12 52:15 79:6 86:13 107:6 115:17 116:21 116:25
Commencing 1:22
commentary 80:16 100:19 111:4
comments 100:13
Commission 133:24
common 132:5
Comp 13:22 30:10 61:3 127:1
company 1:11 5:18 15:15 55:3 63:7 121:19,22,24 121:25 132:9
Compensation 23:7,22 28:8 28:10 30:14
complained 81:11 81:17,19 100:5
complaining 102:19,23
complaint 125:3
complaints 102:18
complete 16:13 49:22 107:5
completed 6:7 17:3 52:3 68:21,24
Completely 112:13
computer 95:5 127:7 133:13
Concentra 13:21 21:9,11 24:4,7 25:4,17 50:6 52:11 62:3,11 62:13,17 63:1 63:14 76:21 77:5 107:22 125:22 126:10 126:21,22 128:4
concentrate 111:18
concern 58:1
concluded 132:20
conclusion 49:10
condition 56:5 72:23 81:5 93:17 96:20 100:4 105:15 106:25 130:13
conditions 71:24 73:23 93:14 105:2
confirm 10:20
confused 36:7
confusing 37:18
Congratulations 79:8,10
considered 20:18
constant 74:21
consult 61:4
consume 58:4
contact 58:9
contacted 126:20 127:5
contacts 44:19 99:18,21
contained 111:21
contents 4:1 123:14 124:2
contest 6:21
continue 16:24 26:4 68:16 87:22
Continued 3:1
continuing 15:18 88:18
contractors 121:21
conversation 123:5 124:24
convicted 14:6
cook 34:18 47:7 54:7,18 117:15
cook's 34:22
copied 95:7,9
copies 95:10
copy 58:15 95:9
corner 82:18,25 83:1
Corporation 1:13 1:15
correct 7:7 8:3 8:23 12:17 14:22 16:18 20:9,25 22:10 28:23 31:2,6 32:3 33:22 34:15 36:16 38:25 41:17 45:9,20 46:7 47:8,13 48:15 48:18 62:6 69:3 79:1 80:13 81:16,20 82:10,22 84:1 87:7 88:9 90:14 92:3,11 92:13,14,21 96:12,13,24 97:3,7,8,22 98:3 99:6 101:22 102:8,9 102:12 105:15 105:16 107:9 107:10,14,17 109:11 110:16 112:17,18 113:2 115:1 116:13 117:5 128:16 129:3 129:24,25 130:3,4,6,7,10 130:14,15,18 130:19 131:22 133:14
corrective 86:1
correctly 78:15 100:9
correspondence 131:3
costs 15:12
counsel 132:21 133:16
county 1:2 133:5 133:7,22
couple 5:23 9:23 13:5,6 22:8 29:22 57:21 62:4 65:7,10 65:11 66:5,7 67:25 68:1,1,6 68:21 77:6,16 77:17 78:5,10 87:19,20 103:24 123:8,9
course 51:8 53:17 72:6 77:14 88:18 94:6,16 117:3 124:23
court 1:2 5:13 6:1 14:17 15:6 15:12
coverage 30:12
covered 77:2 86:19 112:11 112:13,17
covering 115:24
crafty 86:20
crawled 46:13 102:4
crimes 14:6,8
cross 82:21 109:8
crowd 20:5
crutches 69:23
CSR 1:24 133:20
CT 76:24
curbing 57:5
currently 13:8 13:10 17:18,22 25:23 59:15 61:9 80:7 85:16 95:3
curtains 86:21

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

customer 23:14 40:7 60:20 120:2,21,22 121:7,8
customers 40:13 40:24 47:5 51:4 56:18 100:14 121:4
CVS 26:9,11,17 83:4 108:16
Czerniawski 9:25 11:7

D

dad's 78:19
Dance 104:1
dancing 77:19 78:8,9 86:7
dark 41:19 92:10 94:17 95:20,22 95:23
date 10:5 22:6 43:12 56:5 73:22,25 75:6 89:17 90:5 92:1
dates 126:1
daughter-in-law 95:15
Dave 117:15,18 117:22,24
day 7:22,24 13:5 25:15,16 31:13 31:25 38:1 42:11,12,22 46:23 50:11 52:7,20,23 61:16 62:4 70:2 71:7 72:6 74:21 78:17 84:20,23,25 85:11,13,16,17 97:10 101:9 102:10 103:16 104:20,21 112:23,24 117:12 129:4
day-to-day 125:24 126:5
days 29:15 31:9 31:11 53:8 62:4 66:20 67:16,25 68:1 68:1 87:19,21 87:23 88:22 89:2 94:1,4,10 94:13 96:2 97:11 108:4 116:24 127:13
de-ice 121:12
deal 104:5
Debra 31:20,21 33:9 34:16 46:19 47:1 118:19 119:18 119:19,21 120:18,25 125:8,9,12
Debra's 35:1
debt 30:11
decade 57:20
December 45:5 69:5
decrease 81:14
deep 115:19 116:1,4
Defendant 2:18 3:9 58:16
Defendants 1:16
degenerative 71:23 105:6,14
degrees 17:13
delete 80:15
deleted 14:2 95:8
delineate 113:13 113:15
deliver 38:9
delivered 98:9
delivery 38:8 98:5,6,6,6,9 104:20,22
demanded 132:9
Depended 20:4
dependent 13:8 13:10
depending 78:18
Depends 56:25 57:3 70:20 85:12
depict 96:20 112:4
deposition 1:19 4:16,18 5:11 5:20 47:19 111:12,17 112:19 114:21 130:22 131:1 132:20 133:8
depth 38:23 114:20
describe 36:11 96:15 106:2,9 112:21
described 36:15 90:8 92:15,20 96:14 97:15 101:20 102:8 106:6 112:11 114:19,21 129:17 131:4
describing 117:3
description 96:11,21
desirable 20:18
details 91:14
Detroit 8:21 9:3 9:6 16:17,19 131:19
develop 51:13
diagnosed 18:19 103:17
diagnosis 82:4 88:1,7
Diagnostic 61:23
different 21:21 21:21 96:10 116:9
digital 94:19,25
digits 10:14
Dimitre's 1:13 19:5,7 20:3,11 21:1,12,16,18 21:21,24 22:11 22:20,22 31:3 39:6 40:11,12 41:7,9 47:12 53:6,8 54:10 55:14,22 56:9 56:18 57:12,15 57:17 58:2 100:3 122:13 123:11 125:17 125:23 131:25
DINING 1:14
diploma 16:14
direction 106:20
directions 106:25
directly 53:14 53:16
disability 18:1 18:3,7,21 27:23 29:21 72:15 103:7,9 103:10 126:8 126:14 127:20
disabled 72:12 127:20
discovery 5:11
discuss 90:25 121:10
discussed 29:2 73:19 79:19 108:1,14 121:13 125:3
discussing 122:6
discussion 10:22 25:10 67:18 83:17 102:24 122:19,23 130:1
discussions 100:2
diseases 103:18
distance 114:9
District 14:17
do-not-work 125:23
doctor 21:3,5,7 21:9,10,10 24:3 27:14 51:16 52:10 59:24,24 61:15 65:2,19 71:23 72:11 74:12 85:2,6 88:3,8 127:1,13
doctors 30:8 72:21 111:5
document 58:22
documentation 132:16

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

doing 29:25 63:23 70:20,21 74:3 85:12 102:23
domestic 14:11 15:2,9 89:20
dominant 84:11
Domzalski 131:20
Donna 1:4,19 4:2 5:4,9,11 9:24 9:24 10:1 72:20 73:7
door 30:23 33:15 33:20,25 34:5 34:14 41:25 42:5 46:14,19 46:20 47:25 48:7 87:16,16 92:19 101:24 113:20 114:10 117:25 118:2,2 122:13
double 86:15
Dr 21:8 26:3,25 59:9,11 61:15 61:21,21 62:13 62:22,24,25 63:1,3,15,18 63:21,25 65:7 65:10,22 66:2 66:22 67:2,6,7 67:9,20 68:3 68:16 69:6,13 69:17 70:15,25 71:16,25,25 77:6 105:13 126:7,9 127:16
drain 48:8,11,12 48:17
draw 113:13,16
dress 78:13,15
drift 46:15
drink 115:13
drinks 90:21
drive 21:15
driven 38:12 129:23
driver's 85:23 86:1
driveway 107:5
driving 38:5 48:10
dropping 13:22
drug 15:13 90:11
drugs 58:7,7
due 61:22 72:22
duly 5:5 133:10 133:12
dumpster 41:9 113:4,4
duties 20:20 49:20

E

E-mail 95:5,11
earlier 25:21,23 45:18 56:17 59:7 65:16 78:16 104:16
early 101:10,11 112:19
easily 24:21
East 16:16,19
Eastgate 110:9
Eastpointe 1:14 31:4 75:18 80:24
easy 113:14
eat 115:14
edging 57:5
Edison 131:19
Education 17:6
Edward 1:8
effect 13:20,22
efficient 51:5
eight 8:3 68:25 72:7
either 15:8 45:6 57:22 58:7 78:4,11 98:2 107:22 113:21 133:16
elbow 117:19 118:25
emergency 75:1
employed 17:18 17:20
employee 52:4 53:24 54:10,12 54:13,20,21 55:12,13,18,21 56:1 113:20 114:18
employees 40:12 40:19,23,25 47:6 56:18 124:21
employer 29:12 126:2
employment 23:8
EMS 102:10
ended 14:15 46:15 66:7 67:8 102:2 106:23 118:2 120:16
endometriosis 76:11
endurance 6:21
England 10:7
enjoy 77:13
enter 106:22
entering 117:17
entire 20:10 48:13
entrance 113:20 114:4,16,18
epidural 81:6,13
equivalent 84:22
establishment 82:14
estimate 114:20
estimating 114:10
evening 52:5
event 25:19 133:16
events 104:13
eventually 50:3 61:6 69:22
everybody 38:1,2 77:18
everyday 49:20
Evidence 5:14
exact 94:3,9
exactly 91:10,13 91:23 93:19 96:17 102:4 115:5 130:16
EXAMINATION 4:3 4:4,5 5:15 79:12 111:15
examined 5:5
Excuse 67:17
Exhibit 4:15,16 4:18 111:12,17 115:1 117:8 120:3,7 128:8 130:21,22 131:1,9
Exhibits 4:12,13
existing 83:23
exiting 87:8
expenses 132:10
experience 40:11
expires 133:24
explain 96:8
expressed 69:17
extended 69:9
extent 37:8 42:18 49:11 51:14,25
eye 45:1,12,13 45:15 99:15

F

Facebook 13:12 13:14,16 14:2 80:22
facility 30:2
fact 15:18 86:12 115:9 122:12 129:22
Factory 15:16 19:1 21:20 22:19 23:13
facts 119:2
fair 6:18 34:13 57:9 91:3
Fairway 9:16
fall 32:5,7 33:11 59:2 74:16,22 75:23 87:1,3,4,15 89:10,12,12,25 103:15 117:22 119:2 123:9
fallen 48:1
falling 117:7 120:13
falls 120:19
familiar 56:21 58:24 64:11

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

98:4
family 1:14 13:3 79:9 104:13
far 21:15 33:20 123:16 127:2
Farmington 110:21,23
fast 25:1
father 10:12
February 1:23 5:2,19 10:10 17:21,24 18:16 28:4 30:21 52:12,21 61:15 61:16 89:16 98:18 112:5,9 115:10 116:9 117:11 118:10
fee 15:10
feel 89:4
feet 34:3 72:6 106:2,9,10,17 106:22,24 107:2,6,6,7,14 107:15 114:9 114:11,12 121:19 132:1
fell 13:19,20 30:23 33:3 34:3,13 35:4 45:19 50:10 51:3,6 60:22 93:15 102:6 106:5 107:16 112:2,5 117:17 118:4,13 119:5 119:14,22,24 120:2 121:2,4 121:7 128:9
felony 15:4
felt 51:18 69:15
fiance 78:22
field 106:2
fifth 113:6
figure 22:15 115:22
file 23:7,22 126:13 127:15
filed 28:8,10,24 30:15
fill 26:14 103:7
filled 84:3 103:11
filling 103:6,8
financially 12:15 13:8,10
find 119:17
fine 10:18 15:22 32:25 56:24 58:23 59:10 105:17 125:1
finger 113:25
finish 32:11 55:20 84:6 88:25
first 5:5,24 11:3 18:7 21:8 25:24 34:9 45:3,13 59:11 60:24 61:1 62:20 63:3,12 64:14,15,19,22 66:2,4,17 71:8 71:15 72:15 90:6 103:13 105:13 112:21 112:25 116:17 133:10
Fitness 98:22 99:10
five 21:17 46:10 52:2 72:4 81:4 81:11 82:8,9 83:11,20 84:1 84:7 85:19 86:6,7,9 99:8 111:6
flashes 27:12
flashlight 93:7
flat 36:5 102:8
flats 78:14
flatten 35:17 37:5,15
flattened 35:15 37:1 105:18,23 106:6,25
Flex 63:17
floor 23:3
flower 86:14
fluctuation 130:11
fluffy 35:16 36:14
follow 66:21 67:20 80:15
follow-up 122:19
following 14:21 46:8 50:11 51:9,11 52:7 66:21,23,24 67:12 68:16 125:3,19
follows 5:6
food 90:21 98:8
foot 87:24 101:11,14
footage 121:18 122:3,11,14,25 132:1
football 88:5 106:2
foregoing 133:11
forgot 25:21
form 35:21 49:9 50:25 54:1,15 55:15 57:1 59:12 93:3 103:7
forth 133:9
forties 97:10
foundation 22:5 35:22 37:7 40:21 41:4 48:21 49:10 51:16 54:15 55:15 56:11 66:11 94:5
four 10:14,25 53:8 78:18 113:7
four-inch 78:13
frame 39:13 97:15
Fraser 24:8 50:8 62:3
fraud 14:9,13 15:14
Frazho 110:12,13 110:14,15
freeze 32:21
freezing 93:22
Friday 30:21 31:8,15 51:2 66:20 75:6 120:2,23 121:9
friend 81:8
front 23:16 24:12 34:20 40:7 41:21 46:19,20 57:5 101:24 115:16
full 6:7 30:12 34:9 133:14
funny 43:14
further 130:20 132:19
fuse 69:10,11
fusion 64:9
future 61:18 72:25 73:1

G

Gabapentin 26:21 65:17
Gabel 3:3 4:4,7 4:9 7:8 8:8 14:14,18,22,24 15:23 25:9 27:15,18,20 35:21 37:9,17 37:21 38:17 43:24 44:1,2,5 44:8 57:2 79:12,13 80:1 80:2 83:18 85:15 91:21,22 92:3,4,21,23 94:6,8,24 97:3 97:5 98:1,13 100:23 102:17 102:22,25 105:11,21 106:19 109:7 109:10,20 110:4 111:8 115:4 128:7,11 129:8 130:20 132:15,19
Gail 1:24 133:6 133:20
game 6:9

HANSON RENAISSANCE COURT REPORTERS & VIDEO
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313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

GED 16:13
general 20:20 54:2 67:5 86:19 96:11 131:20
generally 30:18 33:23 40:12,20 47:18 49:20 56:17 58:2 85:3 112:4
gentlemen 114:19
getting 66:7 68:18 99:22 116:25
girls 77:17 123:2
give 15:17 26:8 82:4 88:1 90:20 96:21 113:24 126:2
glasses 44:19 102:13
glaucoma 44:22
glide 24:21
go 5:23 10:21,23 13:21 15:9 16:9 20:6 21:1 21:3,5 25:9,11 25:16,17,17 31:7 37:9,17 38:17 39:18 44:3 49:11,24 50:3 52:10,10 57:1,2 62:10 62:22 63:9 65:6 70:10 71:19 72:20 73:9 76:8 77:7 77:18,19 78:8 78:14 79:1,23 80:5 83:13,14 88:3,7,21 89:3 93:4 98:21 99:3,7,11 103:23 107:7 112:9 116:16 118:2 119:7,11 125:17,18 126:3,4 127:1
goes 13:25 124:4
going 5:23 6:14 6:15 17:2 22:4 33:21 34:14 37:6 38:8 44:10 48:1 51:15 52:9 55:16 59:6,8,9 62:24 66:14 73:1 79:14,17 80:3,4,6,14 82:7,22 86:22 86:24 89:21 93:18 95:21 98:25 102:2 103:23 107:7 111:16,17 116:7 118:3 119:3 120:16 126:23 127:10 128:1 129:24 131:1,9
good 27:20,20 44:1 85:3 88:20 128:15
gotten 26:17 69:20 109:2 110:21
grade 17:1,2
gradual 117:3
graduate 16:2 17:8
graduated 16:3 16:12,15 17:5 17:9
Grand 1:13 19:4 19:7 20:2,11 21:1,12,15,18 21:21,24 22:11 22:20,22 31:3 39:6 40:11,12 41:7,9 47:11 53:8 54:10 55:14,21 56:9 56:18 57:12,14 57:17 58:2 100:3 122:13 123:11 125:17
grandchildren 12:19 77:20 78:17 79:4 86:8 104:5
granddaughters 77:24
grandson 13:4 78:24
grandsons 77:19 77:20
granted 18:3,7 18:15 72:14
grass 121:22
Gratiot 31:4 53:6 109:2,3,8 109:21,25 110:1,2,11,12 110:15,15
great 102:23
great-grandchild 79:6
great-grandson's 86:13
Groesbeck 24:8 50:8 109:17,25
ground 5:24 34:10 35:5,15 36:10 37:2,15 46:8 79:15,19 101:17,20 116:6,8 129:3 129:11
Group 1:9 2:19 3:4 5:18 53:24 54:12,13,21 55:12,13,21 56:1,4 58:19 125:15 131:16
growth 71:5
guess 6:11 36:7 82:3 95:21 99:13,15 112:15
guessing 24:6 91:10,15 94:10 95:21 104:19 104:19,24 126:1 128:25 129:3,12
guilty 14:21
guy 60:23
guys 37:18 44:9 98:5 115:13,17
gym 98:21
gyms 99:7

H

Hall 26:3,25 61:15,22 65:7 65:10,22 68:17
hand 81:14
handing 58:15
handle 64:3
handled 60:11,13
hands 46:13 102:2
hangers 24:18
Hanover 3:4
happen 30:19 73:2
happened 24:5 47:16 52:12 88:1 89:4 124:22
happening 73:2
happy 69:19
hard 36:11 114:20 116:1
hardest 26:9
hardware 67:11
Harper 82:15,19 82:20,24,25 83:4 108:18,23
Harrington 109:17,19,21 110:2
Harris 67:6,8
head 6:3
heading 31:3 113:21
heal 74:13
healed 88:22
healing 85:7
health 29:4,7,15 29:16
Healthy 63:12,16
hear 118:18
heard 37:1 71:12 71:15 93:18 120:17
heater 124:4
heavy 20:24 23:5 23:20 72:2,4
heavy-duty 70:8

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

heels 78:12,13
help 27:1
hereinbefore 133:9
hereto 132:22
high 16:2,17,19 17:5 78:12,13 97:14
Highway 3:5
Hills 110:21,23
hire 18:10
hit 46:2 87:25
hobbies 77:12 86:5,19
hold 26:10 33:18 85:9
holding 44:14
hole 124:5
home 9:10,11,13 9:21 20:6 30:25 46:21 49:25 52:4 67:25 69:25 82:16
Hon 1:8
honestly 6:24 7:5 52:25
honors 16:15
hooks 24:20,23
hopefully 13:25
horizon 92:9
hospital 66:17 67:12 76:15 81:7 109:15,16
hospitalized 76:3
hot 27:12 124:4
hour 19:16
hours 8:3 20:2,8 58:4 72:7 86:16 93:23
house 8:15 9:6 79:2 106:8
housework 70:21
hurt 51:11 52:2 87:17,19 89:12 89:12,22 90:2 117:18,19 118:21,22,24
hurting 51:7
hurts 13:20
husband 11:3,7
husbands 11:22
hysterectomy 76:6

I

I-94 75:17
ice 35:6,10,13 36:10,13 38:10 38:21,24 39:7 39:24 42:2,8 42:11 48:7 49:7 119:3
idea 15:5 34:20 38:10 41:22 42:24 49:16 52:14,18,25 53:22 56:4,23 62:12 66:9 71:4 73:1 98:19 100:12 113:24 115:19 117:21 118:16 118:22 123:14 124:2 125:10
identical 112:16
IDENTIFICATION 111:14 130:24
identify 82:21
illicit 58:7
illnesses 103:18
illuminating 93:5
Imaging 61:23
IMEs 63:8
Immediately 22:11
impeded 129:23
imply 115:6
important 5:24 6:3,5
in-house 64:3
incarceration 14:14
inches 34:11 38:22 39:4 114:23,24 115:19 116:1
incident 5:19 13:15 28:9,21 29:5 30:4,18 31:13,17 32:16 39:2,7,12 42:11 43:13,19 44:14 45:24 46:4,9,25 49:17 50:21 51:9,11 52:12 52:19 54:3,4 56:6,21 58:4,9 58:15 60:15 63:15 73:16,22 73:25 74:16,22 75:2,9,10,23 75:25 76:3,18 76:22,24 77:12 77:23 78:6,9 79:15 80:12 82:7,8,9 83:10 83:14,15,21,25 84:13 85:19 86:4,22,25 87:1 88:2 89:8 89:9,20,23,25 90:3,10,17 92:2,6 93:15 93:23 94:1 95:24 96:7,19 96:21 97:7,11 97:19,21,24 98:21 99:8,16 99:25 100:1 101:4,7,14 103:1,4,17,20 103:23 104:8 104:10,14 105:3,17 107:20,21 108:9,17 112:20 115:10 115:21 117:6 118:5,8 121:8 127:13 129:4 129:10
incidents 125:6 125:15
income 28:1 73:8
independent 12:15
index 4:12 97:1
indicate 16:16 20:7 119:19 132:4
indicated 44:22 112:25 132:1
indicates 131:18
Industries 124:17
infected 75:5
infection 82:12 108:6
information 58:12,12 100:16 101:1 120:24 125:5,7 126:22
inhibit 85:7
initial 21:9 126:2
Initially 61:3
injection 81:13
injections 65:20 65:21,22
injure 24:1 46:1
injured 23:11,24 45:23 76:20 118:15
injuries 28:21 30:3 51:13,20 59:1 103:20
injury 18:17 28:24 46:4 125:19
ins 90:25
inside 35:3 46:20 93:5 124:7
instability 88:17
Instagram 13:13 80:21
installing 67:10
instruct 37:20
insurance 29:4,7 60:9 63:7,8 131:21
interactions 97:17
interested 96:22 133:16

HANSON RENAISSANCE COURT REPORTERS & VIDEO
hansonreporting.com
313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

interpretation 36:21
interrogatories 10:19 27:17 43:18 58:17
interrogatory 58:18,20
interrupt 16:9
Investment 1:9 2:18 5:18 53:24 54:12,13 54:20 55:3,12 55:13,21 56:1 56:3,4 58:19 125:14 131:15
Investments 56:14 124:17
Isaac 47:2,9 119:12

J

Jamal 22:2 40:4 124:6
janitor 20:21
January 59:13 60:8 61:12,14 71:11 98:24 99:4
Jason 126:17,19 127:9
Jay 127:5
jeans 24:24
Jessica 95:17 125:6
Jim 53:1,7,8 122:21 124:8
job 10:12 17:22 17:24 20:20 23:5,11,20,24 52:3
John 59:3 60:2,4 64:5 76:16,17
Join 37:9
jump 80:3 86:24

K

keep 5:24 6:7 70:22
keeping 24:12
kept 40:1 72:10 116:25 117:2 126:23
key 34:21
kids 104:6
kind 13:25 24:19 24:25 46:2 51:7 52:4 65:21 66:5 77:18 86:18,20 94:16 95:13
kinds 23:15
knees 46:13 102:2 119:15 119:16
knew 41:5 56:5 57:14 91:8 114:25 128:19
know 6:10,11,12 6:21,22 7:19 9:17 13:6,20 14:18 15:4,14 16:20,23 17:1 18:15,19 19:18 19:20,21 22:3 22:5 24:5,7,25 26:2 28:8 29:24 30:1,15 31:19 32:14,19 32:22,23 34:24 34:25 35:2,17 36:3 37:5,8,10 37:16 38:21 40:1,3,5,22 41:2 43:3,8 45:21,23 47:5 48:3,12,23,25 49:1,18 50:13 51:17,23 52:9 52:13,15,22 53:1,4,12,21 54:16 55:2,2,4 55:8,9,16,24 56:3,7,24 57:12,14,24 61:2,20 62:1 62:20 64:7 65:23 66:2 67:24 70:6,22 73:2 76:16 78:11 82:7 84:22 86:5,15 89:22 91:3,6,7 91:10,14,23,25 92:6 93:19,22 93:25 94:3,7,9 94:13,17,25 95:20 97:14 98:8,10,14,15 99:17 100:10 100:11,15,18 100:25 101:2,7 101:15 102:17 103:13,14 104:24 109:19 115:3,5 116:2 116:2,20 117:18,20 118:15,20,20 119:2 123:18 123:21 124:20 124:24,25 125:1,2,3,4,7 125:12,13,14 125:17 126:6 127:12,14 128:19,20,23 129:2,5,7,10 129:16,22 130:14,17
knowledge 6:18 42:10 124:15
knows 51:17 57:2 94:6
Kornblum 18:22 21:11 60:10,14 60:17,25 61:21 62:22,24 63:1 63:16,19,21,25 64:2,16 66:2 66:22 67:2,9 67:20 68:4 69:6,13,17 70:15,25 71:25 77:5 107:22 126:7,9 127:17
Kornblum's 62:25 63:3
Kroger 26:17 83:13,14 110:7 110:9,21,24

L

L.L.C 1:9
ladder 20:17
lady 120:13
laid 50:2 52:5
landed 45:21
landlord 53:9,22
Landscaping 1:11 3:9 55:25 79:13 90:17 131:20
Landscaping's 58:17
laparoscopy 76:5 76:7
Lasko 9:24 11:3
late 16:3,12
latest 99:5
Law 3:4
lawns 57:4
lawsuit 28:9,12 28:24 29:1 30:15 46:6 53:1
lawyer 58:9
lay-away 24:17 24:22,25
lay-aways 23:17 24:14
leading 45:15 129:10
lease 123:13,14 123:16,24
leave 16:22 22:21 80:17
led 60:7 127:25
left 19:14 45:14 66:19 84:10 88:15,16,17 114:6 120:6,14 121:4 123:3
left-handed 84:9
legal 49:10
lenses 86:1
let's 10:21 25:9 30:18 64:14 75:15 113:13 115:9
letter 131:12,12 131:14,15,16 131:18

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

letters 131:2 132:7
level 51:25 68:24 129:24 130:2,12
Liability 1:10
license 85:24 86:2
lien 30:14
lift 20:23 78:1 111:6
lifting 23:5,20
light 41:18,24 42:4,4 92:16 92:17,17,17,19 92:25,25 93:3 93:8,10
light-colored 114:2,5
lighting 41:24 92:8 102:17
lights 41:20 92:15,16,25
liked 77:13
Limited 1:10
line 22:15
liquor 23:4
list 26:8 96:14 96:15,15,17 97:1
listen 129:6
litigation 94:16
little 7:10 8:24 8:24 36:7 80:3 86:16,24 93:7 113:17 122:14
live 8:14 9:1,3 9:21 12:23,24 21:15
lived 8:12,17,20 8:23 9:8
Livings 1:4,19 4:2 5:4,9,11 5:16 43:18 57:19 95:19 111:16
LLC 131:16
located 31:4 53:6 56:15 96:18
location 21:21 48:19,20 62:13 62:15 83:3 89:10 91:4 99:10,11,23
locations 83:8 84:3 110:9
London 10:7
long 8:12,17 9:1 9:8 16:7 20:13 22:3 25:5 42:10 46:8 62:7,19 66:17 67:12,20 68:14 72:8 127:11
look 35:12 38:12 38:15 43:23 58:21,22,24 106:7,24
looked 17:24 35:19 36:1
looking 17:22 35:4 112:9 113:21 123:4
looks 58:23 59:5 131:19,21
lot 31:16 32:9 32:12,14 33:11 35:11 36:1,13 36:15 38:13,15 38:22 39:8,24 40:11,14,15,17 40:20 41:2,13 42:6,13 48:2,9 48:13 53:10 56:8,15,17 58:12 80:4 86:23 87:2,6 90:13 100:9 102:3 105:17 113:11 115:1 115:20,24 116:3,5 117:7 118:5,13 119:14 120:1,3 121:2,3,12 122:10
lots 88:6
lottery 23:3
loud 79:16,17
low 81:9,13,14 102:18
lower 45:22,23 46:1,5 101:19
lunch 20:5
Lupo 75:19

M

ma'am 14:22 80:3 103:1 128:8
machine 86:11
Mack 8:24,24
Macomb 1:2 64:5 133:5,22
Mahoney 2:13
mail 124:16
main 26:9
maintains 55:23
maintenance 131:20 132:5 132:10
major 104:13
majority 40:25
making 86:11,21
mall 75:21
management 15:10 61:15 65:8,12 68:17,19
manager 23:14
manipulate 81:24
Mansour 18:13
March 61:21,22 62:20,21
Maria 47:2,9 119:12,23 121:6
mark 2:12 5:16 11:3 111:10 130:21
marked 111:13,16 130:23 131:1,9
Market 1:20 2:5 21:20 22:17,19 22:21,25 23:2
marriage 59:21
married 10:25 11:12 25:21 29:11 89:15,16
Martin 18:22 21:11 64:16
matter 90:8 112:15
Matthew 12:8,13
maximum 94:12
McCambridge 2:13
McLeod 1:24 133:6,20
McMillan 10:1 11:18 29:11 59:21 89:7,15
mean 20:1 27:1 32:4 46:2 47:5 51:1,4 57:6 77:21 92:1 98:8 107:5 112:22 115:6 126:5 127:21
Meaning 100:24
means 91:12
meant 113:3
measured 70:11
media 13:12 80:14
Medicaid 29:13 29:16,18
medical 13:23 30:2 44:21 50:3 58:14 60:9 73:17,23 85:20,23 88:8 88:10 90:7 107:18 108:11 111:2 117:20 119:20
Medicare 28:5,7 29:8,17,18,19 29:23
medication 6:23 7:1 27:6,11 65:13 73:11 74:1,3
medications 26:10,20 58:7 84:3
meet 5:16
Meijer 60:21 89:8,9,10,13
membership 99:3
memory 6:10
Mendelson 60:10 60:14,17,24

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

64:2 77:5 107:22
mention 42:14 69:13 72:3 74:9
mentioned 16:12 17:3 18:14 25:13,23 26:15 33:12 36:1 41:15 45:18,23 47:7 56:17 59:7 62:3 64:8 64:10,23 72:1 78:16 80:17,23 82:7 83:9,13 93:1 112:19 127:16
metal 24:20 69:9 70:7
methods 91:12
Metro 109:9
Michael 12:7,9
Michigan 1:1,10 1:12,15,21 2:6 2:15 3:6 5:1 5:13,13 8:11 8:16 9:7 127:6 130:5,12 133:3 133:22
middle 12:7 13:5 81:6
Middlebelt 110:22,23
Mile 2:14 53:6 62:14 75:17 82:15,17,22 83:5 99:13,24 108:18,23 109:13 110:22 110:23
military 17:16
mind 44:5
mine 29:23,25
minimum 94:12
minutes 21:17 70:2 71:7
misdemeanor 15:4
mixed 125:10
model 122:20,24
mom 51:3 78:19
moment 43:25 92:5
moments 47:18
Monday 31:8
money 15:8 23:17 30:3 132:9
month 27:24,25 28:6 37:24 43:19 65:8,12 73:8 79:7
monthly 15:11
months 13:6,21 29:20,22 42:12 42:19,21 65:7 65:10,11 68:6 68:12,15,21,25 96:3,4,5
morning 7:14 8:2 8:5 39:2 48:2 51:3,4,7 52:15 52:17,24 95:24 96:9 112:24 113:18,21 114:14,17 116:20
mornings 100:14
Moross 59:3 76:16,17
Motrin 50:2 52:4 73:13
mound 113:8,9
mounds 118:1
Mount 17:5 109:23
move 10:9 26:13 67:8 86:22
moving 16:6 51:5
mow 57:4
MRI 61:24 71:16 76:24
msteiner@smsm... 2:17
Mt 1:21 2:6 5:1
Mujo 11:12,13,14 11:15
muscular 126:24 126:24,24

N

name 5:8,16 10:3 21:8 32:19 34:22 53:4 60:1,2,5 67:6 79:13 82:13,13 89:7 95:16,18 98:4 125:8 126:17 127:6,7 127:10
names 9:24 12:6
Nana 78:2,3
narcotic 26:10
naval 76:8
navigate 93:10
near 48:11,17 82:19,24 109:21 110:15
necessary 57:7
need 6:20,22 19:18 52:10 60:22 66:9 70:18 79:22 87:15
needed 53:12 70:23 99:19 100:9 119:22
needs 76:9
negative 93:21
Nerve 27:4
nerves 26:23 27:1,3
never 26:18 49:2 62:12 66:12 68:18,23 82:11 97:22,25 116:5 116:7 117:1
new 42:23 103:18 103:20
nice 113:14
night 8:2 16:14 17:4 41:24 42:4 43:2 52:6 52:10,13 93:3
nights 20:16
nine 12:22 77:19
nod 6:3
noon 8:2
Nope 32:21 44:20 47:22 73:13,18 74:23,25 75:11
Norco 7:2,9,13 25:24,25 26:9 65:14 74:7 110:21
normal 112:23
north 104:10 109:18 110:14 110:15
Northwestern 3:5
Notary 133:1,7 133:21
notes 77:7 133:15
notice 5:12 125:15
November 29:13
Novi 2:15
Nowicki 75:20
number 8:15 9:6 10:13 58:20
numbers 93:21

O

o'clock 7:17 50:14 116:20
Oakland 61:23
oath 5:6
OB/GYN 59:24
object 14:25 22:4 35:21 37:6,22,22 40:14 48:21 49:9 50:25 51:15 54:1,15 55:15 56:11 57:1 59:12 115:4
objection 15:18 37:17 40:21 55:8 66:11 72:13 73:6
objections 37:20 54:23
objects 72:2
obligation 121:11
observed 35:23
obtain 120:24
obviously 13:19 86:7
occasion 115:17
Occasional 73:13
occur 64:19

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

occurred 5:19 31:14 64:5 65:23 88:19 105:18
October 18:6,14 90:6
office 60:11 62:25 63:3 71:3
officer 15:11
Oh 19:4 51:6,6 53:12 60:22 63:23
okay 6:10,20 7:21 9:10 10:17 17:10 20:2 21:23 22:18,21 23:2 26:20 27:8 30:1,1,16,18 33:9 34:1,22 37:23 39:18 41:9 42:24 52:12 56:4 58:11 59:4,6,9 60:7 61:23 63:18,25 64:3 64:14,21 66:25 67:2 69:17 71:6 74:8,14 78:20 79:4,16 79:17,18,20,21 80:6 85:18 89:1,15 93:15 94:23 96:4,20 99:25 101:3,11 102:22 106:15 108:9 111:25 112:7 113:13 113:20 114:4 114:24 115:21 117:16 118:12 121:16 122:1 123:4 124:14 125:17 128:3 128:15,18 129:20 130:20 131:15,18
old 15:19 43:19 77:24
oldest 12:7 13:3
once 68:6 75:13
ones 65:16 110:19
open 31:25 114:16 117:25
opened 32:1 46:19 101:24
opening 20:5,10 20:13,15,18
operated 70:3
operator 129:14
opinion 66:14 89:1 126:21 127:4
optimistic 73:4
optometrist 99:19
optometry 99:22
order 90:21 124:23
ordered 15:9,12 77:5
originally 13:19 29:12 116:17 125:24
ortho 70:8
outs 90:25
outside 107:23 119:22 124:8
owe 11:22 15:8 30:3,5 131:5,6
owed 124:9 132:2
owner 21:22,24 22:1 33:7 53:18 57:14,16 57:17,21,22 100:8
owner's 117:15
owners 22:3 40:4 40:9 47:11 57:20
oxygen 85:4,7

P

P 59:9,11
P.C 2:4
p.m 1:22 5:3 132:20
P40617 3:3
P51293 2:3
P78817 2:12
PA 68:8
pack 84:23,25 85:11,13,16
packed 34:11 36:16,17,20 38:10 48:9 101:20 107:8 114:20 116:1 129:17 130:9
packing 116:21 117:1
page 1:18 4:2,15 111:18
paid 21:12,12 61:2,7 124:8 124:18
pain 27:4,6 51:25 52:9 61:14 65:8,12 65:13,14,19 68:17,18,24 69:20 73:11,19 74:4,17,18,21 81:14 84:3 126:23
pains 76:13
paint 86:15
Panthanji 27:14 77:6
paper 6:3
paperwork 23:18
Pappas 60:3
parents 10:12
park 38:6 40:18 40:24
parked 30:22 33:17,20 34:5 38:7 40:17,19 40:24 96:18 112:20,25 113:7,18
parking 31:16 32:9,12,14 33:11,14 34:8 34:9 35:11 36:1 38:6,13 38:15,22 39:7 39:24 40:11,17 40:20 41:2,13 42:5,13 46:14 48:9 56:8,15 56:17 87:2,6 90:13 100:9 102:2 105:17 113:6 118:13 119:14 121:2,3 121:12 122:10
parks 34:20
Parkway 109:9
part 45:21 122:13 123:13
partial 76:5
particular 41:6 74:16 122:9
particularly 89:21
parties 132:22
party 29:1 133:16
patient 30:7
pavement 35:8 120:16
pay 13:23 15:10 15:10 28:7 37:19 61:4,4 78:23,24,25 122:4,14 123:11 127:3
payment 9:17 27:24
pays 121:23
Payton 9:6
peek 44:1
people 24:13 38:8 47:15 51:6,8 57:24 61:3 98:9 119:5
percent 51:6,10
perception 7:10
perfect 36:20
perfectly 6:12 30:1
perform 64:17
performed 64:15 67:2 69:6
period 16:17 22:16 25:3 51:13 62:16 116:10,11

HANSON RENAISSANCE COURT REPORTERS & VIDEO
hansonreporting.com
313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

permanent 46:3
permanently 72:11
person 86:20 105:13
personal 42:10 93:8
Personally 57:23
pharmacies 82:6 83:19 108:14 110:19
pharmacy 26:9 82:13 83:14
phone 32:16 33:1 33:3,8 53:17 94:19 95:1,2,3 95:8
photo 120:14
photograph 111:18,19 112:10,14 113:18 114:5 121:5
photographs 4:17 44:10 113:22
photos 80:17,18 94:15 96:5 120:6
physical 63:18 63:22,23,25 64:2 68:10,12 68:14,20,23 76:18,21
physician 18:19 59:8,17,19 60:8 62:25 63:4,10 127:21
physicians 128:3
pick 48:7
picture 44:6 96:17 112:4
pictures 96:6
piled 34:8
piles 113:10 118:1
pills 65:14
Pinewood 8:11 9:10,21 30:25
pins 66:5
pissed 117:25
pitch 93:13
place 19:5 63:17 82:14 108:1 133:9
places 83:24 112:16
Plaintiff 1:5 2:9
Plaintiff's 58:16
Planet 98:22 99:10
planned 66:25
plastic 24:19,23 25:1
plates 72:4
play 77:20
played 88:5
plaza 38:7,9 56:15
plea 14:21
please 5:7 27:15 49:11 80:15 129:1 130:21
plow 36:2 37:25 38:2 42:16,22 42:23 57:7 116:3,22,23
plowed 35:18 36:2,5 38:15 46:15 107:13 115:1,9,20 116:5,5,8,18
plows 107:11
plus 19:16
point 14:15 15:19 66:10 81:7 94:15 96:23 99:19 106:5 113:25 127:4
pointed 118:25
pointing 81:9 120:6
popped 127:7
portion 122:11
portions 106:2
position 16:7 20:18
possible 30:17
post 13:15
posted 13:24 80:14
posts 92:17,25
pounds 111:6
power 101:25
pregnant 16:24
premises 40:1 41:20,21 53:25 54:14,22 55:14 55:21 56:5,24 57:10 91:24 98:18 100:4,25 114:25 121:12 125:18
prepaid 132:2,4
prescribe 26:4 65:14 70:25
prescribed 25:24 26:2 70:15
prescribes 26:24 27:13
prescription 26:14 73:14 83:23,24
prescriptions 26:6
present 8:10
presently 25:21 27:22 74:3
pressure 27:11
pretty 77:2,4
previous 9:24 11:22 38:16
Previously 38:19
pride 51:11
primary 27:14 59:8,17,19,23 60:8 107:23
prior 8:14 19:9 42:21 52:13 58:4 73:16 82:6 83:10,25 84:13 86:5,6,7 86:9,25 90:10 90:17 99:8,16 105:3,4,8 115:10,21 117:6 118:5,7 123:9 128:3
privacy 10:15
pro 132:1
pro-rata 123:22
probably 5:25 10:19 11:9 13:21 14:20 16:23 43:1 52:2 78:10 85:17 99:17 109:5 110:3
probation 14:16 15:11
problem 15:23 18:19 72:8 87:22 99:18 121:21
problems 72:5 73:16 89:4 99:15
process 117:3
program 17:4
progressed 52:5
progression 51:20
pronouncing 11:9
property 9:19 55:23 57:6 111:24 120:20 121:17,20 131:5 132:5,11
provide 51:21 94:17
provided 58:11 94:15 97:2
providers 58:14 59:7 107:19 108:11
psychiatrist 84:14 103:2
psychologist 84:13 103:2
PT 64:12
Public 133:7,21
punch 25:16,18
Pure 63:12,16
purpose 40:6 56:9 96:4
purposes 5:12 15:20 46:5
purse 44:15,18

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

pursuant 5:12
push 113:10
pushed 24:20,25 105:23
put 24:13,15,16 24:23 25:2 66:8 82:2 123:6 128:9
putting 23:18

Q

quarterly 122:2
question 6:7 7:8 7:12 30:7 32:11 33:19 35:24 37:11,21 43:10 45:25 54:24 55:2,20 84:6 88:25 91:19 92:5 94:21,22 97:19 100:22 106:23 115:7,22 116:2 122:22 123:21 126:12 129:1,6
questioning 104:16
questions 6:5,6 6:14,15 7:6 44:4 59:6 79:14 80:4,5 86:23 102:16 103:13 111:11 128:10 130:20 133:11
quick 44:10 58:21 77:8 122:19 131:2
quite 66:6

R

R 1:24 2:3 3:3 133:6,20
rack 24:15,21,24
racks 24:11
rained 93:25
ran 60:20
Randall 18:13
rata 132:1
Ray 11:7
Raymond 8:15,17
RE-EXAMINATION 4:6,7,8,9 122:18 128:7 130:25 132:15
reading 102:14
real 9:19 77:8 122:19
really 51:13 67:24 68:23 82:11 94:17 95:13,22 98:8 99:3 123:2
rear 33:14 93:2
reason 24:22 73:11 76:4 94:20 122:6
reasons 38:5
recall 13:18 15:6 18:12 19:7 74:16 76:23 82:11 89:7 94:2 97:9 101:16,17 112:11 113:1 126:11 131:6
receive 27:24 28:19 122:2
received 124:16 124:19
receiving 24:19 27:22 28:4 126:22
recess 44:12 77:10 79:25 91:20
recipient 100:18
recognize 111:21 130:2 131:10
recommend 126:9
recommendation 127:19
recommended 126:7,13
record 5:8,10,17 5:23 6:8 10:14 10:21,22,23 14:12 25:9,10 25:11 43:21 67:18 77:8 80:1 83:17 84:19 91:21 102:24 116:14 120:12
recorded 133:12
records 16:16 20:7 44:21 84:16
recovered 69:16
rectangle 113:17 128:16
redeemed 28:12
redemption 30:9 61:7
reduced 133:13
reduces 85:3,6
refer 60:17 62:9 63:25
reference 65:3
referred 103:15
referring 58:20
refill 44:10
refillable 83:24
refilled 26:6
reflect 5:10 43:21
refreeze 130:13
refresh 114:22
refusing 13:23
regard 15:14 46:5 125:5
regarding 13:15 72:14 122:20 122:23
register 24:13 124:22
registers 23:19
regularly 12:25
relate 46:4
related 75:1 108:10 132:10 133:15
relates 108:9 130:16
relation 76:10
relative 98:18
relax 27:1
relayed 125:6
relevance 14:25 15:18 73:6
remember 8:15,17 8:20,22 9:5,7 9:8 28:15 31:13 37:10 52:14,16 59:22 60:2,5 65:24 75:16 101:12 103:6,8 105:12 115:16 127:10
REMOVAL 1:12
remove 121:11
removed 66:10,12 130:3
rent 9:13,15,17
Rentals 9:16
rented 122:15
repairs 121:20
repeat 129:1
rephrase 55:11
report 39:21,23 50:21 58:2 121:8 126:2
reported 125:12
reporter 6:1 111:13 130:23 133:6
reporting 15:11
reports 127:24
represent 5:17 79:13
requested 132:21
require 20:23 23:5,20
required 20:22 23:4 40:18 69:23 73:17 75:5
residue 130:5,8
respect 78:5,8
respective 132:22
respiratory 82:12
respond 6:16
responsibility 49:5,14
responsible 23:16 77:25 122:4,24 123:18
rest 116:23
restaurant 32:2 33:6,8 41:15

HANSON RENAISSANCE COURT REPORTERS & VIDEO
hansonreporting.com
313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

46:11,18 90:20 100:8 112:1 131:25
restrictions 85:21,23 111:2
result 5:18 15:8 23:8 30:3 45:24 58:14 59:1,2 87:17 89:22,25 90:2 90:8
retail 14:9,12 15:14
returns 19:21
right 7:10,24 10:1 11:1 14:2 16:16,17 19:15 20:8 22:23 25:14 28:13 31:5 36:23 37:13 39:3,17 41:9,16 42:2,8 42:14,16,19 45:14,15,18,19 46:6 47:7,12 49:3,19 54:8 54:10 55:7 56:19 57:10 60:12 61:9 62:5 63:9,24 65:5 67:2 69:2 70:4 72:2 75:21 78:17 80:8,12,23 82:18,25 84:9 84:10 86:12 87:5 88:15 93:15 96:25 97:14 98:2 102:20 104:5 105:7 106:5 107:4,25 109:14 110:1 111:7 113:3,19 114:8 115:6 116:12 124:18 126:15 127:17 127:23 128:13 129:24
right-hand 84:11
road 2:14 31:4 83:5 109:13 120:16
Robert 34:23
rod 25:1
rods 66:8,9 67:10 70:7
rolled 24:16
rolling 24:11,15
roof 124:5
room 75:1
rose 97:14
Roseville 8:11 53:7 75:8 99:24 110:18
RPR 1:24
rubber 43:23
rule 6:9
rules 5:13,13,24 79:15,19
ruts 117:1

S

safety 58:1
Sage 5:17 53:1,5 53:7,9,24 54:5 54:12,13,18,20 55:12,13,20 56:1,3,4,8,13 58:19 121:24 122:21 124:8 124:17 125:14 131:3,15 132:9
Sage's 1:9 2:18 55:3 121:19,24 121:25
sake 130:1
salt 40:1,6,9 119:23
salted 116:6
Sam's 99:22
Saturday 31:10 50:15,19 67:16 125:24 126:4,5
savvy 95:13
saw 24:7 35:23 44:21 61:11 63:3 131:3
saying 68:20 126:23
scale 52:2
scan 76:25
schedule 20:4 68:10 78:19,20
scheduled 30:20 34:16 50:15 52:8 114:13
Schoenherr 99:13
school 16:2,14 16:17,19,25 17:5,11
scope 76:8 91:3
scraped 117:1 128:23,24 129:2,11
screw 77:21
se 87:3
season 129:9
second 11:7 33:18 45:4,5 45:11,14 62:21 62:21 64:17 66:1,14 67:1 67:17 68:4,12 68:25 69:14 79:22 91:18 126:21 127:4
secondhand 124:15
seconds 46:10
secretarial 17:10
Security 10:13 18:1,3,7,20 27:22 72:15 103:6,10 126:8 126:13 127:20 127:25
see 12:25 13:2,5 13:6 24:3 28:8 30:1 32:9,12 35:6,8,10 42:1 42:7,8,23 44:17 48:12 52:10 55:11,11 55:18,20 57:9 61:2,18,22 62:7,22,24,24 63:4 65:6,12 67:22 68:9,16 69:16 75:15 76:9,18 79:4 103:1,4 111:19 112:7,14 113:20 114:2,5 114:6 115:1 117:8 118:17 120:3,6 123:2 123:3 124:10 127:1 131:23 131:25
seeing 45:6 63:15,21 64:23 65:7
seek 50:3 90:7 90:10
seen 34:25 36:4 55:23 61:14,14 63:5 76:20 80:25 84:13 97:22,25 114:25 122:10 124:11 131:12 131:15 132:7 132:16
Segal 2:13
senior 17:2
seniority 20:16
sense 93:4
sent 62:14 95:10
September 15:3,3 26:1 89:19 133:24
series 81:3
serve 17:16
server 20:5,10 20:13,15,18,21 31:24 47:10 119:14 121:6
service 23:14
services 123:12
Servitto 1:8
set 20:4 132:14 133:9
Seven 8:13 20:14
sew 86:11 104:3
sewer 121:20
sewing 86:11,18
sgabel@hanove... 3:8
share 131:6

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

sheet 6:2 35:13 36:13 38:9
shelves 23:4
shift 49:22 52:3 102:12 114:13
shipping 24:12
shock 51:21
shoes 43:12,16 44:7
shoot 96:9
shopping 110:10
Shores 8:16,24 14:17 15:7 83:2,6 108:20 108:25
Short 44:12 77:10 79:25 91:20
Shorthand 133:6
shot 96:10
shoulder 24:2,9 25:2 76:20
shoulders 6:4
shovel 48:7
show 43:15 111:16 119:21 131:9
showed 122:8
shower 86:13
showing 96:17
shown 43:22
shows 122:8
shrug 6:4
sick 82:11
side 40:8 41:21 104:11
sidewalk 40:10 119:24,25
sidewalks 40:7
sign 98:23
signature 132:21
signed 98:22 99:12 103:12
similar 131:16
simply 6:7 58:17
Singer 2:13
sir 14:3 23:10 23:12 28:25 29:3 39:23 56:20 82:25
sit 16:7
sits 82:18,25 83:4
sitting 74:20 94:18 102:20
situation 37:23
situations 39:21
six 25:6,13 34:11 39:4 68:12 72:4,7 114:23,24 115:19 116:1
six-month 122:3
Skechers 43:18 43:22
sleep 52:6
sleeping 74:20
slightly 95:25
slip 48:11 74:22 75:23 87:1,3 103:15 117:22 120:19 125:23
slipped 87:3,4 101:11,15 118:4 119:3,25 120:1,4,4,15
slippery 32:14 102:1 130:9,13
slipping 46:12 117:7
smoke 84:16 85:9 85:13,16
smoked 84:19
snapping 44:10
snow 1:11 32:9 32:12 34:8,10 34:11,12 35:14 35:16 36:4,5,6 36:7,14 37:15 38:10,21,24 39:7,24 42:1 42:10,16,23 46:15 93:17 94:4,9 101:21 105:18,20,23 107:1,8,11,12 107:13 112:11 112:12,13,17 113:8,9,10 114:21 115:20 115:24 116:1,4 116:14,17,19 116:21,25 118:1 121:11 121:22 128:22 129:3,9,17,23 130:3,5,8
snowbank 102:5,6
snowed 35:18 37:25 38:2 42:22 52:13,15 52:18 116:24
snowing 37:24 52:16,20,23,23 101:3
snowplow 37:25 38:1 113:10 115:16 129:14
snowplowed 107:12
snowplows 107:13
soaking 46:20
soccer 77:20,22 88:6
social 10:13 13:12 18:1,3,7 18:20 27:22 72:15 80:14 84:14 90:22 97:18 103:2,6 103:10 124:24 126:8,13 127:20,25
soft 34:12 36:9
soles 43:23
solid 36:9,9 38:9 113:7
somebody 47:24 60:4 105:12
son 12:7 13:4,5 51:1 75:15 78:22 81:6
son's 13:3
sons 88:5
soon 58:9
sore 46:2
sorry 16:9 17:8 19:4 26:18 27:7 43:24 62:12 71:20 113:16 122:22 125:9 126:10 126:19
sort 44:22
sought 117:20 119:19
sound 14:22 98:4
sounds 64:11
source 92:16 94:18,25
sources 28:1
Southfield 3:6
speak 53:16 90:19
Spear 34:23 47:2 47:7 54:4,7,17 55:18,22 56:2
specialist 62:14
specialized 21:10
specific 39:13 39:14 105:22 123:22 124:2,6 131:12,14
specifically 43:5 58:24 123:20
speculation 37:7
spell 27:15,19
spelling 27:16
spine 82:3
spoke 51:8
spoken 90:16 98:2
spot 34:9 112:21 113:1 128:9,16
spousal 11:22
Sprint 32:20
square 121:18,18 122:3,11,14,25 132:1,1
SS 133:4
St 8:15,24 14:17 15:7 59:3 60:2 64:5 76:16,17 83:2,6 108:20 108:25
stand 43:24 44:3 46:12
standing 74:20 81:18 83:23
start 16:19 22:25 30:18

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

60:7,24 63:12 71:8 101:9 116:21
started 22:8,22 28:3,5 29:12 29:17,19,24 48:9 63:21 64:23 68:13 76:13,14 116:17 127:16
starts 29:23
state 1:1 5:7 104:11 133:3,7
stated 55:8 72:22 86:1 92:21
Statement 4:19
States 10:9,11
stayed 20:1 28:3 62:22 67:25
Steiner 2:12 4:3 4:6 5:7,10,15 5:16 8:9 10:18 10:23,24 15:1 15:22,24 16:11 19:15,17,24 22:7,14 25:11 25:12 27:16,21 30:13 32:24 33:23 34:2 35:25 36:22 37:1,4,14 38:11,20,25 39:3,5,11,14 39:17,20 40:16 41:1,5,8 43:7 43:9,11,21 44:13 48:24 49:7,15 51:17 51:22,24 52:20 54:2,6,19 55:2 55:6,7,10,17 56:12,16 57:8 57:22,25 59:14 60:6 64:8,10 64:13 65:1,5,9 66:13 67:19 70:14 71:22 72:17,24 73:10 74:8,10 75:22 77:7,11 79:3 79:10,19 80:4 86:23 104:17 105:2,7 107:19 108:16 112:20 122:18 123:24 124:1 126:15 126:18 127:23 128:2,5 132:14
stenographic 133:15
stenographically 133:13
stenosis 105:4
stepped 118:2
steps 30:23 33:12
steroid 65:21
Steve 27:19 79:13
Steven 3:3 12:7 12:11
sticky 16:8
stimulate 71:5
stimulator 70:1 70:25
stock 113:10
stocked 23:4
stocker 23:3
stomach 67:7
stop 68:18,23 86:17 99:2 116:7
stopped 25:1 53:9 69:1 77:18 99:4
store 23:16 24:16 70:10 122:13
stored 95:5
story 47:16
straight 30:23 45:19 101:19 119:15
street 1:20 2:5 8:11,18,22 9:5 9:10,21 26:12 30:25 82:21,21 108:17,21 109:8,19 110:7 110:11 119:25
strength 7:18
stretch 16:5
strike 47:14 85:18
strip 75:21
study 17:14
stuff 36:9 77:13 77:15 88:6 95:13 103:11 117:1
subject 132:10
substance 15:25
successful 69:14
sued 5:18 61:8
suggested 127:14
Suite 2:14 3:5
summer 57:4
sun 92:9
Sunday 31:12 86:13 118:9
supply 70:10
support 11:23,25
supposed 17:8 66:5 71:5
sure 5:22 33:18 69:25 91:19 104:23 119:8
surface 38:22,25 42:13
surgeon 21:11 67:6
surgeons 67:5
surgeries 13:24 45:1,7,9 60:13 64:6,14 67:23 69:21 75:9 99:14,15
surgery 13:24 44:25 45:11,13 45:14 60:11 64:5 66:1,3,4 66:15,18,19,21 66:23,23 67:1 67:4,13,14,21 67:25 68:4,13 68:25 69:1,4,6 69:14,14,15,18 69:19 71:9
surrounding 119:2
sustained 30:4 59:1
swelling 89:2
swept 23:3
switched 22:8
sworn 5:5 133:10

T

T-Mobile 32:20
T&J 1:11 3:9 55:25 56:21 57:14 58:16 79:13 114:25 124:20 131:19
T&J's 90:16,19 91:17,23 97:17 97:20 98:15 104:25 128:18 128:23 129:2 129:11 130:18 132:16
TABLE 4:1
take 7:2,9,21 8:1 10:16 25:14 26:21 27:9,11 58:21 59:23 65:20 73:11 77:25 79:22 124:23 125:22 126:2
taken 1:20 5:11 5:20 6:22 82:2 95:24 96:2,3,5 133:8,15
takes 74:6 86:14 86:16 121:19
talk 28:22 47:23 55:7 64:14 90:23 91:18 97:20 117:22
talked 29:8 50:23,24 65:16 90:22 99:7 103:18,21 105:7 112:20 124:20,25 127:8 128:18 128:22
talking 24:24 87:2,6 113:9 116:8,9 120:11

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

121:4 127:9 128:8 129:9
tax 19:21
taxes 131:21
team 77:16
tech 95:13
tell 7:3 21:3,5 43:5,7 46:25 47:15,21 50:9 51:22,25 61:21 81:5 82:13 84:22 85:6 95:21 105:13 105:19 107:18 108:5,17 110:7 111:4 113:3 120:12 121:1
telling 86:4 105:12
temperature 93:19 97:9 101:6 130:11
Ten 75:17
tenant 123:23,25
tenants 56:14
tends 72:4
TENS 74:6
terminated 14:19 19:1
terms 106:1 123:18,24
test 6:9 15:13
testified 5:5 57:19 72:14 105:10 127:22
testify 36:18 133:10
testimony 7:9 131:7
Thank 8:7,8 14:24 27:18 44:2 79:10 80:19 117:6 122:17 128:15
Thanks 128:6
therapist 76:19
therapy 63:17,18 63:22,23 64:1 64:2 68:10,12 68:14,20,23
they'd 126:4
thing 14:1 20:16 24:14,25 46:3 48:8 66:5 67:9 82:2 103:8
things 6:4 20:24 23:15 63:5 74:8 78:11 86:12 93:18 96:14 97:18 103:24 131:5
think 10:18 15:20 30:8 32:19 33:20 36:14 43:9 45:3,18 60:1 64:10 67:15 73:9 77:8 83:13 86:18 89:19 95:15 98:5 104:15,18 105:6,9,23 109:4 110:6 111:1,17 114:12,19,21 115:4 119:21 126:16,20 128:5 132:14
third 64:20 69:1 69:4,18,19 71:9
Thirteen 2:14
thought 19:4 64:8 69:13 94:22 100:24 104:17 105:14 128:22
threatened 126:25
three 7:25,25 12:5 13:3 22:16 30:23 33:12 34:3 62:8 65:22 67:16 71:9 72:9 74:8 77:20 78:12,18 87:21 88:5 93:25 94:4,10 94:13 113:6
three-week 62:16
Thursday 31:8 43:1 104:18,20 117:11
time 6:20 7:13 7:16 8:4 14:15 17:20 18:8 20:10 22:15 25:3,17,18,24 29:4 31:7,8,16 32:2,4,4,16 34:17 37:24 39:10,13,14 42:24 43:5,19 44:14 50:13 51:14 52:18 54:1 55:4 57:3 57:10,11 59:11 61:11 62:16 63:15 68:11 71:15 72:15,21 74:12 77:23 78:2,13 79:6 80:12 81:1 82:8 86:15 93:15,20 96:6 96:19,20,23 97:15 99:19 100:5 101:3,6 101:9 116:10 116:11 117:2 122:8 123:1 125:11,22 133:9
times 7:25 11:1 13:3,6 78:18 81:4 105:22 125:21
Timothy 11:18 29:11
tips 19:16
titanium 66:7
titled 58:16
today 6:23 7:9 13:20 28:22 79:15 85:9 100:1,2 101:14 111:2
toes 86:15
told 30:2 47:24 48:1,3 49:2,16 51:1,4 52:8,10 52:22 60:22 61:3 62:10 71:16,23 72:11 83:20 85:2 86:5,6 89:20 93:17 99:14,25 100:24 103:24 105:2,14 107:19 108:11 108:16,21 118:19 119:22 124:9 125:25 126:21 127:1 127:11
Tom 22:2 40:4 47:3,11,23 98:4 100:5,6 118:13,15,20 118:20 119:22 121:15 122:20 122:23 123:5 124:6,15,18,20 125:3,4,7,12
Tom's 119:2
tomorrow 73:2
tooth 75:5 108:8
top 35:14 36:6,8 112:15 113:18
topic 86:24
total 27:24 28:16,17 29:14 29:16
totally 93:12
Township 109:5,6 109:24 110:3
transcribed 6:2
transcript 4:13 133:14
transcription 133:13
transpired 103:15
treat 25:3 59:15 60:7 62:19
treated 15:25 25:13 58:14 59:1,11 60:14 62:17 63:16
treaters 58:25

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

treating 60:7,24 61:9 73:22
treatment 63:12 65:3 69:1 73:17 77:2 88:10 90:7,11 108:2 117:20 119:20
trial 15:20
tried 46:12,14 96:9 102:1
trigger 128:20
trodden 35:15 36:11,15,24
trouble 45:6,15
truck 35:19 42:24 43:5 104:17,22 114:2,3,5
trucks 38:7 42:14 104:21 127:5
true 88:11,13 91:6 97:20 133:14
truth 7:3 133:10 133:11
truthfully 6:17 6:24 7:5
try 21:1 48:9 59:8 70:22 131:1
trying 22:15 60:1 96:7 115:22 117:25 126:16,20
Tuesday 31:10 119:8
turned 127:25
twilight 92:11
twin 77:23
twins 13:7
Twitter 13:13 80:19
two 9:2 13:3 29:22 38:7 42:12,19,21 45:1 52:4 57:20 66:20 67:5,22,22 68:2,15 83:8 83:19,24 84:3 86:16 97:10 99:15 110:9 113:6 114:6 116:24 121:4 128:10
type 43:12 48:8 74:19 101:20 105:14 107:1
types 77:15
typically 81:13

U

Ultimately 127:24
unable 52:6 72:22
unbruised 88:20
understand 30:6 45:25 54:24 55:1,6 68:20 80:11 81:19 84:16 87:19 92:22 100:21 121:1 122:22 123:16 130:9 130:11
understanding 9:23 10:25 28:12 54:7 60:10 61:6 72:18 121:7 123:11 124:4 124:14
understood 6:15 33:19
unemployed 22:16
unemployment 18:23,25 23:1
unit 70:3 74:6
United 10:9,11
unrelated 75:10
upper 82:12
upstairs 23:18
urgent 75:3,7,8 108:3,5
use 24:18 56:8 56:15 69:23 70:4 71:6 84:10 105:3,6 114:17
usual 31:7,8
usually 8:1

V

vacations 104:7
Vague 40:14
Valentine 21:8
vehicle 30:22 33:12,25 87:8 87:10 104:25 114:6 118:14 120:15
vehicles 38:4,12
vein 6:5
Vena 27:14
verbal 5:25 111:3,4
verify 58:13,23 58:25
Verizon 32:20
versus 48:19
vertebrae 69:12
Village 21:20 22:17,19,21,25 23:2
violence 14:11 15:2,9 89:20
virtually 112:16
vision 45:9 99:16
visit 63:9 81:3 82:11 125:18
visited 75:12
visiting 127:16
visits 75:1 77:6 81:3,11
vs 1:6

W

W 2:12
wage 19:13 20:1
wait 6:5 29:20 69:16
waited 60:21 127:11
waitress 51:5 72:1 125:18
Wal-Mart 26:17 26:18
Walgreens 26:12 26:18 82:15 95:10,11,14 108:21 109:2 110:5
walk 30:22 38:1 38:3 42:3 46:16 106:11
walker 69:23
walking 39:1 41:13 46:15 70:4 74:20 106:4 119:24 120:15 128:16
wall 96:8,8 107:2,9,10 111:24 113:4,5 113:5,8 116:18
walls 107:11
want 10:20 16:21 29:13 36:15,18 44:21 46:16 58:13,22 62:8 68:15 74:12 86:15 89:22 92:8 93:14 106:16 113:13 113:16 120:12 125:10
wanted 67:22 93:11 126:21
wanting 77:18
wants 44:1 53:23
Warren 62:11,13 62:19 99:13
wasn't 34:12 59:23 87:3 93:11,13 99:18 123:2,8
water 94:4,4 124:4
way 20:17 26:11 48:2 67:9 81:24 89:13 107:10 113:14 114:13 118:13 121:2,17
we'll 10:23 25:11 79:9
we're 24:24 28:22 79:15 80:1,14 91:21

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

100:1,2 101:14
we've 110:20 131:1
wear 44:19 70:2 70:17,21 78:12 78:14 99:18 102:13
wearing 43:12,16 102:21
wears 74:5
weddings 104:13
Wednesday 1:23 5:2 13:25 26:3 26:25 31:11 66:19 67:15 119:8 125:25 126:3,3
week 13:3 15:3 20:2,8 31:9,13 62:20,21,21 66:24 67:23 75:6 78:18 89:2 90:6 119:6,9
weeks 25:6,14 62:8 67:22,23 68:2 71:9 87:20 129:10
weight 80:7
went 5:17 16:14 16:16 28:6 30:22 46:20,21 48:7,8 50:13 52:4,7 59:3 62:3,22 66:4 67:7,14,24 68:1 69:15,18 76:17 81:4,5 82:6,14 83:3 96:8 103:12 108:1,4 116:18 119:15 125:22 125:24 126:6 127:7,13
west 104:11
wet 46:21
white 35:13 36:13 38:9 107:8
wife 51:2
willing 127:2
window 93:2,4,5 96:8 106:7
wings 69:9
winter 57:6 91:9 116:12 117:4 118:5 120:20 130:17
wintertime 87:12
witness 5:9 7:11 7:15,17,20,23 7:25 8:3,6 14:23 16:6 19:16,22 22:6 30:9 32:23 33:24 35:24 36:17,20 37:3 37:12,18,23 38:19 39:4,19 40:23 41:6 43:4,20,22 44:3 48:22 49:8,13 51:1 54:4,17,24 55:5,16 56:13 57:3,23 59:13 60:4 65:6 66:12 70:13 71:20 72:16,21 73:8 75:20 79:1 94:7,22 97:24 98:12 102:20 106:13 106:15,17 109:6,14,18 110:1 126:16 127:24 129:7 132:21 133:10 133:12
witnesses 32:7
woman 119:19
word 36:16,24 105:3,6,24
words 113:16
wore 78:12 87:23
work 13:20 20:2 21:1,19 22:12 25:7,14 30:20 31:7,9 46:22 46:23 47:3 48:2 49:19 50:10,15 52:7 52:15 54:5 72:18,22,25 73:4,9 77:17 78:20,22 87:21 87:23 90:25 91:4,9,12 97:18,20 101:9 114:13 118:16 126:3,4
worked 19:5,7 20:7,11,17 21:18,20,23 22:1,17,19 25:8 31:10,10 39:15 50:18,19 53:6,7 54:17 57:21 123:1
worker 84:14 103:2
Workers' 23:7,22 28:8,10 30:14
working 22:11,22 25:15 55:3 72:10,12 86:9 123:8 125:11
Workmen's 13:22 30:10 61:3 126:25
workplace 58:1
works 56:3 121:6 121:17
worse 52:6
worth 115:20
wouldn't 116:19 125:14
wrestling 88:6
written 85:20 111:2,3
wrong 11:9 51:3 51:6

X

X 128:9
x-rays 82:2

Y

yards 33:16,24 106:1,12,13 114:8
yeah 11:15 16:6 19:22 29:10 33:23 44:8 64:11 79:6 86:20 93:16 111:8 128:13
year 14:20 16:23 17:2 24:5 57:3 61:13 65:24 77:24 86:25 88:18 99:3,25
years 8:13,19 9:2,9 15:19 16:3,12 17:3 19:7,8,9,12 20:14 22:6,8 22:16 29:22 39:15 57:20,21 72:10 75:15 77:17 78:5,10 80:25 81:1,2 82:8,9 83:11 83:20 84:1,7 85:19 86:6,7,9 99:8 123:1,8,9
Yep 88:24 119:10
youngest 12:8 13:4,4

Z

zip 9:7

0

1

1 1:18 4:16 111:12,17 115:1 117:8 120:3,7 128:8
1:00 50:14
1:30 50:14
10 8:19 9:9 16:3 16:12 17:3 19:8,9 22:6 39:15 52:2 57:20 68:5 89:2 108:4 123:1
10/325 7:20
10:00 116:20

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

10th 61:22
11 19:12 53:6 99:13 108:18 110:22,23
11,000 19:23
111 4:5,16
11th 17:2
12 82:15,17,22 108:23
120 1:20 2:5
122 4:6
128 4:7
13 83:5 99:24
130 4:8,18
132 4:9
133 1:18
14 24:8 50:8 62:14
140s 80:11
14th 89:16
15 109:13
163 80:10
17 15:19 58:20 58:25
190 107:7
1960 10:5
1974 10:10
1977 12:10
1978 11:5 17:5
1980 11:5
1983 11:10 12:12
1984 12:14
1986 11:10
1989 11:16
1990 11:16
1996 11:20
1999 11:20
1st 29:24

2

2 4:18 130:21,22 131:1,9
2-21-14 97:7
2.90 19:16
2:00 31:10,11
2:45 1:22 5:3
20 72:10 80:25 84:19
20-year 123:16
2000 14:13,21 19:3 76:20 89:19
2001 23:1
2004 19:11 21:19 21:23 22:23
2009 45:3
2010 15:3 90:6
2011 98:24
2012 19:25 99:4
2013 19:18 91:9 129:9
2013-2014 130:17
2014 5:20 17:21 17:24 18:6,14 19:9 21:23 26:1 29:14 52:13 58:10 61:1 62:2 64:23,24 71:21 91:9 98:18,25 112:9 115:10 115:16 116:9 118:6 127:17 129:9
2015 18:16 28:4 45:5,11,16 59:13 60:8 64:22,24 71:20
2016 28:6 29:17 29:19,24 69:5
2016-1819-NI 1:7
2017 1:23 5:2 133:24
203 2:14
20th 117:11
21st 5:19 30:20 52:12 69:5 112:5,9
22 1:23 5:2
22nd 17:21,24 125:25
23 133:24
233-5535 3:7
23rd 118:9
24 58:4 93:22
248 2:16 3:7
25 80:25
25800 3:5
25th 125:25
27059 8:11
28 127:13
28-day 127:12
28,578 28:20
28100 8:24
2901 1:24 133:20
29th 64:22
2nd 10:5

3

30 29:15,20 70:2 71:7 80:25
30th 61:21
33 75:15,15
34 81:1,2
38 20:7
39475 2:14

4

400 3:5
469-1111 2:7
48043 2:6
48066 8:11
48075 3:6
48081 8:25
48082 8:16
48377 2:15

5

5 4:3
5:50 30:22 41:16 90:13 92:8 95:24 96:9 112:24
50 97:15
56 72:9
586 2:7

6

6:00 30:20
6:10 132:20
615 27:25 28:6 73:8
65,000 28:18
6th 61:17 67:14

7

70 33:16,24 106:10,12,13 106:17,22,24 107:2,6,6,14 107:15 114:8,9 114:11,12
734 27:24 28:5
75 16:21 33:16
750 9:18
77 17:9
78 17:7
79 4:4

8

8:00 31:11
80 51:5,10 107:6
87 17:8,9

9

9:00 7:17 47:2
9:30 31:10
96 76:13
97 76:13 89:16
98 24:6
99 24:6
994-0060 2:16

HANSON RENAISSANCE COURT REPORTERS & VIDEO hansonreporting.com 313-567-8100

RECEIVED by MSC 7/8/2020 5:41:14 PM

In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

Ayman Shkoukani

March 23, 2017

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

vs. Case No. 2016-001819 NI

HON. EDWARD A. SERVITTO

SAGE'S INVESTMENT GROUP, LLC, a Michigan limited liability company, and T&J LANDSCAPING & SNOW REMOVAL, INC., a Michigan corporation,

Defendants.

The Deposition of AYMAN SHKOUKANI,
Taken at 25800 Northwestern Highway, Suite 400,
Southfield, Michigan,
Commencing at 2:05 p.m.,
Thursday, March 23, 2017,
Before Lisa M. Fix, CSR-3121.

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APPEARANCES

CHRISTOPHER R. BARATTA, ESQ.
BARATTA & BARATTA
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Mount Clemens, Michigan 48043
Appearing on behalf of the Plaintiff.

STEVEN R. GABEL, ESQ.
THE HANOVER LAW GROUP
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Southfield, Michigan 48975
Appearing on behalf of the Defendant, T&J Landscaping.

MARK W. STEINER, ESQ.
SEGAL MCCAMBRIDGE
39475 13 Mile Road, Suite 203
Novi, Michigan 48337
Appearing on behalf of the Defendant, Sage's.

JAMES MOLLOY, ESQ.
SECREST WARDLE
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Troy, Michigan 48007
Appearing on behalf of the Witness.

RECEIVED by MSC 7/8/2020 5:41:14 PM

TABLE OF CONTENTS

WITNESS	PAGE
AYMAN SHKOUKANI	
EXAMINATION BY MR. BARATTA:	6
EXAMINATION BY MR. STEINER:	29
EXAMINATION BY MR. GABEL:	42
RE-EXAMINATION BY MR. BARATTA:	43

EXHIBITS

EXHIBIT	PAGE
(Exhibits attached to transcript)	
DEPOSITION EXHIBIT 1 (CAM)	23
DEPOSITION EXHIBIT 2 (Lease Agreement)	37

RECEIVED by MSC 7/8/2020 5:41:14 PM

Southfield, Michigan
Thursday, March 23, 2017
2:05 p.m.

* * *

AYMAN SHKOUKANI,

was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. BARATTA: The record will reflect that this is the deposition of Tom Shkoukani, taken pursuant to Notice, to be used for all purposes consistent with the Michigan Court Rules.

My name is Chris Baratta, and I represent Donna Livings. How are you?

THE WITNESS: Very good.

MR. BARATTA: Good. Have you ever had a deposition before?

THE WITNESS: No.

MR. BARATTA: Okay. A few ground rules. When I ask you a question, I'm going to ask that you give me a verbal response, yes, no, not uh-huh, uh-uh, or nodding or shaking your head, because this lady to your right, she's writing everything down --

THE WITNESS: Okay.

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MR. BARATTA: -- okay? Okay?
THE WITNESS: Sounds good. Yeah, okay.
MR. BARATTA: That's the first rule. If you don't remember something, if you don't know something, that's an acceptable answer.
THE WITNESS: Okay.
MR. BARATTA: I'm only interested in what you know or don't know. If you want to take a guess, let me know that you're guessing at something, okay?
THE WITNESS: Okay.
MR. BARATTA: If you don't understand what I'm asking you, let me know that you don't understand me.
THE WITNESS: Okay.
MR. BARATTA: All right? And if you need to take a break at any time, we can take a break.
THE WITNESS: Yeah.
MR. BARATTA: If there's a question that's pending, though, I'm going to ask you to answer the question before you go on your break.
THE WITNESS: Okay.
MR. BARATTA: All right. Terrific.
May I call you Tom?
THE WITNESS: Yes.
MR. BARATTA: Thank you.

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EXAMINATION

BY MR. BARATTA:

Q. What is your full name, please?

A. Ayman Shkoukani.

Q. All right. And your address?

A. 19203 Rose Garden Street, Roseville, Michigan, 48066.

Q. Your date of birth?

A. 04-13-67.

Q. Coming up soon.

A. Uh-huh. Yeah.

Q. Fifty?

A. Fifty, yeah.

Q. You'll be 50 soon?

A. Yeah.

Q. Nice.

Were you born in the United States?

A. No.

Q. Born in Palestine?

A. Yeah. Yes.

Q. When did you come here?

A. Um, I think like 1998, '97, something like this.

Q. Okay. Did you graduate from high school?

A. Back home.

Q. Okay. Any education or training beyond high school?

A. Well, I did like electrician in high school.

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Q. Okay.
A. So I used to work electrician.
Q. In Palestine?
A. Palestine, yeah, and I work here, too.
Q. Okay. Were you ever employed as an electrician in the United States?
A. Yes.
Q. Any other education, schooling besides your high school and your vocational training to be an electrician in Palestine?
A. No.
Q. Okay. Are you currently employed?
A. Yes.
Q. Where are you employed?
A. Right now I'm employed with Dominion Technology Group.
Q. Dominion Technology Group?
A. Yes.
Q. And what is that?
A. We build machines for the Chrysler and GM. So I work electrician for the building the machine.
Q. Are you an owner of that company?
A. No.
Q. Just an employee?
A. Just an employee, yeah.
Q. And how many hours a week do you work there?

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A. Well, normal hours, 40 hours, but usually like 50 hours pretty much.
Q. How long have you been working for this company?
A. Um, well, I used to work before I bought the restaurant.
Q. Okay.
A. I work there like around seven years, and when I bought the restaurant I quit, and I just went back recently, like last year.
Q. About 2016?
A. In January 2016, yeah.
Q. So if I understand some of the records that I've reviewed already, just to save a little bit of time, you bought the restaurant, Grand Dimitri's in approximately 2004, correct?
A. Yes.
Q. Okay. And did you buy that with anyone in particular?
A. Me and my brother.
Q. Your brother's name is?
A. Jamal Shkoukani.
Q. You guys are 50/50?
A. Yes. Well, I mean we have like partner, like my other brother, like, you know, ten percent, five percent, you know, just like share in the whole family, but me and my brother are the one who work in it.

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Q. You guys are actually the operators?
A. Yeah.
Q. And so from 2004 until 2016, approximately, your full-time job was at the restaurant?
A. Grand Dimitri's, yes.
Q. And what were your specific job duties at the restaurant? Were they manager in charge of everything, or were you, you know, in the kitchen, were you in the front of the house?
A. Well, I'm in charge like pretty much everything. Jamal, he used to do like all the paperwork.
Q. Okay.
A. He used to work like two days a week, and, you know, like do the paperwork and all the other stuff.
Q. So you were the guy who was hands-on every day being the manager?
A. Yes.
Q. You oversaw the kitchen?
A. Yes.
Q. You did the food ordering?
A. Yes.
Q. No liquor license?
A. No.
Q. You directed someone to do the waitresses schedules --
A. Yes.

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Q. -- or you did them yourself?
A. Well, sometime like we have a head waitress, sometime we don't. So if we had a head waitress she do it, if we don't, I do it. But we don't change the schedule, you know, like recently, so we make a schedule and it's good for the whole -- the whole time, unless, you know, somebody requests time off or somebody quit, you know --
Q. Okay.
A. -- we change it.
Q. And you would also handle any customer complaints or issues that would arise?
A. Yes.
Q. Okay. I'm going to go to 2014 -- the 2013-2014 winter. Your duties were those that you just described, they were the same back then, too, right?
A. What is it, I'm sorry?
Q. Meaning you were a manager of your restaurant at that same time period?
A. Yes.
Q. We're here to talk about a fall Donna Livings had on the property, 25001 Gratiot in Eastpointe. That fall was February 21st of 2014. Are you aware of that incident?
A. Yes, sir.

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Q. Okay. How did you become aware of that incident?
A. Well, I -- you know, I come in, I used to go the restaurant everyday at 9:00 o'clock. So when I went there on that day, she told me I fell in the parking lot, and, um, I went home and I change my clothes. I said okay, I mean where did you fell? She said in the back building. So I -- she said it's like a lot of water right now, it's puddle of water right now over there. So I said okay, let me take a look, see what's going on. And I went there, it was like a lot of water. The city drain line, it was like a block, like the water doesn't drain. So I look at it, and I said well, it looks like it's got drain line not taking the water. So I went back to the restaurant, I grabbed sticks and I try to like, you know, tried to find the hole for the city water.
Q. So you poked the sticks in the drain?
A. I poke the stick in the drain, and it's like, you know, five minutes everything is done.
Q. So you actually found -- there was maybe some debris or leaves in there, or something like that that clogged the drain?
A. I think it was like the leaves, and there was a little -- like a little ice, because it used to like get very cold and like at nighttime, and like warm weather in

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the morning. So it's like, you know, how they shovel the ice, they put them against the wall. When it gets warm, you know, the water started dripping.

Q. Runoff?

A. Runoff. And when it freeze at nighttime it's like, you know, a lot of frozen water.

Q. Yes.

A. So I think like the night before, I mean I'm not hundred percent remember, but I think it was like a nice warm weather, so it melt like a lot of the ice, so it's like filling up with water, and the water doesn't go nowhere. And I asked Donna, I said don't you see all the water in there? Why you parking there? I mean the water was like a little bit too high. It was up to the --

Q. Ankle?

A. Yeah, very much. So actually when I drain it, I mean I soak my foot. And it wasn't like cold weather, I couldn't remember it was cold weather on that day.

Q. Did you notice any snow in the parking lot that morning?

A. Um, snow, no. It wasn't snowing before, like I think two days before or three days before.

Q. Not whether it was -- not whether it was snowing or precipitating, did you notice any snow in the parking

RECEIVED by MSC 7/8/2020 5:41:14 PM

lot that morning that she told you she fell?

A. No, like where she fell it was water.

Q. Was there anyplace in the parking lot where there was snow or ice that you observed?

A. Um, I couldn't really remember, no.

Q. You remember water, correct?

A. Yes.

Q. You do not remember if there was snow or ice that morning; is that correct?

A. I remember, like I think like the drain line, the city line, it was like covered with ice, you know, leaf plus ice. Because like, you know, when you get the warm weather the top like start melting and the bottom still like frozen, like, you know, it's going to take awhile to melt, but it was like -- I think it was a sheet of ice underneath -- underneath the water. So when she stepped like from her car to the water, it was like a little ice underneath the water. You understand?

Q. Yes, I do.

How big was the sheet of ice under the water, do you know?

A. No, I don't know, but it wasn't like thick, because when I grabbed the stick I broke it and it just -- like I said, within two minutes it's all down.

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Q. Do you have any recollection of whether or not you observed any snow or ice, other than the ice you described around the drain, in the parking lot that morning?

A. Um, I couldn't remember, no.

Q. Okay. What did Donna tell you about her fall? Did she tell you why she fell, or how she fell, anything like that?

A. Um, not really. She said it's slippery where I park, and when I ask her, I said I mean it's like full of water, why you park there? Because the first waitress when she come in, which is Debbie, I think she tried to park there, and when she saw it was a lot of water she move her car and she moved back to the side where there's no water. The first waitress.

Q. Did Donna park in the area of the parking lot where she was supposed to?

A. Yeah. Yeah.

Q. Do you see -- I'm going to show you a copy of Exhibit 1 in Miss Livings' deposition. This photograph, do you recognize this area in this photograph?

A. Yes, that's pretty much like where -- yeah.

Q. Is that where the employees are supposed to park?

A. Yeah, I mean the whole thing, like around the whole

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wall.
Q. That wall?
A. Yeah, but this area in here, this is the drain line.
Q. Where the X is circled --
A. Yeah.
Q. Okay. Is the drain?
A. So all the water, you know, when get the water if the drain is not there, like everything is going low.
Q. Everything slopes down toward the drain?
A. Yeah, very much. So that's like where it was like the water, the puddle of water.
Q. Okay.
MR. GABEL: Could you just ask where he put his finger when he said this is where they park? I just want to clarify the record for that.
MR. BARATTA: Sure. I think he put his finger, correct me if I'm wrong, he was pointing against the wall that we see in the photograph there, the wall -- it's the white brick wall that we see towards the top of the photograph.
MR. GABEL: Yeah, more toward the right side --
MR. STEINER: Yeah.
MR. GABEL: -- of the photo?
MR. BARATTA: Correct.

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MR. GABEL: Right to -- it's the one toward the right side of the photo?

MR. BARATTA: Correct.

MR. GABEL: Thank you.

MR. MOLLOY: Away from the building?

THE WITNESS: Yes.

BY MR. BARATTA:

Q. The X circled is where -- roughly where the drain is that you just described?

A. Yes.

Q. And do you recall, do you see that rectangle here in the photograph? This rectangle --

A. Yes.

Q. -- that's drawn in?

A. Yes.

Q. Do you have a memory of where Donna parked her car that day?

A. Um, not really, because when I come in she actually -- like when she fell she got all her clothes wet, so she went home, change her clothes and come back. So I didn't see like Donna wet or anything.

Q. And she finished her shift, right?

A. Yes, she worked full shift. That's what I asked, do you need anything? Do you have to go to the clinic or anything? She said no, I'm fine, I don't have

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anything.
Q. Did she work for you for a long time?
A. Yes.
Q. About ten years?
A. Well, I mean she was working for me since we bought the place, so she was an employee when I bought the place.
Q. Okay. So from roughly 2004 to 2014?
A. Yeah.
Q. Was she a good waitress?
A. Yes.
Q. Good employee?
A. Yes.
Q. Are you aware of any witnesses to Donna's fall?
A. Um, no, I don't think anybody see her fall.
Q. Did you talk to anybody else about Donna's fall?
A. Um, what do you mean, like --
Q. Like did you talk to Debbie Buck about Donna's fall? Did you talk to your brother about Donna's fall? Did you talk to Jim Sage?
A. Not really. Like I say, she make it like there's nothing going on. She fall, she change her clothes. It wasn't like -- it wasn't like a big deal, you know what I'm saying? It was like okay, fell down with the water, I went home and I changed my clothes.

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Q. Do you remember if she worked the next day?
A. Yes, she did.
Q. Did she work her whole shift?
A. Yes.
Q. Did she work after that?
A. No, that's when she said I think I might go to the clinic and check on my back.
Q. And that was her last day of work?
A. Yep, it was. It was Friday and Saturday, so she work a Friday and Saturday.
Q. Okay. But getting back to my question. You don't recall having any conversations with anyone else besides Donna about Donna's fall; is that correct?
A. Um.
Q. I mean I know you talked with your attorney.
A. Yeah, can you repeat the question again?
Q. Sure. Aside from talking to Donna about the fall, do you have any memory of talking with anyone else about Donna's fall?
A. Not like in the same time, no. I ask the waitress, you know, what's going on, what happen? And, you know, like they said it's like puddle water there and she park in the middle of it and she say she fell. Nobody see her if she fell, but all the other waitress, when they see the water they kind of move

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like to the other side and park a little bit away from the water.

Q. So when you say they, the waitresses, who are you referring to?

A. Well, there is, you know, her and Debbie, the one she used to open, they come in at 6:00 o'clock.

Q. Yeah.

A. I think there's another two waitress, they come in at 9:00 o'clock, Maria and Sandy, they come in around 9:00 o'clock.

Q. Okay.

A. Who else? The bus girl she used to work, she come in at 7:00 or 8:00 o'clock, and I go there around 9:00 o'clock.

Q. Okay. Do you have a Lease Agreement with Sage's?

A. We never like did any Lease Agreement. Like when we bought the place, the lease was like very much expire and we never do new lease. We kept saying we need to make a new lease, but we never did a new lease.

Q. So no lease?

A. No.

Q. Was Grand Dimitri's responsible to plow the parking lot?

A. No.

Q. Was Grand Dimitri's responsible to salt the parking

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lot?
A. No.
Q. Do you know who's responsibility that was?
A. Well, usually Jim Sage do the parking lot.
Q. Was there any responsibility on the part of Grand Dimitri's to maintain the outside of the premises as far as snow maintenance or salting or ice removal, or anything like that?
A. No, nothing.
Q. Okay.
A. I mean usually just take care of the front door, just put like snow -- salt, you know, like the sidewalk.
Q. Where the customers would come in?
A. Yeah, where the customer comes in.
Q. Other than salting around the front door, Grand Dimitri's did not perform any maintenance on the outside of the property; is that correct?
A. Yes.
Q. Do you know who T&J Snow Removal Services is? Do you know who that company is?
A. I see them in the parking lot, but I don't have any work with them. I only talk to them or -- I don't have any relationship with him.
Q. So you never talked to the guy?
A. Not really, no. I don't even have their phone number.

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Q. You didn't hire T&J to come and perform snow services on the property?
A. No.
Q. And obviously, then, you never set the terms for T&J as to when snow was to be removed, or ice or salt on the property, you didn't set any of the terms of the contract?
A. No, I didn't have any control of that.
Q. Did you ever pay T&J Snow Removal Company for any services they performed on the property at any time?
A. Never pay, no.
Q. Did Jim Sage ever tell you that you -- you, meaning Grand Dimitri's, needed to hire a snow removal contractor on the property?
A. No.
Q. How long did these drain issues exist in the parking lot that you discussed which were present in 2014?
A. Well, like I say, as soon as I broke the hole it disappeared.
Q. I understand that.
A. Takes like five minutes.
Q. So there was a problem with the drain at least in February of 2014, right?
A. Yes.
MR. STEINER: I'll object just as to the

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1 characterization of his testimony, but --
2 BY MR. BARATTA:
3 Q. Okay. So did you ever -- strike that.
4 Do you have any knowledge of any other
5 times where that drain didn't drain water as you
6 described the one time when you saw it in
7 February 14th --
8 **A. Oh, okay.**
9 MR. MOLLOY: Wait for him to finish his
10 question, okay?
11 BY MR. BARATTA:
12 Q. Are you aware of any other times that that drain
13 didn't function or backed up?
14 **A. No.**
15 Q. So only this one time?
16 **A. Yes.**
17 Q. Never before?
18 **A. No.**
19 Q. Never since?
20 **A. No, not that I remember, no.**
21 Q. Okay.
22 MR. STEINER: And that's when you say no,
23 that's correct?
24 THE WITNESS: No, not that I remember.
25 Like not remember happening.

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MR. STEINER: Just to keep the record clear, that's correct, those statements that you don't recall?

THE WITNESS: What do you mean?

BY MR. BARATTA:

Q. Tom, what he's asking you is just to say whether I was correct in my assumption. So let me ask it again just so we're clear. I want you to respond by saying correct or incorrect.

A. Okay.

Q. Other than the one time in February of 2014 when you noticed a problem with the drain in this particular parking lot, you are not aware of any other times that this drain had a problem or issue draining water, correct?

A. Correct.

Q. Okay. Are you aware of any other persons that fell in this parking lot at any time in 2014?

A. No.

MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 1.

BY MR. BARATTA:

Q. I'm going to show you what has been marked as Exhibit Number 1.

MR. BARATTA: I've got a copy for you,

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Steve --

MR. GABEL: Yeah.

MR. BARATTA: -- and Mark.

MR. GABEL: I just want to look at the date. Yeah, that's fine.

MR. BARATTA: Yeah, it's the right date.

MR. GABEL: Thank you.

BY MR. BARATTA:

Q. So Tom, I'm showing you a copy of a letter from Sage's Investment Group, LLC that's dated July 1st, 2014.

A. Yes.

Q. It is addressed to Dimitri's Restaurant. Do you see that?

A. Yes, sir.

Q. Do you recall seeing this letter?

A. What?

Q. Do you recall ever seeing this letter before?

A. Did I see this letter before?

Q. Have you ever seen it before?

A. Oh, yes.

Q. I mean your brother takes care of the bills and stuff?

A. Yeah. Oh, yeah, I get one like every year.

Q. You get one a year, right?

A. Yeah.

Q. And describe for me what it represents to you. What

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does this letter mean?

A. Well, Jim Sage charge for all these stuff on the bill, and he divided them by the square footage for each like tenant over there, and that's how much I supposed to pay him, like the difference in my square footage for the electric, the snow removal, the grass.

Q. The taxes?

A. The parking lot, take care of the parking lot, the tax, and I think the insurance for the building.

Q. Okay. My understanding from looking at this letter is that Dimitri's pre-pays these Common Area Maintenance expenses charges, commonly known as CAM. Are you familiar with that word CAM, C-A-M?

A. No.

Q. Okay. Well, let's do it this way. My understanding is that Dimitri's pre-pays some of these maintenance charges that are passed on to you as a tenant; is that correct?

A. Yes.

Q. Do you pay $1,250.00 a month to total 15,000 per year as your estimated maintenance expenses?

A. No, this bill -- we pay it once a year. He give me the bill once a year.

Q. I know that. I'm asking you a different question, if you know the answer. It indicates in this exhibit

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that Grand Dimitri's pre-pays the maintenance expenses in the amount of $15,000.00 per year.

A. Oh, yes.

Q. So if I do my math, I think that comes out to $1,250.00 per month. Would you agree with that?

A. Yes.

Q. Does Grand Dimitri's, in addition to the base rent that it pays Sage's, does Grand Dimitri's also pay 1,250 a month towards maintenance expenses?

A. Yes.

Q. Okay. If the maintenance expenses are less than $15,000.00 per year, would Mr. Sage refund you the difference?

A. It never happen.

Q. I know, but in theory --

A. I guess.

Q. -- and when they go over 15,000, you have to come up with money to pay him the difference, right?

A. Yes.

Q. Okay. Last question on this exhibit for you. No, two more questions.

Did you ever receive an invoice from T&J Landscaping which verified or stated the charges for services that T&J charged Sage's?

A. No, never.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Do you know how Mr. Sage came up with the figures for the cost of snow removal and salting on an annual basis?

A. No.

Q. Okay. Do you have an opinion as to the quality of services the snow removal contractor Mr. Sage hired to perform snow removal services on this property, do you have an opinion as to the type of job that he did? Did he perform his job well? Was it lacking in any way? Do you have any opinion on that?

MR. GABEL: Are we talking about the time in question?

MR. BARATTA: Um, no, this was just a more general question.

BY MR. BARATTA:

Q. At any time since you've occupied and owned the restaurant there --

A. Okay.

Q. -- do you have any opinion as to how this particular landscape contractor plowed the snow, how he took care of the property?

A. Um, I mean I think they was doing well. Like if I see problem, like I don't remember like, you know, we have a problem with it.

Q. You don't recall having a problem?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. **No.**
Q. Do you ever -- did you ever call Mr. Sage to complain about anything?
A. **Well, I think like one year it was snowing like almost every week, you know.**
Q. Yeah.
A. **It was like snowing every weekend, I can remember like at '12 or which year, you know, they was plowing it, but sometimes like it's snowing during the morning.**
Q. Say that again, I didn't understand you.
A. **Like it's snowing all day.**
Q. Yeah.
A. **When they come in they plow it, like a car parking in there, and when they move, you know, they couldn't like shovel where is the parked car, where the car parking.**
Q. Right.
A. **Sometime I call Jim and I say okay, there is -- see if they can't come back and, you know, redo the parking lot. That's only like --**
Q. What would Jim say under those circumstances?
A. **He usually says okay, I'll call them.**
Q. Okay. Did you ever notice in 2014 whether or not T&J, the snow removal contractor, whether or not that contractor applied any salt to the parking lots?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. No, I don't know.
Q. You don't remember, or you don't know?
A. If they like salt? I couldn't remember, no. I don't remember.
Q. Do you recall that 2014 was the winter where we had record snowfalls?
A. Um.
MR. GABEL: If you know.
MR. MOLLOY: If you remember.
THE WITNESS: I can't remember, no.
MR. BARATTA: No further questions.
MR. STEINER: Hi, sir, my name is Mark Steiner, I represent Sage Investment Group. I have just a few questions for you.

EXAMINATION

BY MR. STEINER:
Q. Did Miss Livings ever miss work for any long periods of time for any reason, that you can recall?
MR. MOLLOY: Ever, in her entire employment?
BY MR. STEINER:
Q. During her career.
A. No.
Q. Did she ever appear injured before?
A. Well, she was complaining like about her back a lot of

RECEIVED by MSC 7/8/2020 5:41:14 PM

time.

Q. Can you recall how often she would complain about her back?

MR. BARATTA: At what time frame are we talking about?

MR. STEINER: Well, she only worked for two days after this accident.

BY MR. STEINER:

Q. So let's say before this incident, did she ever complain about her back?

A. Yeah, she used to complain to the waitress, you know, I have a problem with my back, my back hurts, you know.

Q. Did she ever complain to you?

A. Um, not like personal, no.

Q. Do you know who she would complain about her back to?

A. Well, you know, like she used to talk to the waitresses.

Q. Which waitresses?

A. Um, I think Debbie she might, you know, like talk to Debbie, she's like friends with Debbie.

Q. Can you tell me for how long she complained about her back?

A. I couldn't remember. I mean it wasn't like, you know, everyday complaining, you know.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Can you tell me about how often? Maybe once a month, once a week, once a year?

MR. BARATTA: I'm going to object based on speculation and foundation.

THE WITNESS: No, I couldn't remember.

BY MR. STEINER:

Q. Okay. Did she say where the pain was located in her back, whether it was lower back, neck?

MR. BARATTA: Same objection. I don't think that this witness testified that he talked to her about her back.

BY MR. STEINER:

Q. Do you know?

A. No, no, I don't remember.

Q. How did you come to this information? Did Debbie tell you about this, or did you just overhear it?

A. After she fell they start talking oh, she has problem with her back before, you know, but that's the only.

Q. And they didn't give you anymore details on that?

A. No, just like they saying she was complaining, like a lot of times she complaining about her back to the waitress, not to me very much.

Q. And, of course, they wouldn't tell you if she treated for those injuries with any physicians or anything, right?

RECEIVED by MSC 7/8/2020 5:41:14 PM

1 **A. No.**
2 Q. Do you recall what Miss Livings said the condition of
3 her back was immediately following after the incident?
4 **A. Can you repeat that again?**
5 Q. Okay. So you came in around 9:00 in the morning --
6 **A. Yes.**
7 Q. -- on the day of the incident, right?
8 **A. Yes.**
9 Q. And then you spoke with Miss Livings, right?
10 **A. Yes.**
11 Q. Do you recall what she said about her back at that
12 time?
13 **A. She was fine. I ask if you have anything, she said**
14 **no, I'm fine, I just changed my clothes.**
15 Q. Okay.
16 **A. And I'm mad because my clothes was wet, you know,**
17 **that's why she was mad.**
18 Q. Did she ever tell you that she had a back problem
19 after this incident?
20 **A. No.**
21 Q. So she just left work one day?
22 **A. No, she work Friday and she work Saturday.**
23 Q. And then after that second day --
24 **A. After the second day she said well, I think I'm going**
25 **to go check on my back. That's when she stopped**

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coming in.
Q. And then did she ever talk with you about her back after that time?
A. Well, I mean she come in every once in awhile, and she said oh, they do like, you know, physical therapy to my back, and I think they, um, screw it up, you know, just talking basic stuff, pretty much.
Q. Okay. Did she ever describe how the incident happened?
A. Um, I couldn't remember, but I think she said I come out of my car, and soon as I step down I slipped.
Q. Did she ever mention a sheet of ice, or anything like that?
A. What is it, I'm sorry?
Q. Did she ever mention a sheet of ice, or anything like that?
A. Sheet of ice, what's that?
Q. Like the entire back parking lot covered in ice. Did she ever tell you that?
A. Um, I couldn't remember.
Q. Did she ever tell you that the entire back parking lot was covered in packed snow, or anything like that?
A. I really couldn't remember.
Q. Do you know approximately what time she fell?
A. Well, she start working at 6:00 o'clock, so probably

RECEIVED by MSC 7/8/2020 5:41:14 PM

that's the time.

MR. MOLLOY: Don't guess, just answer what you know.

THE WITNESS: 6:00 o'clock.

BY MR. STEINER:

Q. Okay. You, of course, mentioned that a drain cover that had the ice on it. Was there anywhere else in the parking lot that had ice --

MR. BARATTA: Objection, foundation, speculation.

BY MR. STEINER:

Q. -- that you can recall?

A. I don't remember.

MR. BARATTA: Asked and answered.

BY MR. STEINER:

Q. I'm sorry?

A. I can't remember.

Q. Where did you park on the day of the incident?

A. Um, you know, I don't remember exactly, but I think we park like all the way to the front where it's like there's no water.

Q. Were you still in the back parking lot?

A. Yes.

Q. Are you able to show on that photo where you parked?

A. Might be like a little bit further in here. Because

RECEIVED by MSC 7/8/2020 5:41:14 PM

like the whole wall, that's like where all the employees park.

MR. BARATTA: So you're pointing to the right of the outside of the photograph?

THE WITNESS: Yeah. Probably like, you know, because like I said, I mean that's where the water. So I mean we just avoid the water.

MR. BARATTA: You just indicated that's where the water, by the X. with the circle in it, correct?

THE WITNESS: Yes.

MR. BARATTA: And you said you tried to avoid the water?

THE WITNESS: Yeah, I just avoid it and walk it through to the side.

MR. MOLLOY: That's from Exhibit 1 of Caramagno's dep it says --

MR. BARATTA: Caramagno.

MR. MOLLOY: -- and Livings. Caramagno.

MR. BARATTA: Caramagno, and also Exhibit 1 of Livings.

BY MR. STEINER:

Q. Was there ice, that you recall, where you parked?

A. No.

Q. Was there snow in the parking lot where you parked, in

RECEIVED by MSC 7/8/2020 5:41:14 PM

the area where you parked?
A. I couldn't remember.
Q. Do you recall the parking lot being slippery while you walked into the restaurant?
A. Um, when I walk -- like I couldn't remember really.
Q. Okay. Did you walk in through the back door?
A. Yes.
Q. Do you recall having any trouble walking to the back door?
MR. BARATTA: Asked and answered.
THE WITNESS: No.
BY MR. STEINER:
Q. Were there any parking spots available by the time you got there at 9:00 a.m. that wouldn't have been near that drain where there's water?
MR. BARATTA: Object to foundation.
THE WITNESS: There is like a -- yeah, there's a lot of parking spot.
BY MR. STEINER:
Q. In this litigation there's been a Lease Agreement, um, that some have said, namely Jim Sage has said governs your relationship between your business and Sage Investment Group.
MR. STEINER: And let me just mark this as Exhibit 2.

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MARKED FOR IDENTIFICATION:
DEPOSITION EXHIBIT 2.
BY MR. STEINER:
Q. Have you ever seen that document before?
A. Yes.
Q. Have you ever referred to that document before with Jim Sage?
A. Well, it's the old Lease. It's like expire --
Q. Right.
A. -- in 2004.
Q. Right. But have you ever referred to that document with Jim Sage?
MR. BARATTA: Object to the form.
MR. MOLLOY: Object to the form.
THE WITNESS: What do you mean?
BY MR. STEINER:
Q. Have you ever spoken with Jim Sage about that document?
A. No.
Q. Never?
A. No.
Q. Where have you seen it?
A. We try to like make -- we try to tell him we have to make a lease, and we never did renew the lease.
Q. Did that lease ever govern the relationship that you

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had with Mr. Sage?

MR. BARATTA: Asked and answered.

THE WITNESS: This Lease, no.

BY MR. STEINER:

Q. Did you ever have a written lease with Mr. Sage?

A. No.

Q. When did you first look at that document?

A. Just when we signed the paper with Jim Sage, you know, the paper. You know, when we bought the place.

Q. Okay. Back in 2004?

A. 2004.

Q. And that's the last time you saw that document?

A. Yes, this one expire and we never renewed it.

Q. When you say renew it, it makes it sound like that lease was effective at some point, but is it -- is it your understanding that once you took over the business that that lease was not effective?

MR. BARATTA: Objection, it calls for a legal conclusion. I think it's all been asked and answered. Go ahead.

MR. MOLLOY: Same. You can answer, if you can.

THE WITNESS: Yeah, it's expired. You know, it expired when we bought the place, but we never get a new Lease Agreement.

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BY MR. STEINER:
Q. Okay. How often does Jim Sage visit the Grand Dimitri's location?
A. Not too often.
Q. Are you able to say how frequently he comes there?
A. Um, I mean I usually like take the rent to his place, so maybe like -- I'm not remember, but sometimes I see him like once a month.
Q. Okay.
A. But usually like I give him the rent at his place, so he doesn't come in to pick up the rent from me.
Q. Okay. Do you recall ever seeing the front of Grand Dimitri's on the day of the incident, as in the front parking lot?
A. Did I see the front parking lot?
Q. Right.
A. Yes.
Q. Do you recall any ice or snow in the front parking lot?
A. No.
Q. Now, it's my understanding that there's also a side parking lot. Did you ever see the side parking lot on the day of the incident?
A. Side parking lot, what do you mean?
Q. Is there a parking lot not in the front, not in the

RECEIVED by MSC 7/8/2020 5:41:14 PM

1 back, but to the side?
2 MR. MOLLOY: Do you understand his
3 question?
4 THE WITNESS: No.
5 BY MR. STEINER:
6 Q. Okay. So there's only two parking lots to Grand
7 Dimitri's; is that right?
8 **A. Two parking lots.**
9 Q. Is there a front parking lot and a back parking lot?
10 **A. Yeah, all the area like the back of the restaurant.**
11 Q. Uh-huh.
12 **A. The front of the restaurant, by the Gratiot -- by the**
13 **Gratiot, in the front of the restaurant.**
14 Q. Okay. Have you ever salted around the premises other
15 than just in the front doorway?
16 **A. Just the sidewalk, just the sidewalk and the front**
17 **door.**
18 Q. And where is the sidewalk?
19 **A. It's in the front, the front of the restaurant.**
20 Q. Have you ever salted the parking lot before?
21 **A. No.**
22 Q. Have you ever considered salting the parking lot if
23 you've ever seen it slippery?
24 **A. No.**
25 Q. On the date of Miss Livings' fall did you notify

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anyone?

A. Not on the same date, because like I said, when she said there is nothing going on, so I figured there's no reason to make, you know, a big deal.

Q. Can you tell me the last time you spoke with Miss Livings?

A. The last time? Um, maybe like a year and-a-half, year, something like this.

Q. So you have no idea what her present condition, meaning her physical condition would be, right?

A. No.

Q. If you saw a dangerous condition on Grand Dimitri's premises, you would have done, um, what you needed to do to remedy that condition, right?

MR. BARATTA: Object to the form.

MR. MOLLOY: Second.

THE WITNESS: Well, if it's like not my responsibility I call Jim Sage.

BY MR. STEINER:

Q. But in a case, um, like this February 21st fall, you did take certain steps to clear the drain, right?

A. Yes.

Q. So there were some situations where you recognized that, um, you needed to maintain certain areas of the parking lot?

RECEIVED by MSC 7/8/2020 5:41:14 PM

MR. MOLLOY: Object to form, foundation.

MR. BARATTA: I'm going to object to the characterization of the question.

THE WITNESS: You know, usually I don't do anything with the parking lot, but if I see something handy, and instead of bother Jim Sage I just take care of it. I mean just a little small stuff.

MR. STEINER: Okay. I think that's all I have at this time.

EXAMINATION

BY MR. GABEL:

Q. Sir, on the date --

MR. GABEL: My name is Steve Gabel, I recommend T&J's, the contractor that cared for the outside parking lot.

THE WITNESS: Yeah.

BY MR. GABEL:

Q. On the date of the incident that Miss Livings fell, 2-21-14, do you have any criticisms of T&J?

A. No.

Q. Okay. And as I understand on that day, you didn't see snow six inches or so packed down and all across that back parking lot, did you?

A. Um.

MR. BARATTA: I'm going to object to the

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form. He's already testified he doesn't recall whether there was any snow or ice on the parking lot on that day.

BY MR. GABEL:

Q. You just tell me what you saw then.

A. It was like a lot of water.

Q. Water?

A. Yeah.

Q. Okay. And you saw some ice and debris, leaves I think is the word you used, around that drain, correct?

A. Around the drain.

Q. Is that all you recall, basically?

A. That's all I remember.

MR. GABEL: Okay. Nothing else. Thank you.

MR. MOLLOY: I don't have any questions.

MR. BARATTA: I just have one or two.

RE-EXAMINATION

BY MR. BARATTA:

Q. Did Miss Livings ever complain of leg pain before this incident?

A. Not that I remember, no.

Q. Did Miss Livings, in any time that she worked for you, did she typically miss her shifts, not show up or miss her work shifts?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. No.
Q. As part of her job as being a waitress at your restaurant, was she required to carry plates over to the tables?
A. Carry like --
Q. Plates of food.
A. Yes.
Q. Did you observe her doing that?
A. What do you mean?
Q. Did you watch her delivering food to the tables? Did you observe her --
A. Yes.
Q. -- look at her performing her duties as a waitress?
A. Yes.
Q. For many years, right?
A. Yep.
Q. Did she ever appear to you to have any difficulty in performing her duties as a waitress?
A. No.
MR. BARATTA: Thank you. All set.
MR. GABEL: Nothing else.
MR. MOLLOY: All set.
MR. GABEL: Thank you, sir.
MR. BARATTA: Thanks, Tom.
THE WITNESS: You're welcome.

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1 * * *
2 (The deposition was concluded at 2:49 p.m.)
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CERTIFICATE

STATE OF MICHIGAN

COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take; and that I am not related, nor a counsel to either party, nor interested in the event of this cause.

LISA M. FIX, CSR - 3121

Notary Public, Macomb County

My Commission Expires: 4-9-2019

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In The Matter Of:

Donna Livings v. Sage's Investment Group, LLC

Deborah Buck

March 23, 2017

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Carroll
Court Reporting and Video

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DONNA LIVINGS,

Plaintiff,

vs. Case No. 2016-001819 NI

HON. EDWARD A. SERVITTO

SAGE'S INVESTMENT GROUP, LLC, a Michigan limited liability company, and T&J LANDSCAPING & SNOW REMOVAL, INC., a Michigan corporation,

Defendants.

The Deposition of DEBORAH BUCK,
Taken at 25800 Northwestern Highway, Suite 400,
Southfield, Michigan,
Commencing at 3:23 p.m.,
Thursday, March 23, 2017,
Before Lisa M. Fix, CSR-3121.

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1 APPEARANCES
2
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25 Appearing on behalf of the Witness.

RECEIVED by MSC 7/8/2020 5:41:14 PM

TABLE OF CONTENTS

WITNESS	PAGE
DEBORAH BUCK	
EXAMINATION BY MR. BARATTA:	5
EXAMINATION BY MR. STEINER:	20
EXAMINATION BY MR. GABEL:	30
RE-EXAMINATION BY MR. STEINER:	36

EXHIBITS

EXHIBIT	PAGE
(No Exhibits Marked)	

RECEIVED by MSC 7/8/2020 5:41:14 PM

Southfield, Michigan
Thursday, March 23, 2017
3:23 p.m.

* * *

DEBORAH BUCK,

was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. BARATTA: The record will reflect this is the subpoenaed deposition of Deborah Buck, to be used for all purposes consistent with the Michigan Court Rules.

My name is Chris Baratta, I represent Donna Livings. How are you?

THE WITNESS: Good. How are you?

MR. BARATTA: Good, thank you.

Have you ever had a deposition before?

THE WITNESS: No.

MR. BARATTA: All right. I'm going to give you just a couple of general ground rules. If you don't understand anything that I'm asking you, let me know that, I'll rephrase the question until you and I are communicating effectively, okay?

THE WITNESS: Okay.

RECEIVED by MSC 7/8/2020 5:41:14 PM

MR. BARATTA: The woman to your right, she's taking down everything that we say, so a couple things. I'm going to require a verbal response to my question versus a nod or a shake of the head. Uh-huh, uh-uh doesn't come out on paper very well. The other thing is that, um, when I ask you a question, you will frequently know the answer to the question before I finished asking it, but so the record is nice when the transcript comes out on paper, please allow me to finish my question, and in turn I'll allow you to finish your answer so we have a nice transcript, okay?

THE WITNESS: Okay.

MR. BARATTA: Great. If you don't know something, if you don't remember something, that's fine, some people feel like they have to answer every question. You know, like I said, if you don't know, if you don't remember, if you're not sure, tell me that you don't know, you don't remember, you're not sure, um, and then we'll go from there, okay?

THE WITNESS: Okay.

MR. BARATTA: Great.

EXAMINATION

BY MR. BARATTA:

Q. Your full name, please?

A. Deborah Lynn Buck.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Your address?
A. 15290 Cornell Drive, Clinton Township, Michigan, 48038.
Q. How long have you lived there?
A. Um, nine years -- sorry, nine years.
Q. Who do you live there with?
A. Myself.
Q. Any plans on moving anytime soon?
A. No.
Q. All right. Your date of birth?
A. 12-20-71.
Q. Did you graduate from high school?
A. Yes.
Q. Which high school?
A. Fraser High School.
Q. And any education past high school?
A. No.
Q. Are you currently employed?
A. Yes.
Q. Where?
A. Theo's Family Restaurant and Grand Dimitri's.
Q. Two restaurants?
A. Yes.
Q. Are you a waitress at both?
A. Yes.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. How long have you been employed at Theo's?
A. Nine years.
Q. How long have you been employed at Grand Dimitri's?
A. Since Tom, or in that building?
Q. Well, let's just say since it's been Grand Dimitri's.
A. Twelve years.
Q. Twelve years. So we're going roughly to since 2005?
A. Not sure when it went to Grand Dimitri's. I've been in that building for 26 years.
Q. So let me help you. About 2004 is when it went to Grand Dimitri's.
A. 2004 then.
Q. All right.
A. Thank you.
Q. And you have been a waitress in that building since when?
A. Twenty-six years.
Q. Okay. Okay. So you have gone from owner to owner --
A. Correct.
Q. -- maintaining your position as a waitress?
A. Correct.
Q. All right. So you currently work for the Shkoukani brothers?
A. Yes.
Q. And like how many hours a week do you work there?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. I'm down to six and-a-half now.
Q. Most of your time is spent at Theo's?
A. Correct.
Q. What's the reason?
A. Just changed over. Just -- no reason.
Q. Where is Theo's located?
A. Thirteen Mile and Hoover.
Q. Okay. And in 2014 were you working for Theo's?
A. Yes.
Q. What was the proportion of hours you were working in any given week, let's say in February of 2014, Theo's versus Grand Dimitri's?
A. It was, um, I would say almost equal, because I was still there, um, probably about 20 hours at Grand Dimitri's. I'm guessing, but.
Q. So about 20 hours at each place in that time frame?
A. Correct.
Q. That's an approximation?
A. Yes.
Q. Not going to hold you to exact hours --
A. Yes.
Q. -- your best guess.
A. Yes.
Q. Okay. Do you know Donna Livings?
A. Yes.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. How long have you known her?
A. Since 2004.
Q. Donna was a co-worker of yours, correct?
A. Correct.
Q. She was also a waitress?
A. Yes.
Q. Do you have an opinion as to how she was as a waitress?
A. She was a very good waitress.
Q. Okay. In the entire time that you knew Donna as a waitress, was she able to perform her job duties?
A. Yes.
Q. Okay. Did you -- we're here today primarily to talk about a slip and fall that occurred on the premises located at 25001 Gratiot Ave. in Eastpointe on February 21st, 2014. You're generally aware of that incident?
A. Yes.
Q. Okay. Did you witness this incident?
A. No.
Q. All right. How did you first learn of the incident?
A. Um, I -- well, I had got to work before Donna, and I had walked in with the chef, him and I walked in together, and, um, probably about ten minutes later Donna had called on the phone to open the front door.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. And when she called you, was it the morning of February 21st?
A. Yes.
Q. Do you remember like what time it was?
A. I don't recall.
Q. Was it around 6:00 a.m?
A. Approximately -- yeah, approximately 6:00 a.m., because we both start at 6:00, so it was approximately that time.
Q. What did you do in response to that telephone call?
A. I went and opened the front door.
Q. All right. And at that point in time did Donna say anything to you?
A. Yes.
Q. All right. What did she say?
A. She said -- do you want her words or --
Q. Sure.
A. Well, she said, "I just fuckin' fell in the parking lot." I said, "You're kidding?" And she was soaked.
Q. Her clothing?
A. Her clothing.
Q. Her pants or --
A. She was from the waist down about.
Q. Okay. What else did she say, if anything?
A. She said she was gonna go home and change.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. All right. Did she say or describe how she fell?
A. She said when I got out of the car, she said I went down, that's --
Q. Did you interpret that to mean anything in particular?
A. I interpreted it to mean that she fell.
Q. All right. Did you get into any other specifics as to how she fell, or the mechanism of her fall?
A. I asked her if she was okay.
Q. What did she say?
A. I'm not sure.
Q. All right. So what did Donna do then after you let her in?
A. Well, we had this conversation pretty much in the lobby.
Q. Okay.
A. Um, like I said, she said she was gonna go home and change. I said, you know, you don't have to come back, you know, don't rush back here, you know, 'cuz of the way the weather was as it is and everything. So she said no, I'll be back.
Q. Okay. So to the best of your recollection, did Donna go home and change her clothes and come back to work the rest of her shift that day?
A. Yes.
Q. Do you recall if she worked the next day?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. Yes, from just her telling me and others, yes, she did.
Q. Okay.
A. I was not there Saturday morning.
Q. Do you know if Donna worked at Grand Dimitri's past that next day, which was Saturday?
A. No, she did not.
Q. All right. When was the last time that you spoke with Donna?
A. Um, probably about two, three weeks ago.
Q. How would you classify your relationship with her?
A. We're friends.
Q. Okay. Have you and I ever spoken on the phone?
A. No.
Q. Okay. Well, maybe one time talking about her --
A. Yes, one time when I called to confirm the time change, sorry.
Q. Did we -- we didn't discuss anything else?
A. Not at all.
Q. Thank you.
You arrived before Donna on that morning that she fell?
A. Yes.
Q. Do you recall the condition of the parking lot?
A. Yes.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. What was it?
A. It was, um, a sheet of ice with water on top. Snow, ice, water.
Q. Was that snow and ice that you described, was that covering the parking lot?
A. Yes.
Q. Okay. Was there -- you mentioned that there was, um, water on top of the ice. Do you recall how much water there was?
A. No.
Q. Do you know, if you know, why there was water on top of the ice?
A. No.
Q. Are you aware of any problems with drainage in that particular parking lot?
A. Afterwards, yes.
Q. After what?
A. After the fall I learned that that drain, where we pretty much parked by was blocked.
Q. And who did you learn that from?
A. Um, just from Donna, um, another employee had said the same thing.
Q. Did you have difficulty yourself walking in?
A. Yes.
Q. Did you have difficulty yourself walking into work

RECEIVED by MSC 7/8/2020 5:41:14 PM

that morning?
A. Yes.
Q. Did you park where the employees were supposed to that morning?
A. No.
Q. Where did you park?
A. Um, normally we park in the back, which we did. Normally we park closer to the door, but from what I recall there was, um, a mound of snow in that area, so I could not park that way, and I parked about three or four spots down, still to the back, but not in normal -- the spot where I normally park.
Q. Okay. And I don't -- I don't recall. Did you actually arrive to work with someone else?
A. I had pulled in, and then, um, Chef Bob had pulled in pretty much the same time I did.
Q. Yeah. And I asked you the question because I wasn't sure if you and Chef Bob commuted to work together.
A. No.
Q. Are you aware of any witnesses to this incident?
A. No.
Q. You described what you recall as to the condition of the parking lot on the date of this incident. Do you recall how long this condition existed, generally, in the manner in which you described?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. No.
Q. In other words, you don't recall what the lot looked like on the day before Donna fell?
A. No.
Q. Okay. Do you recall what the lot looked like the day after?
A. No.
Q. Are you aware of anyone else slipping, um, in this particular parking lot, or falling in this parking lot at any time within say two weeks either before this incident or two weeks after this incident?
A. I don't recall.
Q. Okay. Do you recall if Tom Shkoukani was made aware of this incident?
A. Yes.
Q. All right. Do you know how he was made aware of it?
A. I believe Donna told him.
Q. Do you know if Tom did anything in response to Donna telling him?
A. I believe he went outside to unblock the drain.
Q. And do you know how he did that?
A. No.
Q. You weren't present?
A. No.
Q. Are you aware of anyone taking any remedial action, so

RECEIVED by MSC 7/8/2020 5:41:14 PM

to speak, to clear the water in the lot, or the ice or the snow --

A. No.

Q. -- as you described?

No?

A. No.

Q. Okay. In terms of Grand Dimitri's, are you aware at any time in 2014, are you aware of any employees plowing or salting the parking lot?

A. No.

Q. Do you know who is responsible to plow or salt the parking lot?

A. TJ's Snow Removal.

Q. Okay. Do you know if Grand Dimitri's contracted with them, or whether Mr. Sage contracted with them?

A. From conversations with the guys who worked from the snow removal company, Jim Sage.

Q. Okay. And you said conversations with the guys from T&J. Did they stop into the restaurant once in awhile?

A. Well, when they would do the lot or the landscaping, or whatever it may be, they would come in and get a coffee or a hot chocolate or a carry-out, and, um, here and there they would refer to, you know, Jim Sage wants us to do this, Jim Sage wants us to do that.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Okay. Did they ever drop off any bills or invoices, to the best of your knowledge?
A. Not while I was there, no.
Q. Can you describe or tell me, to the best of your recollection, how many different people, um, in that 2014 winter you remember seeing who you thought were either owners or employees of T&J?
A. Oh, God, I can't recall.
Q. Was it more than one?
A. Yes. I mean I would say there's probably three or four.
Q. Okay. Do you ever recall observing any of the snowplow trucks from T&J that winter at Grand Dimitri's?
A. Yes.
Q. Do you recall how many different trucks you observed?
A. One.
Q. Okay. That winter, do you recall any salt being laid out on the parking lot?
A. No, not while I was there, no.
Q. And that morning, do you recall seeing any salt on the parking lot?
A. No.
Q. When you came in for a -- I guess it's a day shift, right, or would you call it a morning shift when you

RECEIVED by MSC 7/8/2020 5:41:14 PM

start at 6:00 in the morning?
A. Morning shift.
Q. Okay. And the morning shift at Grand Dimitri's would typically go from what, 6:00 a.m. to?
A. 2:00.
Q. 2:00 p.m?
A. (Witness Nodding.)
Q. Correct?
A. Correct.
Q. When you would show up for a morning shift, um, were you supposed to use the employee entrance to enter into Grand Dimitri's?
A. The back door we used.
Q. Did you have a key for the back door?
A. No.
Q. When you typically arrive that winter for your morning shift, would the back door be open?
A. No.
Q. How would you get in?
A. When Chef Bob would come.
Q. And Chef Bob would go through the back?
A. To the front, to the back.
Q. And he would open up the back door for the waitresses?
A. Yes.
Q. And that's where you were supposed to come in?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. Correct.
Q. And Bob would be in the kitchen doing his cooking?
A. Yes.
Q. What time did the restaurant open for biz for customers?
A. At that time we opened, oh, gosh, 6:30, I think it was. I don't recall, because we've changed since then.
Q. I want to take you to a time frame, any time before the incident in 2014, and your experience for approximately say ten years as a co-worker with Donna. In that ten years before the incident that you knew Donna, did she ever complain to you about her back hurting her?
A. No.
Q. Did she ever complain to you about her leg or legs hurting her?
A. No.
Q. Was she, in your opinion, a good waitress?
A. Yes.
Q. Did you, through the course of your friendship and working experience with her, did you observe her carrying plates or trays of food to the tables?
A. Yes.
Q. And was she able to do that in what you feel was a

RECEIVED by MSC 7/8/2020 5:41:14 PM

1 competent manner?
2 **A. Yes.**
3 Q. Did she appear to have any difficulty in performing
4 her job as a waitress?
5 **A. No.**
6 Q. You're friends with Donna, and you have been before
7 this incident and after this incident, correct?
8 **A. Yes.**
9 Q. What changes, if any, have you noted in Donna since
10 this incident?
11 **A. I don't see her that often, just due to my work**
12 **schedule, so.**
13 Q. So you're not able to answer that question?
14 **A. No.**
15 MR. BARATTA: I don't have anything else.
16 THE WITNESS: Okay.
17 MR. STEINER: Hi, Debbie, my name is Mark
18 Steiner, I represent Sage Investment Group with
19 respect to this matter. I have just a few questions
20 for you.
21 EXAMINATION
22 BY MR. STEINER:
23 Q. In 2014, are you able to say how often you worked with
24 Miss Livings?
25 **A. Yes.**

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. How often?
A. Two days.
Q. Do you know what days those were?
MR. BARATTA: Is this per week?
BY MR. STEINER:
Q. Per week.
A. Monday and Friday.
Q. How closely do you keep in contact now?
MR. BARATTA: Asked and answered. Go ahead.
THE WITNESS: Every -- I mean just through phone because of my schedule, so.
BY MR. STEINER:
Q. I mean to say --
A. Every three -- three weeks or so. Not very often, but just enough to pick up the phone and carry on a conversation.
Q. When's the last time you saw Miss Livings in person?
A. I don't remember.
Q. Okay. Did you speak with Miss Livings after her deposition?
A. No.
Q. Do you recall Miss Livings ever missing work for a long period of time before this incident?
A. No.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. You mentioned that you arrived with Chef Bob on the date of the incident, and he would typically unlock the back door by going through the front. Did he do that on the day of the incident, as well?

A. I walked in with him.

Q. So did you walk in through the front door?

A. Through the front.

Q. So you walked from the back parking lot to the front?

A. To the front.

Q. And you didn't slip, did you?

A. No, because I kinda shimmied my way in.

Q. Okay. Did you see a large pool of water near the drain?

A. I didn't pay attention to the drain.

Q. Okay. Was water covering the entire back parking lot or --

A. Where I parked, yes.

Q. Okay. Was there a part of the parking lot where there was not water?

MR. BARATTA: Objection, foundation. You can answer, if you know.

THE WITNESS: I don't know. I just know where I parked it was wet.

BY MR. STEINER:

Q. Okay. Do you recall if there is any part of the

RECEIVED by MSC 7/8/2020 5:41:14 PM

parking lot that did not have snow on it?
MR. BARATTA: Asked and answered. Go ahead.
BY MR. STEINER:
Q. You can answer.
A. From what I remember, I remember snow, ice and water pretty much through the parking lot.
Q. Right. And I'm asking if any part of the parking lot did not have that?
A. No, it was covered.
Q. Okay. What about the sidewalk, was that covered, as well?
A. Yes.
Q. Okay. So there was no part -- no surface of the ground that did not have snow, water or ice on it?
A. No.
MR. BARATTA: That's correct?
THE WITNESS: Right. Correct. It was covered.
BY MR. STEINER:
Q. All right. Do you know how much snow there was?
A. A couple inches, maybe.
Q. Do you recall it snowing on the night before the incident happened?
A. I don't remember.

RECEIVED by MSC 7/8/2020 5:41:14 PM

Q. Do you recall the last time that it snowed before the incident?
A. No.
Q. Okay. It's my understanding that they keep salt at the premises of Grand Dimitri's. Have you seen that?
A. Yes.
Q. Have you ever used the salt?
A. Once, twice, maybe.
Q. And where did you apply that salt?
A. Just right at the front door.
Q. Did you see anyone else apply salt on the premises?
A. Tom.
Q. And where would he apply it?
A. Front door.
Q. You also mentioned that Tom went back to the drain in the back parking lot and broke up some of the ice around it?
A. I didn't see him, but from what I heard, yes.
Q. Okay. Do you know if that relieved some of the water in the parking lot?
A. I don't know.
Q. When you left the premises that day, do you recall water being in the back parking lot?
A. I don't remember.
Q. Do you recall any snow or ice in the back parking lot?

RECEIVED by MSC 7/8/2020 5:41:14 PM

A. Yes.
Q. So there was still snow and ice?
A. Yes.
Q. When she called you on -- when I say she, I mean Miss Livings. When Miss Livings called you on her cell phone to open up the front door, do you know why that was locked if Chef Bob had already gone through it?
A. It was minutes after we arrived. I don't know if he opens the book door, and why she chose not to go to the back door. She came to front door. I don't know if it was locked or what at that time.
Q. When she called you, what did she say?
A. Can you open the front door.
Q. Okay. But you had gone through the front door that day, right?
A. With Bob.
Q. And so the door remained locked after you opened it?
MR. BARATTA: Objection, foundation. She said -- I thought she said she didn't know, but go ahead.
THE WITNESS: With the door, the front door being locked?
BY MR. STEINER:
Q. Yeah.
A. Yeah, we were not open. I don't open the door.

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Q. Okay. But you had gone through that door already, right?
A. And locked it back up.
Q. Locked it back up, okay.
A. Now, whether she went to the back, I don't know.
Q. Okay. Immediately after the fall did she talk about her condition at all?
A. Like I said, I asked her if she was okay, she said I don't know.
Q. Okay. When was the first time that you spoke with her where she indicated that there might be some sort of a medical issue?
A. Saturday.
Q. And did you just receive a phone call from her? How did she contact you?
A. I called her.
Q. And what did she say?
A. That she had gone to the clinic that day.
Q. Did she say anything else?
A. No, nothing too much. I just asked her how she was, she said sore.
Q. Do you have any personal knowledge regarding the terms of the relationship between Grand Dimitri's and Sage?
MR. BARATTA: Object to the form, but go ahead.

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BY MR. STEINER:
Q. And if you don't know --
MR. MOLLOY: If you know.
THE WITNESS: Well, Jim Sage is the owner of the building.
BY MR. STEINER:
Q. Okay. Besides --
A. Tom is the landlord.
Q. Okay. So besides that basic landlord/tenant arrangement --
A. That's all I know.
Q. -- are you aware --
MR. BARATTA: I'm sorry, did you say Tom is the landlord?
THE WITNESS: I'm sorry, Jim Sage is -- I got it mixed up. Jim Sage is the landlord, Tom is the tenant.
BY MR. STEINER:
Q. Are you aware of any other purpose for the Grand Dimitri's premises, including the back and front parking lot, um, other than for the restaurant business?
A. Wait, can you --
MR. MOLLOY: Do you understand the question?

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BY MR. STEINER:
Q. Sure. Is the restaurant premises, including the back and front parking lot, used for any other purpose other than for the restaurant?
A. Not that I'm aware of, no, just restaurant.
Q. Have you ever seen Jim Sage at the premises?
A. Yes.
Q. How often does he come around, if you know?
MR. BARATTA: What time frame?
THE WITNESS: Yeah, I don't know, I mean how often he would come. I've seen him.
BY MR. STEINER:
Q. Okay. So every now and then, it's not like a daily occurrence?
A. No.
Q. Do you have any idea what he's there for?
A. No.
Q. When you saw Tom Shkoukani go out and break up some ice around -- I'm sorry, you did not see him?
A. I did not see him.
Q. But had you ever heard of Tom Shkoukani going out to the parking lot other than this circum -- this incident to fix some sort of condition?
A. No.
Q. Did you notify anyone of salt or ice when you arrived

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on the premises?
A. Well --
MR. MOLLOY: Objection, form.
THE WITNESS: Huh?
BY MR. STEINER:
Q. On the date of the incident, you mentioned that there was a sheet of ice, right?
A. Right.
Q. Did you tell anyone that morning?
A. I didn't. I mean I believe Donna told Tom right away, and I'm -- I can't -- I didn't say anything.
Q. Okay.
A. I'm just -- I would assume he was aware because that's how the parking lot was that day.
Q. If your -- strike that.
If you see snow or ice build-up in the parking lot, who would you contact about that issue? Would it be Tom?
MR. BARATTA: Objection, assumes facts not in evidence.
BY MR. STEINER:
Q. Who would you report any issues to?
A. Well, Tom, of course. I mean that's the boss, so. I mean it's not like I have the snow company number or Jim Sage's to call them, you know.

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Q. Okay. In February of 2014, do you remember how often or how many -- strike that.

Do you remember what days you worked in February 2014?

A. No.

Q. Did you work the day before this incident?

A. No.

Q. Did you work the, um, Saturday --

A. No.

Q. -- before?

A. I changed my schedule a lot, so I would be guessing.

Q. Okay. So --

A. I know for sure I was not there Saturday.

MR. BARATTA: I thought the witness testified she worked Mondays and Fridays.

MR. STEINER: I'm talking February 2014, not presently. And that's when she worked with Miss Livings.

MR. BARATTA: Okay.

MR. STEINER: That's all I have right now. Thank you.

MR. GABEL: My name is Steve Gabel, I represent T&J's. I have a few questions for you.

Can I have the exhibit for Mr. Caramagno there?

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EXAMINATION

BY MR. GABEL:

Q. Okay. You said earlier, and I'm not trying to stand over your back, I'll back up. You said earlier you were going to park somewhere, you couldn't, there was some snow in the area so you parked somewhere else.

A. Correct.

Q. Could you point with your finger and we'll describe for the record? So if you could tell me which photo for Mr. Caramagno. Exhibit 1 you're looking at, and then we can go from there.

A. The back of the building, is that what you --

Q. So you're pointing at the top photo.

Where would you normally park that you couldn't park on that day?

A. Normally, right here.

Q. Okay. So you're pointing --

A. Because here's the door, so it was close. That's where we would normally park.

Q. So you're pointing where the vehicle is shown?

A. Well, I can't tell if there's -- 'cuz this picture, is this the wall, the dumpster, and then the first car how this is.

Q. I'm just -- as you look at this back area --

A. Uh-huh.

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Q. -- and that's the back area that you normally park, correct?
A. Correct.
Q. You pointed with your finger where the car is shown, correct?
A. Well, if, like I said, this is the wall where the dumpster is, I would park closest right by that wall.
Q. Okay. So that's where the dumpster, and there's a car near it, right?
A. Correct.
Q. Okay. So --
A. I believe.
MR. MOLLOY: Show me in the picture.
THE WITNESS: If that's a car, yes.
MR. GABEL: All right.
MR. BARATTA: He just wants to know, because when we read this --
THE WITNESS: Uh-huh.
MR. BARATTA: -- months from now we're not going to know what you're saying.
THE WITNESS: Okay.
MR. BARATTA: So if you could, and you might have answered it already, just tell him where your finger is pointing on the photograph.
THE WITNESS: Closest to the wall. There

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would be a dumpster, then a spot.

MR. BARATTA: Okay.

BY MR. GABEL:

Q. Okay. So for the record, Mr. Caramagno's Exhibit 1, the top photo, there is a vehicle, correct? You see the vehicle?

A. Yes.

Q. Do you see like the white object to the left of it?

A. Yes.

Q. Is that the general area you would park?

A. Yes.

Q. So on the morning of the incident were you not able to park there?

A. No.

Q. Is that correct?

A. Correct.

Q. Okay. So then where did you park?

A. I believe, if this is the window here --

Q. What do you mean -- you got to use words, the word here won't work.

A. If this is a window --

Q. Okay. Along the building?

A. On the building.

Q. Thank you.

A. If this is the window, I pretty much lined up right

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with that window.
Q. So it would be near where the rectangle is in that photograph?
A. Yes, right in this area right here.
Q. Just to the right of the --
MR. BARATTA: Just to the right of the hand drawn rectangle.
MR. GABEL: That's fine. That's all I need to know. Thank you very much.
BY MR. GABEL:
Q. And you were able to park there successful, correct?
A. Yeah.
Q. Okay. In that photograph where the circle and the X. is, could you describe what you saw there, if you're able to, or would you be guessing?
MR. MOLLOY: On the day of the incident?
BY MR. GABEL:
Q. Sure, on the day of the incident.
A. I would be guessing.
Q. Then don't guess, okay?
Now, you mentioned that over time you would see some TJ's personnel, and you said the words three or four people. Is that during spring, summer, winter, or is it a specific season you're thinking about?

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A. Just in general.
Q. Generally, okay.
So you're not thinking of the winter specifically?
A. Not --
Q. You got to let me finish my question.
Not in the wintertime specifically?
A. Correct.
Q. Okay. So in the winter time, including the winter of February 2014, if I were to ask you the number of TJ personnel out at that premises, could you tell me, or would you be guessing?
A. Guessing.
Q. Okay. I don't want you to guess.
Now, you don't know T&J's duties specifically, do you, vis-a-vis this property?
A. No.
Q. Okay. And you don't know what they did or did not do specifically in February 2014 vis-a-vis this property?
A. No.
Q. Okay. Now, on the morning of the incident when Donna Livings appeared at the front door of the restaurant, was she crawling?
A. No, I didn't see her -- I saw her at the door.
Q. Did she tell you she crawled to the front?

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A. She did not tell me that.
Q. Were her clothes wet?
A. Yes.
Q. Did she go home to change?
A. Yes.
Q. And did she tell you that she fell due to the water and that's why her clothes were wet?
A. Yes.
Q. Have you seen her dep transcript at all?
A. No.
Q. Did you discuss your proposed testimony with Donna Livings?
A. No.
MR. GABEL: Okay. I don't have anything else. Thank you.
MR. BARATTA: Nothing.
MR. STEINER: Just one really quick follow-up.

RE-EXAMINATION

BY MR. STEINER:
Q. How long was it from when she left to go change to the time she came back?
A. I would -- I'd say less than a half hour. I don't know. I'd be guessing, but it was not long.
Q. Do you remember what door she walked in --

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A. No.
Q. -- after she came back?
A. No.
Q. She didn't say that she fell a second time, did she?
A. No.
MR. STEINER: Thank you.
MR. BARATTA: You're all set. Thank you.
MR. GABEL: Thank you very much.
* * **
(The deposition was concluded at 3:56 p.m.)

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CERTIFICATE

STATE OF MICHIGAN

COUNTY OF MACOMB

I, LISA M. FIX, C.S.R. 3121, a Notary Public in and for the above county and state, do hereby certify that the deposition was taken before me on the date hereinbefore stated, that the witness was by me first duly sworn to testify to the truth; that this is a true, full and complete transcript of my stenographic notes so take; and that I am not related, nor a counsel to either party, nor interested in the event of this cause.

LISA M. FIX, CSR - 3121
Notary Public, Macomb County
My Commission Expires: 4-9-2019

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2016-001819-NI

Case Type	NI-PERSONAL INJURY, AUTO NEG.	Action:	WITH JURY DEMAND
Case Status:	Open	Status Date:	05/25/2016
File Date:	05/25/2016	Case Judge:	SERVITTO, JR, EDWARD A
DCM Track:	TRACK 180 DAYS DISCOVERY	Next Event:	10/03/2017

All Information | Docket | Party | Event | Financial | Receipt | Disposition

Docket Information

Date	Description	Docket Text	Amount Owed
05/25/2016	ENTRY FEE	ENTRY FEE Receipt: 893599 Date: 05/26/2016	$150.00
05/25/2016	JURY FEE	JURY FEE Receipt: 893599 Date: 05/26/2016	$85.00
05/25/2016	ELECTRONIC FILING SYSTEM FEE - CIVIL	ELECTRONIC FILING SYSTEM FEE - CIVIL Receipt: 893599 Date: 05/26/2016	$25.00
05/25/2016	COMPLAINT/PETITION FILED - CIVIL	COMPLAINT AND JURY DEMAND/PETITION FILED - CIVIL DONNA LIVINGS (PLAINTIFF); SAGE'S INVESTMENT GROUP, LLC (DEFENDANT);	
05/25/2016	SUMMONS ISSUED	SUMMONS ISSUED **EXP 08-24-16**	
05/25/2016	CASE PLACED ON E-FILING STATUS PER ADMINISTRATIVE ORDER 2010-6	CASE PLACED ON E-FILING STATUS PER ADMINISTRATIVE ORDER 2010-6	
06/06/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=33712773) PROOF OF SERVICE W/ATTCHED SIGNED CERT CARD	
06/06/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33712774)	
06/06/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=33770654) E-FILING FEE mt Receipt: Date: 6/7/2016 11:24:54 AM Receipt: 896788 Date: 06/07/2016	$5.00
06/10/2016	ANSWER TO COMPLAINT	ANSWER TO COMPLAINT (OBDH=33940063) DEFT SAGES INVESTMENT GROUP LLCS ANSWER TO COMPLAINT; ERIC CONN P64500 SAGE'S INVESTMENT GROUP, LLC (DEFENDANT);	
06/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33940085)	
06/10/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=34044871) E-FILING FEE mt Receipt: Date: 6/14/2016 10:37:25 AM Receipt: 898975 Date: 06/14/2016	$5.00
06/10/2016	AFFIRMATIVE DEFENSES	AFFIRMATIVE DEFENSES (OBDH=33940071) DEFT SAGES INVESTMENT GROUP LLCS AFFIRMATIVE DEFENSES	
06/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33940082)	
06/10/2016	RELIANCE ON JURY DEMAND	RELIANCE ON JURY DEMAND (OBDH=33940068) RELIANCE ON JURY DEMAND	
06/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33940088)	
06/10/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=33940067) PROOF OF SERVICE	
06/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33940075)	
06/10/2016	APPEARANCE (LITIGANT'S ATTORNEY)	APPEARANCE (LITIGANT'S PRIMARY ATTORNEY) (OBDH=33940064) APPEARANCE (LITIGANTS PRIMARY ATTORNEY); ERIC CONN P64500 SAGE'S INVESTMENT GROUP, LLC (DEFENDANT);	
06/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=33940076)	

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Date	Description	Docket Text	Amount Owed
06/14/2016	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED Event: EARLY DISPOSITION SETTLEMENT CONFERENCE Date: 08/11/2016 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR Result: ADJOURNED-STIPULATION & ORDER	
06/14/2016	IMAGE OF EVENT NOTICE SENT	IMAGE OF EVENT NOTICE SENT (N) EDSC NOTICE Sent on: 06/14/2016 15:33:25.76	
06/14/2016	SCHEDULING ORDER TO BE ENTERED - ANSWER RECV'D FROM:	SCHEDULING ORDER TO BE ENTERED - ANSWER RECV'D FROM:	
06/14/2016	DISCOVERY AND CASE EVALUATION ORDER ISSUED	DISCOVERY AND CASE EVALUATION ORDER ISSUED (N) IMAGE OF DISCOVERY AND CASE EVAL ORDER Sent on: 06/14/2016 15:41:47.79	
06/14/2016	CASE EVAL AFTER: SUMMARY DISPO MOTION BY: PLTF'S WITNESS LIST BY: DEFT'S WITNESS LIST BY:	CASE EVAL AFTER: 12/12/2016 SUMMARY DISPO MOTION BY: 03/13/2017 PLTF'S WITNESS LIST BY: 09/12/2016 DEFT'S WITNESS LIST BY: 09/27/2016	
06/15/2016	ANSWER TO AFFIRMATIVE DEFENSES	ANSWER TO AFFIRMATIVE DEFENSES (OBDH=34102817) PLAINTIFF'S REPLY TO DEFENDANT'S AFFIRMATIVE DEFENSES, PROOF OF SERVICE	
06/15/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=34102818)	
06/15/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=34204847) E-FILING FEE mt Receipt: Date: 6/17/2016 10:25:33 AM Receipt: 900144 Date: 06/17/2016	$5.00
08/09/2016	NOTICE OF NON-PARTY FAULT	NOTICE OF NON-PARTY FAULT (OBDH=36413551) DEFTS NOTICE OF NON-PARTY FAULT, PROOF OF SERVICE	
08/09/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36467081) E-FILING FEE mt Receipt: Date: 8/10/2016 9:27:26 AM Receipt: 916204 Date: 08/10/2016	$5.00
08/09/2016	NOTICE OF NON-PARTY FAULT	NOTICE OF NON-PARTY FAULT (OBDH=36413665) DEFENDANT'S NOTICE OF NON-PARTY FAULT; PROOF OF SERVICE	
08/09/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36413748)	
08/09/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36467329) E-FILING FEE mt Receipt: Date: 8/10/2016 9:31:03 AM Receipt: 916479 Date: 08/10/2016	$5.00
08/09/2016	AMENDED COMPLAINT	AMENDED COMPLAINT (OBDH=36418765) FIRST AMENDED COMPLAINT; RELIANCE UPON PREV FILED JURY DEMAND; PRF OF SRVC (ADDING ONLY T&J LANDSCAPING & SNOW REMOVAL INC AND GRAND DIMITRES OF EASTPOINTE FAMILY DINING) KEVIN A MCNEELY P38368	
08/09/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36418768)	
08/09/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36513184) E-FILING FEE mt Receipt: Date: 8/11/2016 8:40:21 AM Receipt: 916498 Date: 08/11/2016	$5.00
08/09/2016	SUMMONS ISSUED	SUMMONS ISSUED (OBDH=36418767) SUMMONS ISSUED: 08-09-16 EXP 11-09-16 AS TO GRAND DIMITRES OF EASTPOINTE FAMILY DINING AND T&J LANDSCAPING & SNOW REMOVAL INC	
08/09/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36418770)	
08/10/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36470218)	

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Date	Description	Docket Text	Amount Owed
08/11/2016	ADJOURNED - STIPULATION & ORDER	ADJOURNED - STIPULATION & ORDER TO 9/15/2016 AT 8AM, OTE The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 08/11/2016 at 8:00 am has been resulted as follows: Result: ADJOURNED-STIPULATION & ORDER Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR	
08/11/2016	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 08/11/2016 at 8:00 am has been rescheduled as follows: Event: EARLY DISPOSITION SETTLEMENT CONFERENCE Date: 09/15/2016 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR Result: HELD-CIVIL	
08/16/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=36683284)	
08/16/2016	STIP & ORDER SGD RE:	STIP & ORDER SGD RE: (OBDH=36470217) S/O ADJ EDSC FROM 8/11/2016 TO 9/15/2016 AT 8AM - SGD/EAS	
08/16/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=36683284)	
08/16/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36728353) E-FILING FEE mt Receipt: Date: 8/17/2016 8:14:05 AM Receipt: 918035 Date: 08/17/2016	$5.00
08/19/2016	ANSWER TO COMPLAINT	ANSWER TO COMPLAINT (OBDH=36845256) DEFT SAGE INVESTMENT GROUP LLC'S ANSWER TO PLTF FIRST AMENDED COMPLAINT SAGE'S INVESTMENT GROUP, LLC (DEFENDANT); ; ERIC P. CONN (Attorney) on behalf of SAGE'S INVESTMENT GROUP, LLC	
08/19/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36845257)	
08/19/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36893685) E-FILING FEE mt Receipt: Date: 8/22/2016 8:47:23 AM Receipt: 919883 Date: 08/22/2016	$5.00
08/22/2016	ANSWER TO AFFIRMATIVE DEFENSES	ANSWER TO AFFIRMATIVE DEFENSES (OBDH=36894834) PLTFS REPLY TO DEFTS AFFIRMATIVE DEFENSES PLED IN RESPONSE TO PLTFS FIRST AMENDED COMPLAINT; PRF OF SRVC	
08/22/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=36894836)	
08/22/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=36943440) E-FILING FEE mt Receipt: Date: 8/23/2016 9:16:52 AM Receipt: 920199 Date: 08/23/2016	$5.00
08/25/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=37067468) PROOF OF SERVICE	
08/25/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=37067469)	
08/25/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=37071441) E-FILING FEE mt Receipt: Date: 8/26/2016 8:13:52 AM Receipt: 921278 Date: 08/26/2016	$5.00
08/25/2016	SERVICE ON COMPLAINT FILED	SERVICE ON COMPLAINT FILED (OBDH=37067797) PROOF OF SERVICE ON COMPLAINT FILED CERT MAIL/GREEN CARD 8/22/16 GRAND DIMITRES OF EASTPOINTE FAMILY DINING (DEFENDANT);	
08/25/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=37067802)	
08/25/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=37072046) E-FILING FEE mt Receipt: Date: 8/26/2016 8:47:57 AM Receipt: 921465 Date: 08/26/2016	$5.00
09/12/2016	PLAINTIFF'S WITNESS LIST	PLAINTIFF'S WITNESS LIST (OBDH=37791222) PLTF'S WITNESS LIST, EXPERT WITNESS LIST, AND EXHIBIT LIST W/ PROOF OF SVC	

Date	Description	Docket Text	Amount Owed
09/12/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=37791225)	
09/12/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=37841486) E-FILING FEE mt Receipt: Date: 9/13/2016 10:00:12 AM Receipt: 926479 Date: 09/13/2016	$5.00
09/15/2016	HELD:	HELD: The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 09/15/2016 at 8:00 am has been resulted as follows: Result: HELD-CIVIL - CONF HELD IN CHAMBERS, MATTER ADJ TO 11/3/2016 AT 8:00AM FOR FURTHER EDS CONF, SGD. Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR	
09/15/2016	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 09/15/2016 at 8:00 am has been rescheduled as follows: Event: EARLY DISPOSITION SETTLEMENT CONFERENCE Date: 11/03/2016 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR Result: ADJOURNED-STIPULATION & ORDER	
09/15/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=37964110) PROOF OF SERVICE	
09/15/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=37964112)	
09/15/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38012685) E-FILING FEE mt Receipt: Date: 9/16/2016 11:26:17 AM Receipt: 927888 Date: 09/16/2016	$5.00
09/16/2016	NOTICE OF APPEARANCE	NOTICE OF APPEARANCE (OBDH=38012208) NOTICE OF APPEARANCE GRAND DIMITRES OF EASTPOINTE FAMILY DINING (DEFENDANT);	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012216)	
09/16/2016	APPEARANCE (LITIGANT'S ATTORNEY)	APPEARANCE (LITIGANT'S PRIMARY ATTORNEY) (OBDH=38012211) APPEARANCE (LITIGANTS PRIMARY ATTORNEY)(JAMES MOLLOY P59224) GRAND DIMITRES OF EASTPOINTE FAMILY DINING (DEFENDANT);	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012214)	
09/16/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38107976) E-FILING FEE mt Receipt: Date: 9/20/2016 8:06:03 AM Receipt: 928347 Date: 09/20/2016	$5.00
09/16/2016	ANSWER TO COMPLAINT	ANSWER TO COMPLAINT (OBDH=38012207) DEFT GRAND DIMITRE'S OF EASTPOINT FAMILY DININGS ANSWER TO PLTF FIRST AMENDED COMPLAINT (JAMES MOLLOY P59224) GRAND DIMITRES OF EASTPOINTE FAMILY DINING (DEFENDANT);	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012215)	
09/16/2016	CERTIFICATE OF SERVICE	CERTIFICATE OF SERVICE (OBDH=38012210) CERTIFICATE OF SERVICE	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012217)	
09/16/2016	AFFIRMATIVE DEFENSES	AFFIRMATIVE DEFENSES (OBDH=38012209) SPECIAL AND AFFIRMATIVE DEFENSES	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012219)	
09/16/2016	RELIANCE ON JURY DEMAND	RELIANCE ON JURY DEMAND (OBDH=38012212) RELIANCE ON JURY DEMAND	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38012222)	

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Date	Description	Docket Text	Amount Owed
09/16/2016	BRIEF IN SUPPORT	BRIEF IN SUPPORT (OBDH=38014855) BRIEF IN SUPPORT OF MOTION TO ADJOURN SCHEDULING ORDER DATES BY NINETY DAYS	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38014857)	
09/16/2016	MOTION TO ADJOURN	MOTION TO ADJOURN (OBDH=38014854) DEFENDANT, GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING'S, MOTION TO ADJOURN SCHEDULING ORDER DATES BY NINETY DAYS	
09/16/2016	MOTION FEE	MOTION FEE Filing Fee mt Receipt: Date: 9/16/2016 2:08:13 PM Receipt: 928585 Date: 09/20/2016	$20.00
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38014856)	
09/16/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38113927) E-FILING FEE mt Receipt: Date: 9/20/2016 10:25:48 AM Receipt: 928585 Date: 09/20/2016	$5.00
09/16/2016	E-FILED REQUEST FOR HEARING	E-FILED REQUEST FOR HEARING (OBDH=38014853) E-FILED REQUEST FOR HEARING; PRF OF SVC	
09/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38014859)	
09/20/2016	HEARING: MTN TO ADJOURN SCHEDULED	HEARING: MTN TO ADJOURN SCHEDULED Event: (E) MTN TO ADJOURN Date: 10/03/2016 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR MOLLOY Result: HELD-CIVIL	
09/20/2016	DISCOVERY AND CASE EVALUATION ORDER ISSUED	DISCOVERY AND CASE EVALUATION ORDER ISSUED TO ATTY JAMES MOLLOY (N) IMAGE OF DISCOVERY AND CASE EVAL ORDER Sent on: 09/20/2016 13:32:18.29	
09/20/2016	IMAGE OF EVENT NOTICE SENT	IMAGE OF EVENT NOTICE SENT (N) EDSC NOTICE Sent on: 09/20/2016 13:33:59.79	
09/20/2016	ANSWER TO AFFIRMATIVE DEFENSES	ANSWER TO AFFIRMATIVE DEFENSES (OBDH=38119307) PLTF REPLY TO DEFT GRAND DIMITRE'S AFFIRM DEFENSES	
09/20/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38119310)	
09/20/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38175041) E-FILING FEE mt Receipt: Date: 9/21/2016 11:00:38 AM Receipt: 929133 Date: 09/21/2016	$5.00
09/26/2016	DEFENDANTS WITNESS LIST	DEFENDANTS WITNESS LIST (OBDH=38439985) DEFT, GRAND DIMITRES OF EASTPOINTE FAMILY DININGS WITNESS LIST, PRF OF SERV	
09/26/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38439987)	
09/26/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38481696) E-FILING FEE mt Receipt: Date: 9/27/2016 8:30:09 AM Receipt: 930714 Date: 09/27/2016	$5.00
09/27/2016	DEFENDANTS WITNESS LIST	DEFENDANTS WITNESS LIST (OBDH=38493678) DEFT SAGES INVESTMENT GROUP WITNESS AND EXHIBIT LIST, PROOF OF SERVICE	
09/27/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=38493681)	
09/27/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=38582577) E-FILING FEE mt Receipt: Date: 9/29/2016 8:13:09 AM Receipt: 931464 Date: 09/29/2016	$5.00

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Date	Description	Docket Text	Amount Owed
10/03/2016	HELD:	HELD: MTN TO ADJ SCHEDULING ORDER DATES-GRTD, ADJ 90DYS, OTE The following event: (E) MTN TO ADJOURN scheduled for 10/03/2016 at 8:30 am has been resulted as follows: Result: HELD-CIVIL Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR HELD ON THE RECORD COURT REPORTER: CIMINI, MARY Certificate #: CSR-2643	
10/03/2016	ORDER EXTENDING DISCOVERY - SGD	ORD ADJ SCHEDULING ORDER DATES 90DYS: PWL 12/19/2016, DWL 1/2/2017, DSCVY CUTOFF 3/13/2017, MSD BY 6/12/2017 -SGD/EAS	
10/18/2016	SERVICE ON COMPLAINT FILED	SERVICE ON COMPLAINT FILED (OBDH=39613210) PROOF OF SERVICE ON COMPLAINT FILED PERS / 10/11/16 T&J LANDSCAPING & SNOW REMOVAL INC (DEFENDANT);	
10/18/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=39613573)	
10/18/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=39706563) E-FILING FEE mt Receipt: Date: 10/20/2016 8:06:26 AM Receipt: 938425 Date: 10/20/2016	$5.00
10/20/2016	DEFENDANTS WITNESS LIST	DEFENDANTS WITNESS LIST (OBDH=39710199) DEFENDANT, GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING'S, FIRST SUPPLEMENTAL WITNESS LIST, PRF OF SRV	
10/20/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=39710204)	
10/20/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=39840302) E-FILING FEE mt Receipt: Date: 10/24/2016 8:34:34 AM Receipt: 939406 Date: 10/24/2016	$5.00
10/25/2016	BRIEF IN SUPPORT	BRIEF IN SUPPORT (OBDH=39902301) BRIEF IN SUPPORT WITH ATTCHD EXHIBS A THROUGH C	
10/25/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=39902311)	
10/25/2016	MOTION FOR SUMMARY DISPOSITION	MOTION FOR SUMMARY DISPOSITION (OBDH=39902302) DEFENDANT, GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING'S, MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)	
10/25/2016	MOTION FEE	MOTION FEE Filing Fee mt Receipt: Date: 10/25/2016 3:23:32 PM Receipt: 940615 Date: 10/27/2016	$20.00
10/25/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=39902309)	
10/25/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=40048475) E-FILING FEE mt Receipt: Date: 10/27/2016 8:19:16 AM Receipt: 940615 Date: 10/27/2016	$5.00
10/25/2016	E-FILED REQUEST FOR HEARING	E-FILED REQUEST FOR HEARING (OBDH=39902303) E-FILED REQUEST FOR HEARING WITH PROOF OF SERVICE FOR GRAND DIMITRES MOTION FOR SUMMARY DISPOSITION FOR 11-28-16	
10/25/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=39902314)	
10/26/2016	HEARING: MTN FOR SUMMARY DISP SCHEDULED	HEARING: MTN FOR SUMMARY DISP SCHEDULED Event: (E) MTN FOR SUMMARY DISPOSITION Date: 11/28/2016 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR MOLLOY Result: HELD-CIVIL	
10/31/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40195967)	

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Date	Description	Docket Text	Amount Owed
11/03/2016	ADJOURNED - STIPULATION & ORDER	ADJOURNED - STIPULATION & ORDER The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 11/03/2016 at 8:00 am has been resulted as follows: Result: ADJOURNED-STIPULATION & ORDER Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR	
11/03/2016	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED	EARLY DISPOSITION SETTLEMENT CONFERENCE SCHEDULED The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 11/03/2016 at 8:00 am has been rescheduled as follows: Event: EARLY DISPOSITION SETTLEMENT CONFERENCE Date: 12/08/2016 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR Result: HELD: NOT PLACED ON RECORD	
11/03/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=40348874)	
11/03/2016	STIP & ORDER SGD RE:	STIP & ORDER SGD RE: (OBDH=40195963) S/O ADJ EDSC FROM 11/3/2016 TO 12/8/2016 AT 8AM - SGD/EAS	
11/03/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=40348874)	
11/03/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=40369469) E-FILING FEE mt Receipt: Date: 11/4/2016 8:05:46 AM Receipt: 942883 Date: 11/04/2016	$5.00
11/03/2016	CERTIFICATE OF SERVICE	CERTIFICATE OF SERVICE (OBDH=40339756) CERTIFICATE OF SERVICE	
11/03/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40339759)	
11/03/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=40429810) E-FILING FEE mt Receipt: Date: 11/7/2016 8:21:12 AM Receipt: 943457 Date: 11/07/2016	$5.00
11/16/2016	AFFIRMATIVE DEFENSES	AFFIRMATIVE DEFENSES (OBDH=40705613) AFFIRMATIVE DEFENSES; PRF OF SRVC	
11/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40705615)	
11/16/2016	ANSWER TO COMPLAINT	ANSWER TO COMPLAINT (OBDH=40705611) ANSWER TO FIRST AMENDED COMPLAINT; PRF OF SRVC; STEVEN GABEL P40617 T&J LANDSCAPING & SNOW REMOVAL INC (DEFENDANT);	
11/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40705616)	
11/16/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=40973248) E-FILING FEE mt Receipt: Date: 11/23/2016 8:10:19 AM Receipt: 948687 Date: 11/23/2016	$5.00
11/16/2016	RELIANCE ON JURY DEMAND	RELIANCE ON JURY DEMAND (OBDH=40705614) RELIANCE UPON DEMAND FOR JURY TRIAL; PRF OF SRVC	
11/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40705617)	
11/16/2016	APPEARANCE (LITIGANT'S ATTORNEY)	APPEARANCE (LITIGANT'S ATTORNEY) (OBDH=40706405) APPEARANCE; PRF OF SRVC; SSTEVEN GABEL P40617 (LITIGANTS ATTORNEY) T&J LANDSCAPING & SNOW REMOVAL INC (DEFENDANT);	
11/16/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40706406)	
11/16/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=40973431) E-FILING FEE mt Receipt: Date: 11/23/2016 8:16:22 AM Receipt: 948709 Date: 11/23/2016	$5.00
11/17/2016	ANSWER TO AFFIRMATIVE DEFENSES	ANSWER TO AFFIRMATIVE DEFENSES (OBDH=40769919) PLTF REPLY TO DEFT T&J LANDSCAPING AND SNOW REMOVAL INC'S AFFIRM DEFENSES	

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Date	Description	Docket Text	Amount Owed
11/17/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=41538933) E-FILING FEE mt Receipt: Date: 11/30/2016 10:00:12 AM Receipt: 949928 Date: 11/30/2016	$5.00
11/18/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40769924)	
11/18/2016	BRIEF IN OPPOSITION	BRIEF IN OPPOSITION (OBDH=40818774) PLTFS BRIEF IN OPPOSITION TO DEFT MTN FOR SUMMARY DISPOSITION; PRF OF SVC	
11/18/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40818782)	
11/18/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=41541609) E-FILING FEE mt Receipt: Date: 11/30/2016 11:45:21 AM Receipt: 950076 Date: 11/30/2016	$5.00
11/18/2016	ANSWER TO MOTION	ANSWER TO MOTION (OBDH=40818778) PLTFS ANSWER TO DEFT GRAND DIMITRES OF EASTPOINT FAMILY DINING MTN FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116 (C)(7); PRF OF SVC	
11/18/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40818781)	
11/18/2016	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=40818777) EXHIBIT A TO PLTFS ANS TO DEFTS MTN FOR SD	
11/18/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40818780)	
11/23/2016	ANSWER TO MOTION	ANSWER TO MOTION (OBDH=40980289) DEFT GRAND DIMITRES OF EASTPOINTE FAMILY DININGS REPLY TO PLTF ANSWER TO GRAND DIMITRES MTN FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116 (C)(7) W/EXHIBIT; PRF OF SVC	
11/23/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=40980291)	
11/23/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=41833157) E-FILING FEE mt Receipt: Date: 12/2/2016 8:22:15 AM Receipt: 950914 Date: 12/02/2016	$5.00
11/28/2016	IMAGE OF EVENT NOTICE SENT	IMAGE OF EVENT NOTICE SENT - AS TO STEVEN GABEL (N) EDSC NOTICE Sent on: 11/28/2016 11:46:46.65	
11/28/2016	DISCOVERY AND CASE EVALUATION ORDER ISSUED	DISCOVERY AND CASE EVALUATION ORDER ISSUED (N) IMAGE OF DISCOVERY AND CASE EVAL ORDER Sent on: 11/28/2016 11:49:25.30	
11/28/2016	HELD:	HELD BFR JMB FOR EAS: MTN FOR S/D-TAKEN U/A, OPIN/ORD TO ISSUE The following event: (E) MTN FOR SUMMARY DISPOSITION scheduled for 11/28/2016 at 8:30 am has been resulted as follows: Result: HELD-CIVIL Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR HELD ON THE RECORD COURT REPORTER: RHONDA FOSTER CSR #3612	
11/28/2016	STIP & ORDER SGD RE:	STIP & ORDER SGD RE: (OBDH=41124972) S/O COMPELLING PLTFS ANSWERS TO DEFT GRAND DIMITRES OF EASTPOINTE FAMILY DININGS INTERROGS AND RES TO REQ FOR PROD OF DOCS DTD 9/16/2016 -SGD/JMB/EAS	
11/28/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41124973)	
11/28/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=42111632) E-FILING FEE mt Receipt: Date: 12/6/2016 3:45:26 PM Receipt: 952556 Date: 12/06/2016	$5.00
12/01/2016	PLAINTIFF'S WITNESS LIST	PLAINTIFF'S WITNESS LIST (OBDH=41786758) PLAINTIFF'S LAY WITNESS AND EXPERT WITNESS INTERROGATORIES TO DEFENDANT, SAGE'S INVESTMENT GROUP, LLC, PRF OF SRV	

Date	Description	Docket Text	Amount Owed
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41786779)	
12/01/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=42218668) E-FILING FEE mt Receipt: Date: 12/8/2016 8:06:49 AM Receipt: 953015 Date: 12/08/2016	$5.00
12/01/2016	REQUEST FOR PRODUCTION OF DOCUMENTS	REQUEST FOR PRODUCTION OF DOCUMENTS (OBDH=41786756) PLAINTIFF'S 2nd REQUEST FOR PRODUCTION OF DOCUMENTS PURSUANT TO MCR 2.310 TO DEFENDANT GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING, PRF OF SRV	
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41786784)	
12/01/2016	REQUEST FOR PRODUCTION OF DOCUMENTS	REQUEST FOR PRODUCTION OF DOCUMENTS (OBDH=41786762) PLAINTIFF'S 2nd REQUEST FOR PRODUCTION OF DOCUMENTS PURSUANT TO MCR 2.310 TO DEFENDANT SAGE'S INVESTMENT GROUP, LLC, PRF OF SRV	
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41786785)	
12/01/2016	PLAINTIFF'S WITNESS LIST	PLAINTIFF'S WITNESS LIST (OBDH=41786761) PLAINTIFF'S EXPERT WITNESS INTERROGATORIES TO DEFENDANT, GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING, PRF OF SRV	
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41786783)	
12/01/2016	REQUEST FOR PRODUCTION OF DOCUMENTS	REQUEST FOR PRODUCTION OF DOCUMENTS (OBDH=41786759) PLAINTIFF'S 2nd REQUEST FOR PRODUCTION OF DOCUMENTS PURSUANT TO MCR 2.310 TO DEFENDANT T&J LANSCAPING, PRF OF SRV	
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41786782)	
12/01/2016	PLAINTIFF'S WITNESS LIST	PLAINTIFF'S WITNESS LIST (OBDH=41790060) PLAINTIFF'S FIRST AMENDED WITNESS LIST, EXPERT WITNESS LIST AND EXHIBIT LIST, PRF OF SRV	
12/01/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=41790061)	
12/01/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=42218768) E-FILING FEE mt Receipt: Date: 12/8/2016 8:10:57 AM Receipt: 953073 Date: 12/08/2016	$5.00
12/06/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=42111575)	
12/06/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=42111575)	
12/07/2016	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=42169649) PROOF OF SERVICE	
12/07/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=42169652)	
12/07/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=42503820) E-FILING FEE mt Receipt: Date: 12/14/2016 8:09:20 AM Receipt: 954715 Date: 12/14/2016	$5.00
12/08/2016	HELD: NOT PLACED ON RECORD,	HELD: NOT PLACED ON RECORD, DSCVY EXTENDED 30DYS, STATUS CONF SET FOR 4/27/2017 AT 8AM, MSD CUTOFF IS 6/12/2017, OTE The following event: EARLY DISPOSITION SETTLEMENT CONFERENCE scheduled for 12/08/2016 at 8:00 am has been resulted as follows: Result: HELD: NOT PLACED ON RECORD Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR	
12/08/2016	ORDER EXTENDING DISCOVERY - SGD	ORDER EXTENDING DISCOVERY TO 2/12/2017- SGD	
12/08/2016	CERTIFICATE OF SERVICE	CERTIFICATE OF SERVICE (OBDH=42220120) CERTIFICATE OF SERVICE	

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Date	Description	Docket Text	Amount Owed
12/08/2016	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=42220122)	
12/08/2016	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=42554724) E-FILING FEE mt Receipt: Date: 12/15/2016 8:06:13 AM Receipt: 954969 Date: 12/15/2016	$5.00
12/09/2016	STATUS CONFERENCE SCHEDULED	STATUS CONFERENCE SCHEDULED Event: STATUS CONFERENCE Date: 04/27/2017 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR Result: ADJOURNED-STIPULATION & ORDER	
12/09/2016	OPINION & ORDER SIGNED	OPIN/ORD GRANTING GRAND DIMITRES OF EASTPOINTE FAMILY DININGS MTN FOR S/D -SGD/JMB/EAS (DOES NOT CLOSE CASE)	
01/04/2017	DEFENDANTS WITNESS LIST	DEFENDANTS WITNESS LIST (OBDH=43908258) DEFENDANTS SAGE'S INVESTMENT GROUP WITNESS AND EXHIBIT LIST	
01/04/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=43908260)	
01/04/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=44249947) E-FILING FEE mt Receipt: Date: 1/17/2017 10:50:26 AM Receipt: 962892 Date: 01/17/2017	$5.00
01/10/2017	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=44071036) PROOF OF SERVICE	
01/10/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=44071041)	
01/10/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=44391823) E-FILING FEE mt Receipt: Date: 1/20/2017 8:27:02 AM Receipt: 964473 Date: 01/20/2017	$5.00
01/10/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=44075161) PLTF 2ND EXPERT WITNESS INTERROGS TO DEFT, SAGE'S INVESTMENT GROUP LLC	
01/10/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=44075162)	
01/10/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=44395456) E-FILING FEE mt Receipt: Date: 1/20/2017 11:10:58 AM Receipt: 964728 Date: 01/20/2017	$5.00
02/01/2017	DEFENDANTS WITNESS LIST	DEFENDANTS WITNESS LIST (OBDH=44828077) WITNESS LIST OF DEFT T & J LANDSCAPING & SNOW REMOVAL INC	
02/01/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=44828079)	
02/01/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=44896329) E-FILING FEE mt Receipt: Date: 2/6/2017 9:00:13 AM Receipt: 970977 Date: 02/06/2017	$5.00
02/13/2017	NOTICE OF TAKING DEPOSITIONS	NOTICE OF TAKING DEPOSITIONS (OBDH=45150080) NOTICE OF TAKING DEPOSITION DUECES TECUM OF JAMES SAGE; PRF OF SRV	
02/13/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45150081)	
02/13/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=45236313) E-FILING FEE mt Receipt: Date: 2/15/2017 3:31:20 PM Receipt: 974464 Date: 02/15/2017	$5.00
02/14/2017	CASE EVALUATION HEARING SCHEDULED	CASE EVALUATION HEARING SCHEDULED Event: CASE EVALUATION HEARING Date: 04/03/2017 Time: 2:00 pm Judge: 3A040317 Location: CASE EVAL CONF ROOM A - 3RD FLOOR Result: CASE EVALUATION ADJOURNED	
02/14/2017	CASE EVAL NOTICE SENT	CASE EVAL NOTICE SENT CASE EVALUATION HEARING NOTICE Sent on: 02/14/2017 16:13:45.74	

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Date	Description	Docket Text	Amount Owed
02/17/2017	NOTICE OF TAKING DEPOSITIONS	NOTICE OF TAKING DEPOSITIONS (OBDH=45302971) RE-NOTICE OF TAKING DEPOSITION DUCES TECUM OF JAMES SAGE, PROOF OF SERVICE	
02/17/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45302985)	
02/17/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=45494338) E-FILING FEE mt Receipt: Date: 2/24/2017 2:50:42 PM Receipt: 977030 Date: 02/24/2017	$5.00
02/21/2017	CASE EVALUATION HEARING TO BE RESCHEDULED	CASE EVALUATION HEARING TO BE RESCHEDULED **2/21/17 - ADJ TO 4/17/17 - ATTY BARATTA OUT OF TOWN ALL WEEK** The following event: CASE EVALUATION HEARING scheduled for 04/03/2017 at 2:00 pm has been resulted as follows: Result: CASE EVALUATION ADJOURNED Judge: 3A040317 Location: CASE EVAL CONF ROOM A - 3RD FLOOR	
02/22/2017	PLAINTIFF'S WITNESS LIST	PLAINTIFF'S WITNESS LIST (OBDH=45415148) PLAINTIFF'S LAY WITNESS AND EXPERT WITNESS INTERROGATORIES TO DEFENDANT, T&J LANDSCAPING & SNOW REMOVAL, INC; PRF OF SRVC	
02/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45415156)	
02/22/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=45683393) E-FILING FEE mt Receipt: Date: 3/3/2017 11:10:58 AM Receipt: 979163 Date: 03/03/2017	$5.00
02/27/2017	CASE EVALUATION HEARING SCHEDULED	CASE EVALUATION HEARING SCHEDULED Event: CASE EVALUATION HEARING Date: 04/17/2017 Time: 9:00 am Judge: 3A041717 Location: CASE EVAL CONF ROOM A - 3RD FLOOR Result: CASE EVALUATION HEARING HELD	
02/27/2017	CASE EVAL NOTICE SENT	CASE EVAL NOTICE SENT CASE EVALUATION HEARING NOTICE Sent on: 02/27/2017 13:16:33.91	
02/28/2017	SUBPOENA-ORDER TO APPEAR	SUBPOENA-ORDER TO APPEAR (OBDH=45574384) SUBPOENA - SIGNED BY ATTORNEY	
02/28/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45574400)	
02/28/2017	SUBPOENA-ORDER TO APPEAR	SUBPOENA-ORDER TO APPEAR (OBDH=45574385) SUBPOENA - SIGNED BY ATTORNEY (DEBORAH BUCK)	
02/28/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45574401)	
02/28/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=45574366) NOTICE OF TAKING DEPOSITION DUCES TECUM OF THOMAS CARAMANGO	
02/28/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45574402)	
02/28/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=45829824) E-FILING FEE mt Receipt: Date: 3/8/2017 8:31:08 AM Receipt: 981030 Date: 03/08/2017	$5.00
02/28/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=45574394) NOTICE OF TAKING DEPOSITION OF DEBORAH BUCK	
02/28/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45574405)	
02/28/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=45574392) NOTICE OF TAKING DEPOSITION DUCES TECUM OF THOMAS SHKOUKANI	
02/28/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45574406)	
03/07/2017	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=45783864) PROOF OF SERVICE OF SUBPOENA W/ATTCHMENT	

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Date	Description	Docket Text	Amount Owed
03/07/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45783865)	
03/07/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=46007672) E-FILING FEE mt Receipt: Date: 3/13/2017 8:11:02 AM Receipt: 982723 Date: 03/13/2017	$5.00
03/08/2017	SUBPOENA TO APPEAR RETURNED	SUBPOENA TO APPEAR RETURNED (OBDH=45834598) SUBPOENA TO APPEAR RETURNED	
03/08/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=45834618)	
03/08/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=46015270) E-FILING FEE mt Receipt: Date: 3/13/2017 3:47:10 PM Receipt: 983419 Date: 03/13/2017	$5.00
03/24/2017	CASE EVALUATION HEARING FEE PAID	CASE EVALUATION HEARING FEE PAID CK #2581586, 2581587, 2581588 FOR $25 EACH FOR THE 4/17/17 HRG STEVEN R. GABEL (Attorney) on behalf of T&J LANDSCAPING & SNOW REMOVAL INC (DEFENDANT)	
04/03/2017	CASE EVALUATION HEARING FEE PAID	CASE EVALUATION HEARING FEE PAID CK#3584 FOR $75 FOR THE 4/17/17 HRG CHRISTOPHER R. BARATTA (Attorney) on behalf of DONNA LIVINGS (PLAINTIFF)	
04/03/2017	CASE EVALUATION SUMMARY FILED	CASE EVALUATION SUMMARY FILED FOR THE 4/17/17 HRG CHRISTOPHER R. BARATTA (Attorney) on behalf of DONNA LIVINGS (PLAINTIFF)	
04/03/2017	CASE EVALUATION SUMMARY FILED	CASE EVALUATION SUMMARY FILED FOR THE 4/17/17 HRG STEVEN R. GABEL (Attorney) on behalf of T&J LANDSCAPING & SNOW REMOVAL INC (DEFENDANT)	
04/12/2017	CASE EVALUATION HEARING FEE PAID	CASE EVALUATION HEARING FEE PAID ***FEE & LATE FEE*** CK#2344 FOR $225 FOR THE 4/17/17 HRG ***CK RET'D FOR CORRECTED EVALUATORS - ATTY WILL BRING CK TO HRG*** ERIC P. CONN (Attorney) on behalf of SAGE'S INVESTMENT GROUP, LLC (DEFENDANT)	
04/12/2017	CASE EVALUATION LATE FEE PAID	CASE EVALUATION LATE FEE PAID	
04/12/2017	CASE EVALUATION SUMMARY FILED	CASE EVALUATION SUMMARY FILED ***LATE*** FOR THE 4/17/17 HRG ERIC P. CONN (Attorney) on behalf of SAGE'S INVESTMENT GROUP, LLC (DEFENDANT)	
04/12/2017	CASE EVALUATION CHECK RETURN LETTER	CASE EVALUATION CHECK RETURN LETTER CHECK RETURN LETTER FOR CASE EVALUATION Sent on: 04/12/2017 13:01:26.23	
04/12/2017	CASE EVALUATION CHECK RETURN LETTER	CASE EVALUATION CHECK RETURN LETTER CHECK RETURN LETTER FOR CASE EVALUATION Sent on: 04/12/2017 13:01:43.25	
04/18/2017	CASE EVALUATION HEARING HELD	CASE EVALUATION HEARING HELD The following event: CASE EVALUATION HEARING scheduled for 04/17/2017 at 9:00 am has been resulted as follows: Result: CASE EVALUATION HEARING HELD Judge: 3A041717 Location: CASE EVAL CONF ROOM A - 3RD FLOOR	
04/26/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=47552708)	
04/27/2017	ADJOURNED - STIPULATION & ORDER	ADJOURNED - STIPULATION & ORDER The following event: STATUS CONFERENCE scheduled for 04/27/2017 at 8:00 am has been resulted as follows: Result: ADJOURNED-STIPULATION & ORDER Judge: SERVITTO JR, EDWARD A Location: COURTROOM F - 3RD FLOOR	

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Date	Description	Docket Text	Amount Owed
04/27/2017	SETTLEMENT CONFERENCE SCHEDULED	SETTLEMENT CONFERENCE SCHEDULED The following event: STATUS CONFERENCE scheduled for 04/27/2017 at 8:00 am has been rescheduled as follows: Event: SETTLEMENT CONFERENCE Date: 05/25/2017 Time: 8:00 am Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3 Result: HELD: NOT PLACED ON RECORD	
04/27/2017	STIP & ORDER SGD RE:	STIP & ORDER SGD RE: (OBDH=47552707) S/O ADJ STATUS CONF 4/27/2017 TO SETTLMNT CONF ON 5/25/2017 AT 8AM -SGD/EAS	
04/27/2017	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=47596934)	
04/27/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=47596989) E-FILING FEE mt Receipt: Date: 4/27/2017 2:25:22 PM Receipt: 999994 Date: 04/27/2017	$5.00
05/16/2017	CASE EVALUATION ACCEPTANCE/REJECTION NOTICE MAILED	CASE EVALUATION ACCEPTANCE/REJECTION NOTICE MAILED CASE EVAL ACCEPT/REJECT NOTICE Sent on: 05/16/2017 11:38:01.30	
05/16/2017	CASE EVALUATION AWARD REJECTED	CASE EVALUATION AWARD REJECTED	
05/22/2017	MOTION:	MOTION: (OBDH=48423204) DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S, MOTION FOR SUMMARY DISPOSITION	
05/22/2017	MOTION FEE	MOTION FEE Filing Fee mt Receipt: Date: 5/22/2017 4:22:40 PM Receipt: 1010187 Date: 05/30/2017	$20.00
05/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48423249)	
05/22/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=48733133) E-FILING FEE mt Receipt: Date: 5/30/2017 9:00:32 AM Receipt: 1010187 Date: 05/30/2017	$5.00
05/22/2017	BRIEF IN SUPPORT	BRIEF IN SUPPORT (OBDH=48423216) DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION	
05/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48423250)	
05/22/2017	PROOF OF SERVICE	PROOF OF SERVICE (OBDH=48423211) PROOF OF SERVICE	
05/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48423252)	
05/22/2017	E-FILED REQUEST FOR HEARING	E-FILED REQUEST FOR HEARING (OBDH=48423207) E-FILED REQUEST FOR HEARING, NOTICE OF HEARING, PROOF OF SERVICE	
05/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48423254)	
05/22/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=48423245) EXHIBITS A-K	
05/22/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48423253)	
05/25/2017	HELD: NOT PLACED ON RECORD,	HELD: NOT PLACED ON RECORD, MATTER TO BE FACILITATED W/DANIEL MAKARSKI, COUNSEL FOR QBE SHALL BE PRESENT AT FACILITATION, P/TRIAL SHALL BE HELD ON 10/3/2017 AT 8:30AM, TRIAL SET FOR 10/11/2017 AT 1:30PM -SGD/EAS The following event: SETTLEMENT CONFERENCE scheduled for 05/25/2017 at 8:00 am has been resulted as follows: Result: HELD: NOT PLACED ON RECORD Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	

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Date	Description	Docket Text	Amount Owed
05/25/2017	PRETRIAL CONFERENCE SCHEDULED	PRETRIAL CONFERENCE SCHEDULED The following event: SETTLEMENT CONFERENCE scheduled for 05/25/2017 at 8:00 am has been rescheduled as follows: Event: PRETRIAL CONFERENCE Date: 10/03/2017 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	
05/25/2017	TRIAL SCHEDULED	TRIAL SCHEDULED Event: TRIAL Date: 10/11/2017 Time: 1:30 pm Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	
05/25/2017	MOTION:	MOTION: (OBDH=48594103) PLTFS MTN TO COMPEL SURVEILLANCE VIDEO WITH EXHS, PROOF OF SERVICE	
05/25/2017	MOTION FEE	MOTION FEE Filing Fee mt Receipt: Date: 5/25/2017 10:26:40 AM Receipt: 1010302 Date: 05/30/2017	$20.00
05/25/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48594105)	
05/25/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=48735651) E-FILING FEE mt Receipt: Date: 5/30/2017 11:05:27 AM Receipt: 1010302 Date: 05/30/2017	$5.00
05/25/2017	E-FILED REQUEST FOR HEARING	E-FILED REQUEST FOR HEARING (OBDH=48594101) E-FILED REQUEST FOR HEARING; NOTICE OF HEARING; PROOF OF SERVICE	
05/25/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48594104)	
05/30/2017	HEARING: MTN TO COMPEL SCHEDULED	HEARING: MTN TO COMPEL SCHEDULED Event: (E) MTN TO COMPEL Date: 06/19/2017 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3 BARATTA Result: MOTION DISMISSED	
05/30/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=48735465)	
05/31/2017	HEARING: MTN FOR SUMMARY DISP SCHEDULED	HEARING: MTN FOR SUMMARY DISP SCHEDULED Event: (E) MTN FOR SUMMARY DISPOSITION Date: 06/12/2017 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3 STEINER Result: MOTION HEARING ADJOURNED	
06/02/2017	MOTION DISMISSED	MOTION DISMISSED PER ATTY BARATTA The following event: (E) MTN TO COMPEL scheduled for 06/19/2017 at 8:30 am has been resulted as follows: Result: MOTION DISMISSED Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	
06/06/2017	STIP & ORDER SGD RE:	STIP & ORDER SGD RE: (OBDH=48735454) S/O OF DISM OF DEFT T&J LANDSCAPING AND SNOW REMOVAL INC ONLY W/PREJ -SGD/EAS (DOES NOT CLOSE CASE)	
06/06/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=49046703) E-FILING FEE mt Receipt: Date: 6/6/2017 2:15:30 PM Receipt: 1013024 Date: 06/06/2017	$5.00

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Date	Description	Docket Text	Amount Owed
06/12/2017	MOTION HEARING ADJOURNED	MOTION HEARING ADJOURNED TO 6/19/2017 AT 8:30AM The following event: (E) MTN FOR SUMMARY DISPOSITION scheduled for 06/12/2017 at 8:30 am has been resulted as follows: Result: MOTION HEARING ADJOURNED Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	
06/12/2017	HEARING: MTN FOR SUMMARY DISP SCHEDULED	HEARING: MTN FOR SUMMARY DISP SCHEDULED The following event: (E) MTN FOR SUMMARY DISPOSITION scheduled for 06/12/2017 at 8:30 am has been rescheduled as follows: Event: (E) MTN FOR SUMMARY DISPOSITION Date: 06/19/2017 Time: 8:30 am Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3 STEINER Result: HELD-CIVIL	
06/12/2017	ANSWER TO MOTION	ANSWER TO MOTION (OBDH=49286303) PLAINTIFF'S ANSWER TO SAGE INVESTMENT GROUP'S MOTION FOR SUMMARY DISPOSITION WITH PROOF OF SERV	
06/12/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=49286317)	
06/12/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=49623303) E-FILING FEE mt Receipt: Date: 6/21/2017 11:34:25 AM Receipt: 1019064 Date: 06/21/2017	$5.00
06/12/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=49286301) EXHIBITS D THROUGH J TO MOTION/BRIEF IN OPPOSITION TO MOTION	
06/12/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=49286315)	
06/12/2017	BRIEF IN OPPOSITION	BRIEF IN OPPOSITION (OBDH=49286302) PLAINTIFF'S BRIEF IN OPPOSITION TO SAGE INVESTMENT GROUP'S MOTION FOR SUMMARY DISPOSITION WITH PROOF OF SERV	
06/12/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=49286320)	
06/12/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=49286305) EXHIBITS TO ANSWER/BRIEF IN OPPOSITION TO MOTION	
06/12/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=49286306)	
06/14/2017	DOCUMENT FILED:	DOCUMENT FILED: (OBDH=49394910) DEFENDANT, SAGE'S INVESTMENT GROUP, LLC'S, REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION WITH PROOF OF SERV	
06/14/2017	TRUEFILING PROOF OF SERVICE	TRUEFILING PROOF OF SERVICE (OBDH=49394912)	
06/14/2017	E-FILING FEE WITH SERVICE	E-FILING FEE WITH SERVICE (OBDH=49670526) E-FILING FEE mt Receipt: Date: 6/22/2017 10:53:59 AM Receipt: 1019605 Date: 06/22/2017	$5.00
06/19/2017	HELD:	HELD: MTN FOR S/D-DENIED -SGD/EAS (DOES NOT CLOSE CASE) The following event: (E) MTN FOR SUMMARY DISPOSITION scheduled for 06/19/2017 at 8:30 am has been resulted as follows: Result: HELD-CIVIL Judge: SERVITTO JR, EDWARD A Location: CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3 HELD ON THE RECORD COURT REPORTER: CIMINI, MARY Certificate #: CSR-2643	

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Party Information

LIVINGS, DONNA - PLAINTIFF

DOB
DOD
Disposition
Disp Date

Address Phone

Alias

Party Attorney
Attorney: BARATTA, CHRISTOPHER R.
Bar Code: 51293
Address: 120 MARKET STREET
MT CLEMENS, MI 48043
Phone: (586)469-1111

More Party Information

SAGE'S INVESTMENT GROUP, LLC - DEFENDANT

DOB
DOD
Disposition
Disp Date

Address Phone

Alias

Party Attorney
Attorney: CONN, ERIC P.
Bar Code: 64500
Address: 39475 THIRTEEN MILE RD # 203
NOVI, MI 48377
Phone: (248)994-0060

More Party Information

T&J LANDSCAPING & SNOW REMOVAL INC - DEFENDANT

DOB
DOD
Disposition: DISMISSED
Disp Date: 06/06/2017

Address Phone

Alias

Party Attorney
Attorney: GABEL, STEVEN R.
Bar Code: 40617
Address: 25800 NORTHWESTERN HWY # 400
SOUTHFIELD, MI 48075
Phone: (248)233-5575

More Party Information

GRAND DIMITRES OF EASTPOINTE FAMILY DINING - DEFENDANT

DOB
DOD
Disposition: SUMMARY DISPOSITION
Disp Date: 12/09/2016

Address Phone

Alias

Party Attorney
Attorney: MOLLOY, JAMES P
Bar Code: 59224
Address: PO BOX 5025
TROY, MI 48007
Phone: (248)851-9500

More Party Information

Events

Date/Time	Location	Type	Result	Event Judge
08/11/2016 08:00 AM	COURTROOM F - 3RD FLOOR	EARLY DISPOSITION SETTLEMENT CONFERENCE	ADJOURNED-STIPULATION & ORDER	SERVITTO, JR, EDWARD A
09/15/2016 08:00 AM	COURTROOM F - 3RD FLOOR	EARLY DISPOSITION SETTLEMENT CONFERENCE	HELD-CIVIL	SERVITTO, JR, EDWARD A
10/03/2016 08:30 AM	COURTROOM F - 3RD FLOOR	(E) MTN TO ADJOURN	HELD-CIVIL	SERVITTO, JR, EDWARD A
11/03/2016 08:00 AM	COURTROOM F - 3RD FLOOR	EARLY DISPOSITION SETTLEMENT CONFERENCE	ADJOURNED-STIPULATION & ORDER	SERVITTO, JR, EDWARD A
11/28/2016 08:30 AM	COURTROOM F - 3RD FLOOR	(E) MTN FOR SUMMARY DISPOSITION	HELD-CIVIL	SERVITTO, JR, EDWARD A

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Date/Time	Location	Type	Result	Event Judge
12/08/2016 08:00 AM	COURTROOM F - 3RD FLOOR	EARLY DISPOSITION SETTLEMENT CONFERENCE	HELD: NOT PLACED ON RECORD	SERVITTO, JR, EDWARD A
04/03/2017 02:00 PM	CASE EVAL CONF ROOM A - 3RD FLOOR	CASE EVALUATION HEARING	CASE EVALUATION ADJOURNED	3A040317
04/17/2017 09:00 AM	CASE EVAL CONF ROOM A - 3RD FLOOR	CASE EVALUATION HEARING	CASE EVALUATION HEARING HELD	3A041717
04/27/2017 08:00 AM	COURTROOM F - 3RD FLOOR	STATUS CONFERENCE	ADJOURNED-STIPULATION & ORDER	SERVITTO, JR, EDWARD A
05/25/2017 08:00 AM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	SETTLEMENT CONFERENCE	HELD: NOT PLACED ON RECORD	SERVITTO, JR, EDWARD A
06/12/2017 08:30 AM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	(E) MTN FOR SUMMARY DISPOSITION	MOTION HEARING ADJOURNED	SERVITTO, JR, EDWARD A
06/19/2017 08:30 AM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	(E) MTN FOR SUMMARY DISPOSITION	HELD-CIVIL	SERVITTO, JR, EDWARD A
06/19/2017 08:30 AM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	(E) MTN TO COMPEL	MOTION DISMISSED	SERVITTO, JR, EDWARD A
10/03/2017 08:30 AM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	PRETRIAL CONFERENCE		SERVITTO, JR, EDWARD A
10/11/2017 01:30 PM	CIRCUIT COURT BUILDING - 3RD FLOOR - COURT ROOM 3	TRIAL		SERVITTO, JR, EDWARD A

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Adjusted	Amount Outstanding
FILING FEE	$505.00	$505.00	$0.00	$0.00
MOTION FEE	$80.00	$80.00	$0.00	$0.00
	$585.00	**$585.00**	**$0.00**	**$0.00**

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
893599	05/26/2016	LIVINGS, DONNA	$260.00
896788	06/07/2016	BARATTABARATTAP-105055	$5.00
898975	06/14/2016	MCCCEFILING-726108	$5.00
900144	06/17/2016	BARATTABARATTAP-105055	$5.00
916204	08/10/2016	MCCCEFILING-726108	$5.00
916479	08/10/2016	MCCCEFILING-726108	$5.00
916498	08/11/2016	BARATTABARATTAP-105055	$5.00
918035	08/17/2016	BARATTABARATTAP-105055	$5.00
919883	08/22/2016	MCCCEFILING-726108	$5.00
920199	08/23/2016	BARATTABARATTAP-105055	$5.00
921278	08/26/2016	BARATTABARATTAP-105055	$5.00
921465	08/26/2016	BARATTABARATTAP-105055	$5.00
926479	09/13/2016	BARATTABARATTAP-105055	$5.00
927888	09/16/2016	BARATTABARATTAP-105055	$5.00
928347	09/20/2016	AMERICANEXPRESS-685906	$5.00
928585	09/20/2016	AMERICANEXPRESS-685906	$25.00
929133	09/21/2016	BARATTABARATTAP-105055	$5.00

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Receipt Number	Receipt Date	Received From	Payment Amount
930714	09/27/2016	AMERICANEXPRESS-685906	$5.00
931464	09/29/2016	MCCCEFILING-726108	$5.00
938425	10/20/2016	BARATTABARATTAP-105055	$5.00
939406	10/24/2016	AMERICANEXPRESS-685906	$5.00
940615	10/27/2016	AMERICANEXPRESS-685906	$25.00
942883	11/04/2016	AMERICANEXPRESS-685906	$5.00
943457	11/07/2016	AMERICANEXPRESS-685906	$5.00
948687	11/23/2016	CURTISDCONDIT2123365	$5.00
948709	11/23/2016	CURTISDCONDIT2123365	$5.00
949928	11/30/2016	BARATTABARATTAP-105055	$5.00
950076	11/30/2016	BARATTABARATTAP-105055	$5.00
950914	12/02/2016	AMERICANEXPRESS-685906	$5.00
952556	12/06/2016	AMERICANEXPRESS-685906	$5.00
953015	12/08/2016	BARATTABARATTAP-105055	$5.00
953073	12/08/2016	BARATTABARATTAP-105055	$5.00
954715	12/14/2016	BARATTABARATTAP-105055	$5.00
954969	12/15/2016	AMERICANEXPRESS-685906	$5.00
962892	01/17/2017	MCCCEFILING-726108	$5.00
964473	01/20/2017	BARATTABARATTAP-105055	$5.00
964728	01/20/2017	BARATTABARATTAP-105055	$5.00
970977	02/06/2017	CURTISDCONDIT2123365	$5.00
974464	02/15/2017	BARATTABARATTAP-105055	$5.00
977030	02/24/2017	BARATTABARATTAP-105055	$5.00
979163	03/03/2017	BARATTABARATTAP-105055	$5.00
981030	03/08/2017	BARATTABARATTAP-105055	$5.00
982723	03/13/2017	BARATTABARATTAP-105055	$5.00
983419	03/13/2017	BARATTABARATTAP-105055	$5.00
999994	04/27/2017	BARATTABARATTAP-105055	$5.00
1010187	05/30/2017	MCCCEFILING-726108	$25.00
1010302	05/30/2017	BB5891989	$25.00
1013024	06/06/2017	STEVENRGABEL-213259	$5.00
1019064	06/21/2017	BB5891989	$5.00
1019605	06/22/2017	MCCCEFILING-726108	$5.00
			$585.00

Case Disposition

Disposition	Date	Case Judge
UNDISPOSED		SERVITTO, JR, EDWARD A

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STATE OF MICHIGAN

COURT OF APPEALS

DONALD C. KNOLL and ANN M. KNOLL,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 16, 2004

No. 245387
Genesee Circuit Court
LC No. 01-071633-NO

Before: Jansen, P.J. and Markey and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting defendant's motion for summary disposition. We affirm.

Plaintiff Donald Knoll,[1] owner of American Made Textiles, distributed shirts, jackets, and other items. On November 8, 2000, plaintiff Donald Knoll was at defendant General Motors' Plant 36 in Flint, Michigan, sizing individuals for jackets with a UAW logo. Plaintiff left the plant at nighttime carrying four or five jackets, and tripped and fell from a step/curb. Plaintiff's hip was fractured as a result of the fall.

Plaintiffs contend that summary disposition was improper. We disagree. On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When

[1] Because Ann Knoll's claim is a derivative claim, the singular term "plaintiff" will be used in this opinion to refer to Donald Knoll.

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deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *J & J Farmer Leasing, Inc v Citizens Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 239069, issued February 12, 2004) slip op p 3. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allstate Ins Co v State*, 259 Mich App 705, 709-710; ___ NW2d ___.

Plaintiff contends that he was an invitee onto defendant's property, while defendant argues that he was a licensee. A licensee is a person privileged to enter the land of another by the possessor's consent. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The duty to adult licensees is only to warn them of any hidden dangers about which the owner knows or has reason to know, if the licensee does not know or have reason to know of the dangers involved, and to refrain from wanton and willful misconduct. *Id*. The owner owes no duty of inspection, nor any duty to prepare the premises for the safety of the licensee. *Id.*; *Burnett v Bruner*, 247 Mich App 365, 370-371; 636 NW2d 773 (2001). That the defective condition is obvious is usually sufficient to apprise an adult licensee of the full extent of the risk involved. *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240, 242-243; 483 NW2d 422 (1992).

An invitee is a person who enters the land of another on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and make them safe. *Stitt, supra* at 596-597. The invitee's presence on the defendant's premises must be for a commercial purpose, and the essence of the relationship is a pecuniary interest on the part of the landowner. *Id.* at 604-605; *Stanley v Town Square Cooperative*, 203 Mich App 143, 147; 512 NW2d 51 (1993). Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitor must warn of hidden defects, but is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Lugo*, *supra*; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495, 498; 595 NW2d 152 (1999).

The trial court did not address whether or not plaintiff was an invitee because it found, regardless, the condition causing plaintiff's injury was an open obvious condition with no special aspects creating an unreasonable risk of harm. Upon a de novo review, we find that summary disposition was proper as the step/curb causing plaintiff's injuries was an open and obvious condition without any special aspect creating an unreasonable risk of harm.[2]

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[2] We also note that it appears plaintiff was a licensee on defendant's property rather than an invitee because the essence of the relationship resulting in plaintiff; being on defendant's premises was not the pecuniary interest of defendant. See *Stitt, supra* at 604-605; *Stanley, supra* at 147. Plaintiff was at Plant 46 to size UAW members for UAW purposes. The pecuniary interest was that of plaintiff.

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Plaintiffs contend that because the step/curb was poorly lit and was the same color as the ground it was not an open and obvious danger. We disagree.

"The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000) quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The Michigan Supreme Court has stated, "the danger of tripping and falling on a step is generally open and obvious." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Generally, steps are considered open and obvious:

> Because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps and will take appropriate care for his own safety. . . . However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. . . [*Bertrand, supra* at 616-617.]

Our Supreme Court has also stated that "ordinary steps cannot be considered to present an unreasonably dangerous risk of harm." *Lugo, supra* at 525, n 6. Just because a particular plaintiff fails to see a step does not mean it is not open and obvious. *Bertrand, supra* at 621. Steps are encountered as an everyday occurrence. The hazardous condition of the step or incline at defendant's plant was open and obvious.

The color photographs of the area in question indicate that the step and the ground below it were the same color or were at least similar in color. However, one in plaintiff's position, who has walked the step before, might reasonably be expected to see this contrast and transition. [3] The fact that a particular plaintiff falls when negotiating a particular, readily observable, step does not make it dangerous, and, in particular, when it is at least the third time the plaintiff has crossed the same path. See *Bertrand, supra* at 621. The trial court correctly found that reasonable minds could not differ on whether any danger posed by the step/curb was open and obvious. *Novotney, supra* at 474-475. We find that any danger posed by the step, even if it were dimly lit and a similar color to the ground below, was open and obvious to the average user with ordinary intelligence. See *id*.

Plaintiff further contends that even if the condition of the stairway was open and obvious, it still presented an unreasonable risk of harm. We disagree.

As discussed, hereinbefore, the danger of tripping and falling on steps is generally open and obvious and a failure to warn theory cannot establish liability. *Bertrand, supra* at 614.

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[3] We note that plaintiff claims he was looking ahead while carrying five or six jackets and talking to an individual behind him, when he tripped over the step/curb.

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Indeed, people are expected to exercise reasonable care for their own safety; therefore, landowners are not required to make their premises "foolproof." *Bertrand, supra* at 616-617. But the unique character, location, or conditions surrounding steps have the potential to make them unreasonably dangerous. *Id*. at 617.

In *Lugo, supra* at 517-519, our Supreme Court provided the following with regard to open and obvious conditions:

> With regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. . . . [O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. [Citations and footnotes omitted.]

Basically, special aspects are those conditions that create a high risk of harm or severity of harm if not avoided. *Lugo, supra* at 518-519. The *Lugo* Court provided two scenarios to demonstrate when a condition could be considered unavoidable or unreasonably dangerous. *Id*. at 518-519. The *Lugo* Court noted that in the following situation the open and obvious doctrine would not apply because the condition would be essentially unavoidable:

> [A] commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*. at 518.]

Lugo, supra, next discussed the special aspects of a thirty foot unguarded and unmarked pit in a parking lot as posing an unreasonable risk of severe harm as:

> The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Id*.]

Lugo has clearly established a high standard for determining what constitutes a special aspect. Without the existence of a special aspect, an action premised on a typical open and obvious condition will be barred by the open and obvious danger doctrine. *Id*. at 519-520.

In the instant case, plaintiff suggests that the lack of proper illumination and the similar color of the step/curb to the ground was a condition surrounding the step that created an

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unreasonable risk of harm. Applying the principles established in *Bertrand, supra*, and *Lugo, supra*, we do not find that the danger in the instant case was unavoidable or that it presented a uniquely high likelihood of severe harm or death. Plaintiff has failed to present any evidence that even if the area were dimly lit and the step and the ground below it were similar colors, the area was an unavoidable risk. Unlike the example in *Lugo, supra*, plaintiff was not trapped inside defendant's arena so that he was effectively forced to traverse the dimly lit path. Plaintiff could have used the handicap ramp and easily avoided the step he now claims posed an unreasonable risk of harm. Plaintiff had traveled the same path earlier on his way into the plant, and had used the same entrance on another occasion when he visited the plant a week earlier and would be aware of the handicap ramp as an exit option.

Additionally, plaintiff has failed to offer any evidence that the condition of the step was so unreasonably dangerous that it posed a likelihood of severe injury or death.[4] Plaintiff does not argue that the step was defective in any way and it is undisputed that he was aware of its existence, as he had gone over the step earlier. More importantly, the risk of harm in this case does not rise to the degree of harm discussed in *Lugo, supra*. Indeed, there is a difference in the potential for harm in tripping on a step and falling into a thirty foot hole in a parking lot. Thus, we find that no reasonable juror could conclude that the darkness surrounding the step and the similar color in the lighting were such unique circumstances that the step posed an unreasonable risk of harm.

Plaintiff failed to demonstrate the existence of any special aspects that made the condition, causing him to fall, unreasonably dangerous in spite of its open and obvious nature. Had plaintiff simply watched his step, any risk of harm would have been obviated. *Spagnuolo v Rudds # 2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). Consequently, we conclude that plaintiff's premises liability claim is barred by the open and obvious danger doctrine. Upon a de novo review, we find that summary disposition was properly granted in favor of defendant.

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[4] We note plaintiff did present an affidavit from Steven Ziemba, a licensed engineer, who indicated that the coloring of the concrete step and the concrete below, with the lighting conditions, made the step hidden from view. Zimeba's affidavit further provided that the step unreasonable and dangerous and would not be an open and obvious danger. Defendant contends that there are evidentiary problems with using this affidavit. We do not agree with defendant, as we are to take the documentary evidence in favor of plaintiff when reviewing an appeal from a grant of summary disposition. However, the affidavit does not provide support for plaintiff's position because it does not address that plaintiff was an individual who had made the step without any problem earlier in the day and, apparently, on at least one other occasion. Moreover, the affidavit does not provide support or opinion as to whether the step was unavoidable or posed a substantial risk of death or severe injury. Thus, reviewing the evidence in a light most favorable to plaintiff, we do not believe that the affidavit raises a question of fact for a jury.

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Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage

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STATE OF MICHIGAN

COURT OF APPEALS

SHEILA FEOLE,

Plaintiff-Appellant,

v

RUGGERO'S RESTAURANT,

Defendant-Appellee.

UNPUBLISHED
April 27, 2004

No. 245047
Genesee Circuit Court
LC No. 01-072211-NO

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

In this slip and fall action, plaintiff appeals as of right a trial court order granting summary disposition in favor of defendant, pursuant to MCR 2.116(C)(10). We affirm.

We review a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). The motion should be granted if the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*.

In the instant case, plaintiff entered defendant's restaurant in an attempt to solicit advertising for her employer's newspaper. Plaintiff noticed that the floor was covered with a greasy, dirty substance, but nevertheless walked across the floor and asked to speak to the manager. After the manager declined plaintiff's offer, she walked back across the floor toward the door which she had originally entered. While crossing the floor, plaintiff slipped and fell, sustaining injuries.

Plaintiff sued defendant in premises liability, alleging that the greasy and slippery floor constituted an unreasonably dangerous hazard, and that defendant breached its duty to protect her from the hazard. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that because the condition was open and obvious, it had no duty to warn plaintiff about the condition. Plaintiff conceded that the condition was open and obvious, but argued that because she was unaware of an alternate exit, she was effectively forced to walk across the greasy floor to leave the restaurant, and that this constituted an unreasonable risk of harm,

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thereby allowing her to prevail in imposing liability on defendant. The trial court was not persuaded by plaintiff's argument, and granted defendant's motion for summary disposition on the basis that plaintiff could have avoided the condition because alternate exits were available, and that there was no unique likelihood of harm giving rise to a duty on the part of defendant.

On appeal, plaintiff argues that the trial court erred in applying the open and obvious doctrine to bar her claim where her alleged lack of knowledge of an alternate exit from defendant's restaurant made the open and obvious condition effectively unavoidable, thereby allowing her to prevail in imposing liability on defendant. We disagree.

"In general, a premises possessor owes a duty to an invitee[1] to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). "However, this duty does not generally encompass removal of open and obvious dangers," which exist "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Moreover, "a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, *supra* at 517.

Our Supreme Court has stated that "with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the

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[1] Our analysis considers plaintiff an invitee, but we note that the same result would apply *a fortiori* if we considered her to be a licensee, because licensees are owed a lesser duty. See *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001).

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit.
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> ***
>
> An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

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risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Lugo*, *supra* at 517-518. Thus, "special aspects" exist (1) where the open and obvious condition is effectively unavoidable, or (2) where the condition imposes an unreasonably high risk of severe harm. *Id*. at 518.

In the instant case, plaintiff concedes that the greasy substance on the floor of defendant's restaurant constituted an open and obvious danger, but argues that the obvious condition of the greasy floor was "effectively unavoidable," because she had to cross the floor to reach the only exit of which she was allegedly aware. Plaintiff argues that the instant case is analogous to our Supreme Court's example of an unavoidable condition that involved "a commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo*, *supra* at 518. Our Supreme Court explained that "while the condition is open and obvious, a customer wishing to exit the store must leave the store through the water." *Id*.

However, plaintiff's situation is distinguishable from our Supreme Court's example in *Lugo*, *supra* at 518. There, the customer was required to confront an unavoidable condition because the customer was already in the defendant's store and had to walk through the water in order to leave. Here, plaintiff was not required to confront an unavoidable condition, which she noticed on her way into the building; she simply could have refused to solicit a business that displayed such purported negligence in the maintenance of its floors. See *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002). Further, unlike our Supreme Court's example in *Lugo*, plaintiff was not required to confront an unavoidable condition because she did not have to walk across the greasy floor in order to leave. The restaurant had two doors, which were available to the public, from which plaintiff could have exited the premises. The fact that plaintiff claims that she was unaware of the other exit is irrelevant, as plaintiff was not effectively trapped inside the building. Plaintiff made no mention of the alleged greasy floor to the manager, nor did she ask if there was an alternate exit. Accordingly, because there was no special aspect to the condition of the restaurant floor that posed an unreasonable risk of harm, the trial court properly granted summary disposition in favor of defendant.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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STATE OF MICHIGAN

COURT OF APPEALS

DUANE SLATER,

Plaintiff-Appellant,

v

MARVIN BRANDLE, BRANDLE INVESTMENTS, LLC, and BRANDLE CORPORATION, INC, a/k/a BRANDLE REAL ESTATE,

Defendants-Appellees.

UNPUBLISHED
June 23, 2005

No. 260867
Saginaw Circuit Court
LC No. 03-048980-NO

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this case involving a slip and fall accident, plaintiff appeals by right an order granting summary disposition to defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff's slip and fall occurred outside an office, or "depot" that was located in a mall in Bridgeport. The mall was owned by defendants who leased the office to plaintiff's employer, GTech. Plaintiff was employed by GTech as a customer service representative. His duties included servicing Lottery and other equipment, and training customers. In the course of providing service support to customers, he and other service technicians routinely traveled to the office to obtain supplies. Plaintiff also used equipment located in the office. The lone entrance to the office was located at the back of the shopping center.[1]

In the early morning of January 9, 2002, in response to a service page, plaintiff went to the office to obtain supplies. According to plaintiff, the area was unlit and dark, but not "pitch

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[1] A second garage door also allowed entrance to the office but could only be unlocked from the inside of the building.

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black." Plaintiff parked near the entrance but did not leave his automobile running or his lights on. There was no snow on the ground. Plaintiff looked for ice on the ground and on the wall of the building, where it would normally be seen, but he did not see any. He approached the door, placed his key in the door and tried to open it, but could not do so.[2] Thinking that a box had fallen behind the door, he shoved the door with his left shoulder. The door flew open, his feet "went the opposite way," and plaintiff fell. He continued to hold onto the door handle as he fell, and injured his left shoulder. Once he entered the building, plaintiff turned on the light and was able to observe a thin sheet of ice outside the door. He threw salt on the icy area. His subsequent inspection also revealed that a line of ice had formed on the inside of the doorjamb.

An ineffective drainage system on the roof of the building caused water to collect around the doorframe and puddle on the ground. On occasion, the lock would freeze. Under the terms of the lease, defendants were obligated to maintain and repair the exterior portions of the building. GTech employees, including plaintiff, had complained to defendants about the drainage problem, and several unsuccessful attempts had been made to fix the problem. Defendants' attempt to repair the leaking gutter seam was likewise unsuccessful. Plaintiff and other employees were aware of the possibility of icing in front of the door and the nearby garage-style door, and GTech provided salt and other tools to remove ice, which were kept inside the office.

Plaintiff filed suit alleging negligence and public nuisance. The trial court granted summary disposition for defendants, finding that the dangerous condition involved was open and obvious and did not present any "special aspects" to allow recovery under a negligence theory. The trial court further held that plaintiff's public nuisance claim was inappropriate because the office was not open to use by the public. The trial court refused to allow plaintiff to amend his complaint to add a claim for damages as a third–party beneficiary of the contract between defendants and GTech, finding that such an amendment would be futile.

II. STANDARD OF REVIEW

The parties and the trial court relied on matters outside the pleadings; thus, review under 2.116(C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

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[2] Plaintiff had previously had difficulty with the keyhole becoming frozen. He had not previously experienced the door failing to open after the key was inserted.

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III. OPEN AND OBVIOUS

First, plaintiff argues that the trial court erred when it found that the icy condition that caused his injury was open and obvious. He further argues that, even if the condition was open and obvious, it possessed "special aspects" that rendered it "unreasonably dangerous" despite its open and obvious nature. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Kosmalski ex rel Kosmalski v St John's Lutheran Church,* 261 Mich App 56, 60; 680 NW2d 50 (2004). A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609- 610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. The open and obvious doctrine should not be viewed as an exception to the duty generally owed invitees, but rather, as an integral part of the definition of that duty. *Lugo, supra* at 516. Whether the unobstructed ice is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo, supra* at 517-518. But where no such special aspects exist, the "openness and obviousness should prevail in barring liability." *Id.*

While all accumulations of snow and ice are not open and obvious, "the open and obvious danger doctrine and principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice." *Kenny v Kaatz Funeral Home, Inc,* 264 Mich App 99, 106, 107-108; 689 NW2d 737 (2004). Thus, absent special circumstances, Michigan courts have generally held that when the plaintiff knew or had reason to know of the slippery conditions, the hazards presented by unobstructed ice and snow were open and obvious and did not impose a duty on the property owner to warn of or remove the hazard. See *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd,* 466 Mich 11, 16; 643 NW2d 212 (2002).

Here, plaintiff knew that defendant's building had a drainage problem above the door where he slipped. He knew that icing was a possibility and as a lifelong resident of Michigan, he should have been aware that ice frequently forms during cold January nights. Under these facts, the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the doorway was open and obvious. *Novotney, supra.*

Finally, plaintiff has presented no evidence of the alleged "special aspects" of the icy doorway that created "a uniquely high likelihood of harm or severity of harm...." *Lugo, supra* at 518-519. This Court has previously held that a layer of snow on a sidewalk did not constitute a

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unique danger creating a "risk of death or severe injury," *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002), and that falling down ice-coated stairs likewise does not give rise to the type of severe harm contemplated in *Lugo*. *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002). Ice in an outdoor doorway in Michigan in January is a common, not unique, occurrence. Under the *Lugo, supra* at 518-519, definition of "special aspects," ice and snow do not present "a *uniquely high* likelihood of harm or severity of harm." (Emphasis added.).

Plaintiff also argues that the allegedly icy condition was unavoidable because he had to enter the building to obtain supplies for his service call. However, this does not rise to the level of making his encounter with the allegedly icy condition "effectively unavoidable" such that it constituted an unreasonable risk of harm. See *Lugo, supra* at 518-519. Thus, plaintiff's argument that the slippery doorway presented "special aspects" is without merit because the condition was both common and avoidable. *Corey, supra.*

IV. PUBLIC NUISANCE

Next, plaintiff argues that the trial court improperly dismissed his claim of public nuisance.

A public nuisance is an unreasonable interference with a common right enjoyed by the general public. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). "The term 'unreasonable interference' includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Id*., citing *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990). A private citizen may file an action for a public nuisance only where he can show he suffered a type of harm different from that of the general public. *Adkins v Thomas Solvent Co*, 440 Mich 293, 306 n 11; 487 NW2d 715 (1992). A public nuisance is distinguishable from a private nuisance in that the public nuisance involves interference with the rights of the community at large, and not a civil wrong based on a disturbance in a plaintiff's rights in land. *Williams v Primary School District # 3, Green Twp*, 3 Mich App 468, 475-476; 142 NW2d 894 (1966); see also *Adkins, supra* at 303.

Here, the trial court found that plaintiff's public nuisance claim was untenable because plaintiff failed to show that the "faulty gutter created an unreasonably interference in the use of a way of traveling that is used by the general public." Plaintiff has cited numerous cases involving actions for nuisance where a claimant was injured on a defendant's premises. However, in those cases the defendant was either a governmental entity or an entity whose premises were open to the general public. See, e.g., *Bluemer v Saginaw Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959); *Wagner, supra*. See also *Bishop v Northwind Investments, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2004 (Docket No. 250083). In this case, however, no question of fact was raised below concerning whether defendants' property was open to the general public. Plaintiff admitted during deposition testimony that the depot was not manned continuously and that only six to eight service people employed by GTech used this office on an intermittent basis. The trial court correctly found that plaintiff's affidavit did not create a question of fact on this point. A party may not create a question of fact by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition.

Downer v Detroit Receiving Hosp, 191 Mich App 232, 234; 477 NW2d 146 (1991). Plaintiff was not on defendants' premises as a member of the general public, but rather was on defendants' premises as an employee of the lessee. We agree with the trial court that plaintiff has failed to offer any evidence that the condition of the doorway interfered with an interest, i.e., a right common to the general public, that is protected by a claim for public nuisance.

V. AMENDMENT OF COMPLAINT

Finally, plaintiff argues that the trial court erred when it refused to allow him to amend his complaint to assert a claim for breach of contract as a third-party beneficiary of the lease contract between defendants and GTech. We disagree.

The grant or denial of leave to amend is within the sole discretion of the trial court and is reviewed for an abuse of discretion. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000). Generally, a court should freely grant leave to amend a complaint when justice so requires. *Id*. at 493; MCR 2.118. However, leave to amend may be denied when such an amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment is futile where it is legally insufficient on its face. *Id*.

The trial court did not err when it found that amendment in this case would be futile. Plaintiff is unable to show that he was an intended third-party beneficiary of the contract between defendant and GTech. As plaintiff admits, only intended beneficiaries, not incidental beneficiaries, have a right to sue on an underlying promise between two other parties, because only intended beneficiaries can show that the promisor has undertaken to act or refrain from acting "directly to or for said person." MCL 600.1405. For a contractual promise to be construed as inuring to the benefit of a third party to the contract, the promise must run to, at the least, a "reasonably identified" distinct class consisting of "something less than the entire universe, e.g., 'the public'." *Brunsell v Zeeland*, 467 Mich 293, 296-297; 651 NW2d 388 (2002).

In the instant case, plaintiff maintains that, because the contract specifically mentions GTech's employees, the parties intended to benefit this specific class. However, the contract does not refer to any duty owed toward GTech's employees, but rather to GTech's responsibilities for the actions of its employees. Nothing indicates an intent to benefit plaintiff or any of GTech's other employees. Plaintiff cannot show that the contract intended to benefit any particular class of which he is a member; thus, he may not maintain a claim for damages under a third-party beneficiary theory. The trial court did not err when it determined that an amendment to add such a claim would be futile.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette

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STATE OF MICHIGAN

COURT OF APPEALS

DAVID MEAD and MELISSA MEAD,

Plaintiffs-Appellants,

v

BARRETT PAVING MATERIALS, INC.,

Defendant-Appellee.

UNPUBLISHED
August 30, 2005

No. 261197
Washtenaw Circuit Court
LC No. 04-000247-NO

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff David Mead delivered fuel to defendant's premises. He slipped and fell on a dilapidated ladder used to access defendant's fuel storage tank, which was situated on a flatbed trailer. The trial court ruled that the defective ladder was open and obvious and lacked any special aspects that would render it unreasonably dangerous.

We review the trial court's ruling on a motion for summary disposition de novo on appeal. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

The parties do not dispute that plaintiff was an invitee on defendant's premises. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000). "A premises owner owes, in general, a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Kenny v Kaatz Funeral Home*, 264 Mich App 99, 105; 689 NW2d 737 (2004), rev'd on other grounds __ Mich __; 697 NW2d 526 (2005). "The care required extends to instrumentalities on the premises that the invitee uses at the invitation of the premises owner." *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to

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protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001). A special aspect is one, for example, which the invitee could not avoid regardless of the care taken for his or her own safety. *Id.* at 518. "Though the condition is open and obvious, the 'special aspects' of the condition would render the condition 'effectively unavoidable' and therefore could constitute an unreasonably dangerous risk." *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002), quoting *Lugo, supra* at 517-518.

We reverse. The trial court did not err in finding that the defective condition of the ladder was open and obvious. Plaintiff acknowledged that the ladder was missing one or two rungs, and that the lower rails were broken or bent. Although plaintiff did not necessarily have to climb the ladder by utilizing the bent rail as a step, he had no choice but to use the ladder in order to make his fuel delivery. The defective ladder provided the only means of access to the trailer on which the storage tank was situated, and there was no evidence that plaintiff could have elected to refuse to make the delivery until a safe ladder was provided. Therefore, the trial court erred in finding that no issue of fact existed with respect to whether any special aspects of the condition made it unreasonably dangerous. *Lugo, supra* at 518.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

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STATE OF MICHIGAN

COURT OF APPEALS

PAMALA BROWNLEE and PAUL BROWNLEE, Plaintiffs-Appellants,	UNPUBLISHED August 30, 2005
v	No. 252867 Oakland Circuit Court
GENERAL MOTORS CORPORATION, Defendant-Appellee.	LC No. 03-047476-NO

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs commenced this action after plaintiff Pamela Brownlee slipped on a puddle of water while clearing dishes in a kitchen at a General Motors Proving Grounds facility in Milford, Michigan.[1] The trial court granted summary disposition in favor of defendant, concluding that the puddle did not create an unreasonable risk of harm because it was open and obvious, and that there were no special aspects to the condition because plaintiff could have avoided it.

A trial court's decision granting summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

[1] Plaintiff Paul Brownlee brought a claim for loss of consortium. As used in this opinion, the term "plaintiff" refers only to Pamela Brownlee.

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Plaintiff, an employee of Aramark Food Services, was on defendant's premises for business purposes that benefited defendant. Therefore, plaintiff was defendant's invitee. See *White v Badalamenti*, 200 Mich App 434, 436; 505 NW2d 8 (1993). Plaintiff's responsibilities included serving food, bussing tables, mopping floors and general cleaning. On the date of the incident, plaintiff was assigned to clean the food service line. A co-worker was assigned to the dishwasher. Plaintiff was injured when she slipped on the water while taking a dirty cup and dish to the dishwasher.

A "landowner has a duty of care, not only to warn [an] invitee of any known dangers, but also to make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). A premises possessor is not required to protect an invitee from open and obvious dangers, but "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

In this case, plaintiff admits that she was aware of the large puddle of water in front of and around the dishwasher, because the pipes under the dishwasher had been leaking for months. Thus, the only question is whether there were "special aspects" to the puddle that made it unreasonably dangerous, notwithstanding that it was open and obvious. In *Lugo*, *supra* at 518-519, our Supreme Court cautioned that in considering whether special aspects exist, the risks posed by the condition ought not be considered after the fact. A risk ought not be deemed to have special aspects because, in hindsight, the risk of serious injury is apparent. Rather, special aspects exist only where the open and obvious condition is effectively unavoidable or where the conditions "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Id.*

In this case, the trial court determined that the risk of harm was avoidable, observing that plaintiff could have set the dishes in another area without adverse employment repercussions. Plaintiff admitted she would not have suffered any adverse employment action had she simply set the plates in another area of the kitchen. Thus, plaintiff was not required to traverse the wet floor in order to comply with the demands of her employment. Because the condition was avoidable, we agree with the trial court that the hazardous condition in the kitchen did not have any special aspects that precluded application of the open and obvious danger defense to plaintiff's premises liability claim.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray

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STATE OF MICHIGAN

COURT OF APPEALS

THOMAS BRENT,

Plaintiff-Appellant,

v

TOM HOLZER FORD, INC.,

Defendant-Appellee.

UNPUBLISHED
November 29, 2005

No. 256695
Oakland Circuit Court
LC No. 03-050865-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the order granting summary disposition in favor of defendant. We affirm. This case is being decided without argument pursuant to MCR 7.214(E).

A motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A premises possessor has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented

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upon casual inspection. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

Generally, an average parking lot user with ordinary intelligence will discover and recognize the danger and risk presented by snow and ice upon casual inspection of the lot. *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005); *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002). In the present case, plaintiff stated that the parking lot where he fell was completely covered by snow and, thus, was open and obvious. While plaintiff concedes the open and obvious nature of the hazard, plaintiff contends that special aspects made the ice effectively unavoidable and, therefore, defendant still had a duty to undertake reasonable precautions to protect him. We disagree.

There is an exception to the general rule regarding open and obvious dangers if "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo*, *supra* at 517. If the danger has special aspects that pose an unreasonable risk, "the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* The Court in *Lugo* explained that unreasonable risks were risks that were entirely unavoidable or that, despite being open and obvious, presented "such a substantial risk of death or severe injury … that it would be unreasonably dangerous to maintain the condition." *Id.* at 518.

In this case, the danger posed by a slip and fall in the parking lot does not "present such a substantial risk of death or severe injury" that it creates an "unreasonable risk of harm." *Id.* at 517-518; see also *Corey*, *supra* at 7 ("Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit."). Likewise, we disagree with plaintiff's contention that the snow-covered parking lot was effectively unavoidable. While plaintiff argues that he was compelled to traverse the slippery lot because his employment would be terminated had he refused, plaintiff proffered no evidence to support that claim. Plaintiff could have refused to tow the vehicle until such time as the premises owner cleared the snow and ice.[1] Consequently, because the hazard was neither unavoidable nor posed a substantial risk of death or severe injury such that it would be unreasonable to maintain it, we must conclude that the condition had no special aspects that made the condition unreasonably dangerous. The trial court did not err when it granted summary disposition in favor of defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello

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[1] This Court's recent decision in *Robertson v Blue Water Oil Co*, ___ Mich App ___; ___ NW2d ___ (2005), does not alter this result. In *Robertson* the Court determined that the plaintiff had no choice but to traverse the icy parking lot. In this case, the snow-covered parking lot was to the rear of the dealership. There was no evidence that plaintiff could not have safely entered the dealership to request that the area surrounding the vehicle he needed to tow be cleared of snow and ice.

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STATE OF MICHIGAN

COURT OF APPEALS

REYNALDO SALINAS, JR.,

Plaintiff-Appellant,

v

OMAR'S MEXICAN RESTAURANT, INC., d/b/a ARMANDO'S MEXICAN RESTAURANT, INC.,

Defendant-Appellee.

UNPUBLISHED
December 20, 2005

No. 263845
Wayne Circuit Court
LC No. 04-410101-NO

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals the trial court's order that granted defendant's motion for summary disposition and we affirm.[1]

I

At approximately 12:20 a.m. on March 29, 2003, plaintiff entered defendant's restaurant through the door commonly used by take out patrons. That entrance has one concrete step outside the door. As plaintiff exited, he attempted to avoid three patrons, but tripped off the step and fell to the ground, wherein he allegedly sustained a serious injury to his ankle.

In his complaint, plaintiff claimed that defendant failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. In its motion for summary disposition, defendant averred that it owed no duty to plaintiff because the alleged unsafe condition is open and obvious, and that no special aspects make it unreasonably dangerous. Finding that no evidence created a question of fact as to whether the condition was open and obvious, or whether special aspects made the condition unreasonably dangerous, the trial court granted defendant's motion for summary disposition.

[1] This appeal is being decided without oral argument pursuant to MCR 7.214(E).

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We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

II

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

If the alleged unsafe condition is an open and obvious danger, then the landowner owes no duty to plaintiff. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects make even an open and obvious risk unreasonably dangerous, then a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Steps are encountered as an everyday occurrence. A reasonably prudent person is obliged to watch where he is going and the law requires that he use reasonable caution for his own safety. *Bertrand*, *supra* at 616. Importantly, plaintiff acknowledged that he had used the door on previous occasions, and that he traversed the step and entered the door without incident minutes before the accident occurred. Moreover, and significantly, plaintiff acknowledged that he was distracted by other patrons, and simply forgot that a step existed. The fact that plaintiff did not notice the step immediately prior to the accident is irrelevant. *Novotney*, *supra* at 477. The trial court correctly found that reasonable minds could not differ on whether the condition of the step was open and obvious.

The open and obvious danger doctrine cannot be relied upon to avoid a specific statutory duty. *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003). However, plaintiff's complaint did not allege that defendant breached a specific statutory duty. Rather, the complaint alleged that defendant failed to maintain the premises in compliance with the building code. While the violation of a building code can be some evidence of negligence, *id*. at 578, not every building code violation supports a special aspects analysis in avoidance of the open and obvious danger doctrine. The issue is whether something unusual about the step because of its character, location, or condition gives rise to an unreasonable risk of harm. *Bertrand*, *supra* at 617. A central point of plaintiff's argument is that the door was effectively unavoidable. However, it was undisputed that the restaurant had a second door that plaintiff could have used. Moreover, no evidence showed that the condition was so unreasonably dangerous that it created a risk of death or severe injury. Cf. *Lugo*, *supra* at 518. Plaintiff acknowledged that the accident

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occurred because he simply forgot that the step existed. He failed to demonstrate the existence of any special aspect that made the condition of the step unreasonably dangerous in spite of its open and obvious nature. *Id*. at 517-519. Accordingly, the trial court properly granted summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood

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STATE OF MICHIGAN

COURT OF APPEALS

ROBERT KELLY,

Plaintiff-Appellant,

v

CLAY, INC., d/b/a MARKET STREET LIQUOR,

Defendant-Appellee.

UNPUBLISHED
February 7, 2006

No. 255314
Wayne Circuit Court
LC No. 03-316458-NO

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant summary disposition. We affirm.

When plaintiff arrived to deliver beverages to defendant's business in Detroit, he parked in the store's parking lot because there were large snow banks in the street. While loading the beverages onto a dolly, he slipped on ice and snow and fell, sustaining a shoulder injury. Plaintiff had seen the snow and knew it was there, but the ice was not visible.

Plaintiff argues that the trial court erred in granting defendant summary disposition because the condition that caused his fall was not open and obvious. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriately granted, "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Generally, a premises possessor has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

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knowledge of it on behalf of the invitee." *Id.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

In determining whether accumulation is open and obvious, we consider whether the plaintiff had actual knowledge of ice or snow-covered ice. *Corey, supra* at 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002). In the instant case, plaintiff saw the snow and exercised caution and care while traversing it to enter defendant's store and to return to his truck to get his delivery. The parking lot had been shoveled, but there were visible patches of snow. Plaintiff is a longtime resident of Michigan who knew that snow and ice could be slippery. What caused his fall was ice under the snow, and he did not see it until after he fell.

In *Kenny v Kaatz Funeral Home, Inc (Kenny II)*, 472 Mich 929; 697 NW2d 526 (2005), the Michigan Supreme Court reaffirmed the open and obvious defense in snow and ice accumulation cases. In *Kenny II*, the Court reversed an earlier Court of Appeals decision, *Kenny v Kaatz Funeral Home, Inc (Kenny I)*, 264 Mich App 99; 689 NW2d 737 (2004), "for the reasons stated in the dissenting opinion." Like the plaintiff in the instant case, the plaintiff in *Kenny I* slipped on snow-covered ice that she did not see until after she fell. *Id.* at 102-103. The dissenting judge concluded that the slippery condition of the parking lot was open and obvious. *Kenny I, supra* at 119 (Griffin, J, dissenting). Because plaintiff's argument is essentially the same as the one advanced by the *Kenny* plaintiff, we conclude that the trial court correctly granted defendant summary disposition. The slippery condition was open and obvious, and an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. In fact, during his deposition, plaintiff admitted that he was being cautious and careful as he walked across the parking lot and knew that snow and ice could be slippery.

Plaintiff also argues that, even if the snow-covered ice is open and obvious, defendant should be subject to liability because there were special aspects that made the slippery condition unreasonably dangerous. Specifically, plaintiff contends that the hazard was effectively unavoidable; to deliver the beverages, he had to use the parking lot that contained snow-covered ice. We disagree.

When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004). We focus on the degree of potential harm presented, and there must be special aspects that create a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo, supra* at 518 n 2, 519. There was no evidence that the route plaintiff used was unavoidable because plaintiff could have delayed delivery. The situation in the instant case is not "effectively unavoidable" like the hypothetical one posited in *Lugo*, in which a customer wishing to exit a store must leave through the only exit where the floor is covered with standing water. *Id.* at 518. Further, the risk of slipping on ice does not present a high probability of harm or severity of harm. We therefore conclude that there were no special aspects removing the condition from the open and obvious doctrine.

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Lastly, plaintiff contends that the trial court erred in granting summary disposition because a city of Detroit ordinance obligated defendant to remove the snow and ice within 24 hours of an accumulation. However, this issue is unpreserved because plaintiff failed to raise it before the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Moreover, plaintiff's failure to plead an ordinance violation deprived the trial court of authority to find in plaintiff's favor on this issue. See *Reid v Dep't of Corrections*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood

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STATE OF MICHIGAN

COURT OF APPEALS

SHARON LACROSS,

Plaintiff-Appellant,

v

RANKIN INDUSTRIAL PARK and RANKIN PARK, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
May 23, 2006

No. 258953
Oakland Circuit Court
LC No. 03-054126-NO

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff concedes that the icy sidewalk upon which she fell was open and obvious but argues that special aspects existed to remove it from the open and obvious doctrine. We disagree. We review de novo a trial court's grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183.

A prima facie case of negligence requires a party to establish: (1) a duty; (2) breach of that duty; (3) proximate cause; and (4) damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). A landowner has a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The duty does not include open and obvious dangers unless "special aspects" of the condition make the risk "unreasonably dangerous." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A "special aspect" exists when evidence is submitted to show that the condition is "effectively unavoidable," creating a "uniquely high likelihood of harm," or when the condition

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creates "an unreasonably high risk of severe harm." *Id*. at 518-519. Both the special aspects and open and obvious analysis are objective, "i.e., the fact finder should utilize a reasonably prudent person standard." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004).

Plaintiff argues that because she suffered from "osteoarthritis and degenerative joint disease," and because she was only able to use the front entrance to defendants' building, she was effectively forced to traverse the icy sidewalk. However, in a premises liability action, the fact-finder must consider the condition of the premises, not the condition of the plaintiff, when determining if a special aspect exists. *Mann, supra* at 328-329. For example, the Supreme Court has held that a visibly intoxicated person should be held to the same standard of conduct as a sober person. *Id.* at 329. Therefore, the proper inquiry is to determine whether, viewed objectively, the icy sidewalk was "effectively unavoidable," creating a "uniquely high likelihood of harm," or whether the icy sidewalk created "an unreasonably high risk of severe harm." *Lugo, supra* at 518-519.

In the present case, the evidence presented regarding the ice on the sidewalk in front of defendants' building indicates a reasonably prudent person in plaintiff's position would have been able to recognize the ice on the sidewalk and avoid it. Plaintiff testified that there was a rear entrance, with six to seven indoor steps leading to the interior of defendants' building. The majority of VPSI employees parked in the rear parking lot and utilized the rear entrance. On February 24, 2003, VPSI employees parked in the rear lot and utilized the rear entrance to enter defendants' building. Plaintiff testified she was the only person in the front lot at the time of her fall and that the only reason she did not use the rear parking lot was because she did not want to walk up the steps on the inside of the rear entrance. However, in a premises liability action, the fact-finder must consider the condition of the premises, not the condition of the plaintiff, when determining if a special aspect exists. *Mann, supra* at 329. Here, the evidence shows that plaintiff had access to the rear parking lot and the rear entrance and that plaintiff appreciated that there was ice on the front parking lot and on the sidewalk near the front entrance when plaintiff exited her car. A reasonably prudent person in plaintiff's position could have completely avoided the icy sidewalk in front of defendants' building by parking in the rear parking lot and using the rear entrance.

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 at VPSI, the two unidentified persons 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. *Mann, supra* at 328-329; *Lugo, supra* at 518-519.

Additionally, the ice on the sidewalk did not create an "unreasonably high risk of severe harm." *Lugo, supra* at 518. Icy and snowy conditions in a parking lot have generally been held to be "both common and avoidable." *Kenny v Katz*, 264 Mich App 99, 117-118; 689 NW2d 737 (2004) (Griffin, J., dissenting), rev'd 472 Mich 929; 697 NW2d 526 (2005) (reversing in lieu of

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granting leave to appeal for the reasons stated in the dissenting opinion). This Court has held that a layer of ice and snow on a sidewalk is not so "unreasonably dangerous that it would create a risk of death or severe injury." *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Further, this Court has found that no special aspect of snowy, icy steps satisfied the type of harm *Lugo* contemplated. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002). In the present case, plaintiff testified that there was no snow on the sidewalk but that there was ice "all over the sidewalk." Viewed objectively, we conclude that this condition did not pose an unreasonably high risk of severe harm that would satisfy the special aspect criteria set forth in *Lugo, supra* at 518.

Plaintiff contends that she suffers from osteoarthritis and degenerative joint disease and that she could only park in the front parking lot and use the front entrance. Plaintiff argues that, because of her condition and because the rear entrance did not comply with the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., she was forced to use the front entrance. However, when considering whether a special aspect of a condition removed the danger from the open and obvious doctrine, the proper analysis is to focus on the objective nature of the premises and not the condition of the plaintiff. *Mann, supra* at 328-329. Furthermore, we note that plaintiff has failed to submit evidence showing how defendants' building violated the PWDCRA. Thus, we conclude the trial court properly granted defendants' motion for summary disposition because plaintiff failed to create a genuine issue of material fact regarding whether special aspects existed to remove the icy sidewalk from the open and obvious doctrine.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter

I concur in result only.

/s/ Karen M. Fort Hood

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STATE OF MICHIGAN

COURT OF APPEALS

JAMES BRENNAN,

Plaintiff-Appellant,

v

CBP FABRICATION, INC.,

Defendant-Appellee.

UNPUBLISHED
June 20, 2006

No. 267094
Wayne Circuit Court
LC No. 04-410265-NO

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from a circuit court order granting defendant's motion for summary disposition in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. If the moving party satisfies its burden of identifying undisputed facts that entitle it to judgment, summary disposition is properly granted unless the opposing party presents evidence of the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

The parties do not dispute that plaintiff was an invitee on defendant's premises or that the condition, a sloping walkway covered with ice and snow, was open and obvious. A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519. This doctrine applied to an open and obvious accumulation of snow and ice means that a premises possessor must take reasonable steps within a reasonable period of time after the accumulation of snow and ice has arisen to lessen the hazard of injury only if there is some "special aspect" that makes condition "unreasonably dangerous." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332;

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683 NW2d 573 (2004). "An open and obvious accumulation of snow and ice, by itself, does not feature any 'special aspects.'" *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann, supra* at 332-333.

A special aspect is one that presents a high risk of severe harm, e.g., an unguarded deep pit, which presents a risk of serious injury or death to the unobservant person who tumbles in. *Lugo, supra* at 518. The snow-covered ramp did not present a high risk of severe harm because falling a few feet to the ground does not present the same degree of risk of severe harm as falling into a thirty-foot-deep pit. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002). While plaintiff's expert opined otherwise, his opinion does not create an issue of fact because the duty to interpret and apply the law is a function allocated to the courts, not to the parties' expert witnesses. *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998).

Another recognized special aspect may occur when the invitee could not avoid the danger regardless of the care taken for his or her own safety. *Lugo, supra* at 518. Thus, although a condition is open and obvious, when it is "effectively unavoidable" because of "special aspects," it may present an unreasonably dangerous risk. *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002), citing *Lugo, supra* at 517-518. Plaintiff argues that the snow and ice covered ramp was "effectively avoidable" because there was no other safe route providing access to the scrap metal bin that plaintiff was there to inspect. Defendant argues that plaintiff could have avoided the danger by forgoing the inspection, or postponing it until conditions were more favorable. We agree with defendant. The present case is distinguished from that in *Robertson, supra*. Here, plaintiff was not a "paying customer" who came to defendant's premises on a weekly basis to purchase goods defendant offered for sale to the general public. *Id*. at 591, 594. Rather, plaintiff was at defendant's steel manufacturing plant for the purpose of inspecting a bin that plaintiff had placed there in his own business of collecting scrap metal from other business. More importantly, plaintiff had a number of alternatives available to him to avoid the risk presented by the snow and ice covered ramp, including, foregoing the inspection, performing the inspection when conditions were more favorable, asking defendant's employees, who were present, to inspect the bin, or waiting until defendant's employees had cleared and salted the ramp. In sum, the snow and ice covered ramp "presented [no] 'special aspects' . . . because the condition was both common and avoidable." *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99, 122 (Griffin, J., dissenting); 689 NW2d 737 (2004), rev'd "for the reasons stated in the dissenting opinion," 472 Mich 929; 697 NW2d 526 (2005).

Consequently, the trial court correctly applied the open and obvious doctrine to grant defendant's motion for summary disposition.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter

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STATE OF MICHIGAN

COURT OF APPEALS

RENEE STANTON and MICHAEL STANTON,

Plaintiffs-Appellants,

v

FITNESS MANAGEMENT CORPORATION,

Defendant/Third-Party Plaintiff-Appellee,

and

K & C LANDSCAPING, INC.,

Defendant-Appellee,

and

CITY TRANSFER COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
August 17, 2006

No. 267623
Oakland Circuit Court
LC No. 04-061433-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal from an order granting defendant/third-party plaintiff Fitness Management Corporation's motion for summary disposition, in which third-party defendant City Transfer Company joined. Defendant K & C Landscaping had previously been granted summary disposition. Plaintiffs challenge only the grant of summary disposition to Fitness Management and City Transfer. We affirm.

As an independent contractor of City Transfer Company, plaintiff Renee Stanton made a delivery to and picked up packages from Fitness Management at approximately 11:30 p.m. on January 16, 2004. Plaintiff had been given a key to use for deliveries and pickups. She slipped and caught herself on the way into the building with her delivery, and while returning to her van with two large, heavy boxes, she slipped and fell on a sloped area that was covered with ice. Plaintiff's expert averred that snow and ice was piled up next to the sloped cement pad where she fell, and that when it melted the water accumulated on the pad and then froze. He also averred

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that the situation was further complicated by the run off during daytime hours from defective gutters. Plaintiff testified that she was paid $450 weekly, but that she would not get paid unless she made all pickups and deliveries. She claims that she called her dispatcher after she was hurt and was told that unless she finished her deliveries she would not be paid.

Plaintiff concedes that the icy condition was open and obvious, but maintains that a special aspect existed since she had no choice but to enter and exit via the only doorway available to her. Further, she claims that the area was unreasonably dangerous because of exacerbation of the problem by partially plowing and then failing to salt, melting and refreezing, and the gutter problem. She argues that the trial court erred in concluding that there was no genuine issue of material fact as to whether a special aspect made the situation unreasonably dangerous.

We review a trial court's grant of summary disposition de novo. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. The trial court must view all the evidence submitted in the light most favorable to the party opposing the motion to see if it establishes a genuine issue regarding any material fact, which would preclude judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592-593; 708 NW2d 749 (2005), this Court summarized the law pertaining to special aspects of an open and obvious condition:

> Because the icy conditions here were open and obvious, defendant would have no liability in the absence of "special aspects" that "make a risk of harm unreasonable nonetheless," irrespective of the specific kind of negligence alleged. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498; 595 NW2d 152 (1999), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). "Special aspects" exist if the condition "is effectively unavoidable" or constitutes "an unreasonably high risk of severe harm." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). However, the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies. *Id*. at 519 n 2. An open and obvious accumulation of snow and ice, by itself, does not feature any "special aspects." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

In *Lugo, supra* at 519, the Court clarified that the "special aspect" must create "a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ."

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

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demands 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.

We also are not persuaded that a special aspect is presented because, once she was inside the building, she had no choice but to face the danger in order to exit the building. Plaintiff's reliance on *Lugo, supra* at 518, is misplaced. *Lugo* does offer the example of a customer wishing to exit a store who must face a pool of standing water at the only exit, rendering encountering the obstacle unavoidable. The difference here is that plaintiff was aware of the danger before entering the building in the first place. The fact that, once she chose to encounter the danger and enter the building she would have to face the danger a second time in order to exit the building, does not change the analysis. At the time plaintiff discovered the danger, she did have a choice to enter or not. Plaintiff's position might have merit if she was unaware of the danger before and during her entrance to the building and only discovered it once she was preparing to exit the building. In such a situation, it might be said she had no choice but to encounter the danger. But under the facts of this case, plaintiff discovered the danger before she made the decision to enter (and thereby the decision to face the danger upon exiting).

In short, the danger was avoidable and plaintiff, after discovering the danger, chose to face the danger. The fact that the alternative she faced was negative because of the requirements of City Transfer, represents an "idiosyncratic reason" that plaintiff brought to the situation that is immaterial to the application of the open and obvious doctrine. *Lugo, supra* at 518 n 2. Accordingly, the trial court properly applied the open and obvious doctrine and granted summary disposition in favor of defendant Fitness Management.

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Bill Schuette

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STATE OF MICHIGAN

COURT OF APPEALS

STANISLAW WOZNIAK and JANINE WOZNIAK,

Plaintiffs-Appellants,

v

VENTURE INDUSTRIES, INC.,

Defendant-Appellee,

and

MIKE FLOWERS, d/b/a TRI-STATE LAWN CARE,

Defendant.

UNPUBLISHED
May 31, 2007

No. 274026
Hillsdale Circuit Court
LC No. 05-000458-NO

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs Stanislaw and Janine Wozniak appeal as of right, challenging the trial court's order granting summary disposition to defendant Venture Industries, Inc., pursuant to MCR 2.116(C)(10).[1] We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a truck driver, delivered materials to defendant's Hillsdale facility.[2] Plaintiff used an entrance labeled "Shipping and Receiving" to gain entry to defendant's office in order to process paperwork related to the delivery. Plaintiff made two trips into the office, the first when

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[1] The trial court also granted summary disposition in favor of defendant Mike Flowers, d/b/a Tri-State Lawn Care, but plaintiffs do not challenge the dismissal of this defendant.

[2] Because Janine Wozniak's claims are entirely derivative of Stanislaw Wozniak's claims, and because defendant Mike Flowers is not a party to this appeal, we use the singular term "plaintiff" to refer to Stanislaw Wozniak, and the singular term "defendant" to refer to Venture Industries, Inc.

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he arrived, and the second just before he left. He observed that the steps leading to the entrance were icy the first time he entered, but used the same entrance for his second trip to the office. He was injured when he slipped on the steps as he left.

Plaintiffs brought this action against defendants, alleging that the icy condition of the steps was unreasonably dangerous. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the icy condition was open and obvious. Defendant also asserted that there was an alternative entrance into the building, and that plaintiff could have learned about it if he made an inquiry before entering the office the second time. The trial court granted defendant's motion, commenting that there were alternatives available to plaintiff.

This Court reviews a trial court's summary disposition decision de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed, supra*. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact. *Id.*

In a premises liability action, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the possessor of land is generally not required to protect an invitee from open and obvious dangers. *Id.* at 517; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612-613; 537 NW2d 185 (1995). A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Kennedy v Great Atlantic & Pacific Tea Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 272453, 2007), slip op at 2, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517.

In *Lugo*, the Supreme Court stated:

> [W]e conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

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The Court explained, by way of example, that such "special aspect" would be present in a commercial building where there was only one exit for the general public, and the floor in front of that exit was covered with standing water. The Court explained that a customer wishing to exit the store would have to cross the wet floor, thus the "open and obvious condition is effectively unavoidable." *Id.* at 518. In contrast, in *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002), this Court held that the hazard of icy steps was not unavoidable because the plaintiff acknowledged that there was an alternative route nearby.

Here, plaintiff does not dispute that the icy condition of the steps was open and obvious, but argues that he could not have avoided using the steps because the shipping office entrance was the only available entrance into the building. However, defendant introduced evidence that another entrance was available to plaintiff, and that plaintiff failed to inquire about alternative entrances, despite ample time to do so. Although plaintiff established that the shipping and receiving entrance was the entrance customarily used by truck drivers making delivery, he did not establish that alternative entrances were unavailable, or that he was somehow prohibited from using an alternative entrance. And the party opposing a motion for summary disposition (in this case plaintiff) is required by MCR 2.116(G)(4) to "set forth specific facts showing that there is a genuine issue for trial" with regard to the issues raised in the summary disposition motion. See *Lugo, supra* at 520. Because plaintiffs failed to establish a question of fact regarding the absence of alternatives to using the icy steps, the trial court did not err in granting summary disposition in defendant's favor.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

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STATE OF MICHIGAN

COURT OF APPEALS

AMY DYER,

Plaintiff-Appellant,

and

STEVEN DYER,

Plaintiff,

v

TIMOTHY RUSSELL,

Defendant-Appellee.

UNPUBLISHED
December 18, 2007

No. 273574
Ingham Circuit Court
LC No. 05-000821-NO

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Plaintiff Amy Dyer (plaintiff) appeals as of right from the decision of the circuit court granting defendant's motion for summary disposition in this premises liability case. Plaintiff contends on appeal that the open and obvious doctrine does not apply in the face of a special statutory duty, and that special aspects existed in the case which created an exception to the open and obvious doctrine. We disagree, and affirm.

Plaintiff, a licensed realtor's assistant, went to defendant's home for the purpose of showing the house to potential buyers. While walking down defendant's basement staircase, she slipped and fell. Plaintiff brought suit against defendant on a premises liability (negligence) theory. The trial court granted defendant's later motion for summary disposition, indicating that the owner of a private home placed for sale does not owe a duty to ensure that all building codes are met and that the condition of the stairs was open and obvious.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other

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documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first argues on appeal that while the open and obvious doctrine generally eliminates the duty to warn an invitee of a dangerous condition, the doctrine is inapplicable where, as here, a statute or ordinance imposes an independent duty upon a landowner. This Court has stated that a "condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

> The open and obvious danger doctrine is commonly applied in products liability and premises liability cases as a limitation on the duty of care owed, often in the context of a duty to warn. . . . In general, there is no obligation to warn someone of dangers that are so obvious and apparent that a person may reasonably be expected to discover them and protect himself or herself. . . . The rationale underlying this doctrine is that there should be no liability for failing to warn someone of a risk or hazard that he appreciated to the same extent as a warning would have provided. . . . Further, invitors are not absolute insurers of the safety of their invitees. [*Laier v Kitchen*, 266 Mich App 482, 487; 702 NW2d 199 (2005) (citations and quotation marks omitted).]

"Thus, courts are required to determine whether a *reasonable person* in the plaintiff's position would foresee the danger, and not whether a particular plaintiff should have foreseen the danger." *Id.* at 498 (emphasis in original). However, the *Laier* Court further stated that "the doctrine does not exonerate a defendant from liability where the claim is one of a statutory duty to maintain and repair the premises." *Id.* at 490.

In *Jones v Enertel*, 467 Mich 266, 269; 650 NW2d 334 (2002), our Supreme Court stated that "[t]he basic duty owed to an invitee by a premises possessor is 'to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.'" *Id.*, citing *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The Court further stated that an owner's duty to an invitee "does not generally require [him or her] to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious. However, such reasoning may not be applied to the statutory duty of a municipality to maintain sidewalks on public highways . . . ." *Id.*

Plaintiff does not argue that defendant owed her the same duty that a municipality owes to its residents, but contends that the Michigan Residential Code imposed a statutory duty on defendant, because the Code has been adopted by Lansing, where the house at issue is located. According to plaintiff, the building code precludes defendant from asserting the open and obvious defense because it created a new statutory duty. However, plaintiff does not cite any

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cases showing that private owners are responsible under a municipal building code for injuries sustained on their premises due to a danger which would otherwise be classified as open and obvious. Further, it is established that not all building code violations are actionable in a negligence suit. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003); *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994). Accordingly, in the absence of any authority demonstrating that private owners of residential real estate are liable based on the building code to business invitees, under the circumstances of this case, there is no reasonable basis for imposing liability on defendant for any possible code violation related to the condition of the stairs. The issue becomes, then, whether the condition of the stairs was open and obvious.

Here, according to deposition testimony, the stairs were narrow, steep, and lacked handrails or walls on either side. Plaintiff noted that the stairs appeared dangerous, but chose to use them anyway. Because plaintiff admitted that she hesitated before going down the stairs precisely because they appeared to be dangerous, the condition of the stairs was clearly open and obvious.

Plaintiff next argues that special aspects of the situation should remove our analysis from the open and obvious doctrine. In *Lugo*, our Supreme Court stated that where "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[,]" thus creating an exception to the open and obvious doctrine. *Lugo, supra* at 517 (emphasis added). The Court further stated that in such cases, "the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm"; "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 517, 519. The Court stated that a situation might be properly thought of as posing an exception to the open and obvious doctrine where the hazard is "effectively unavoidable" and imposes an unreasonable risk of harm, such as standing water surrounding a retail store's only exit, or an unguarded thirty-foot deep pit in the middle of a parking lot. *Id.* at 518.

On this issue, plaintiff appears to initially argue that her position as a realtor's agent—or more specifically, as a licensed assistant to a realtor—is a special aspect. For example, plaintiff contends the stairs were effectively unavoidable because she had some obligation to defendant to descend the basement stairs. This argument seems to be outside the scope of what is contemplated in *Lugo* and its progeny. See, e.g., *Clahassey v Chez Ami, Inc*, 469 Mich 993, 994; 674 NW2d 158 (2004) (indicating that the proper concern in a premises liability claim is the condition of the premises of the defendant, not risks created by other circumstances).

Plaintiff also contends that the steepness of the stairs, coupled with the lack of handrail presented a severe and excessive risk of injury. Given the specific facts in this case, the

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likelihood of harm associated with descending the flight of stairs into the basement of the home was not uniquely high, nor was the severity of the potential harm. *Lugo, supra,* at 518-519.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto

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STATE OF MICHIGAN

COURT OF APPEALS

LARRY VAN WYNSBERGHE and PATRICIA VAN WYNSBERGHE,

Plaintiffs-Appellants,

v

AMERICAN AXLE & MANUFACTURING HOLDINGS, INC.,

Defendant-Appellee.

UNPUBLISHED
April 15, 2008

No. 277094
Wayne Circuit Court
LC No. 05-535421-NO

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

This case arises out of plaintiff's slip and fall on a sloped, coolant-covered floor at defendant's premises. Plaintiff was there as an invitee. His employer sent him to defendant's premises, at defendant's request, to help diagnose a problem with a large palletized transfer system – a rectangularly arranged group of individual machines – that plaintiff's employer had manufactured and installed on the site approximately twenty-eight years previously. Plaintiff was aware that the concrete floor was very slippery and that the entire area, but particularly the area he needed to go to inspect the machine, was covered with slick coolant. The coolant is a "milky, white substance." Plaintiff testified that he shuffled his feet to move, and held onto another piece of equipment for stability while doing so. Plaintiff was not aware, nor had he been warned, that a portion of the floor some distance into the machine area contained a slope; he discovered the slope only after slipping on it. He testified that, other than some misting on his glasses from the coolant in the air, there was nothing that would have blocked him from seeing the slope, had he been looking for it. He further testified that he could not have conducted the necessary examination of the machinery without traversing the area. The trial court granted

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[1] Because the claims of plaintiff Patricia Van Wynsberghe are derivative, we use "plaintiff" to refer only to plaintiff Larry Van Wynsberghe.

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summary disposition in defendant's favor on the basis of its finding that the dangerous condition of the floor was open and obvious, and it lacked any "special aspects."

Plaintiffs first contend that the trial court erred in finding the dangerous condition of the floor – that it was more slippery than could be anticipated by plaintiff as a result of being covered with coolant and sloped – to be open and obvious. We agree with the trial court that the slippery conditions of the floor were open and obvious, but on the record before us, we find a question of fact whether the slope was open and obvious, particularly where the slope is combined with the coolant on the floor and in the air.

We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We consider all documentary evidence submitted by the parties, and all reasonable inferences that can be drawn therefrom, in the light most favorable to the nonmoving party to determine whether they show that a genuine issue of material fact exists. *Id*., 567-568. Any reasonable doubt must be resolved in favor of the nonmoving party. *West v General Motors Corp*, 467 Mich 177, 183; 665 NW2d 468 (2003). At issue is only whether there exists a genuine issue of material fact to be resolved at trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Because plaintiff was a business invitee, defendant owed plaintiff "the highest level of protection under premises liability law" to ensure that the premises were reasonably safe. *Sitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604; 614 NW2d 88 (2000). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001). Nevertheless, a landowner is usually not obligated to remove a dangerous condition that is "open and obvious." *Id*. A condition is "open and obvious" when "the dangers are known to the invitees or are so obvious that the invitee might reasonably be expected to discover them, i.e., an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection." *Richardson v Rockwood Center*, 275 Mich App 244, 247; 737 NW2d 801 (2007). When assessing openness and obviousness, the focus is strictly on the premises themselves, not any particular plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

It appears to us beyond any dispute that the slippery condition of the floor was not only obvious, but in fact clearly understood by plaintiff, as well. The record is less well-developed regarding the slope and the combination of the two hazards. The evidence indicates that most of the floor was flat, but it had an unannounced "pitch" in the floor at one end of the rectangular machine area, although running the entire width thereof. Plaintiff testified that there was nothing blocking him from observing it. However, the evidence also shows that the coolant was an opaque color and formed a pervasive mist or spray in the air to at least some extent. Whether or not a slope in a portion of an otherwise relatively level floor would have been open and obvious by itself is an issue for the trier of fact. When imbued with the coolant on the floor and the mist in the air the hazard of the existing condition was enhanced. Plaintiff was warned by defendant of the slippery conditions, but not of the slope.

When "the premises" are considered in their entirety, we are less convinced that there is no genuine question of material fact whether "an average user with ordinary intelligence would

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have been able to discover the danger and risk presented upon casual inspection" under the conditions present. Although the slope *may* have been discoverable by an observer carefully looking for a hazard on the floor, we are less convinced that it would have been readily apparent to a casual observer, particularly given the other conditions present.

Our resolution of the other issue raised on appeal makes it unnecessary for us to determine whether the slope was, in fact, open and obvious. Even if a condition is open and obvious, the premises owner may still owe a duty of care to an invitee if "special aspects" of the condition render the hazard effectively unavoidable or unreasonably dangerous. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). "Special aspects" may not be merely theoretical or dependent on a plaintiff's idiosyncrasies. *Id*. They also do not exist if the condition is either common or avoidable. *Richardson*, *supra* at 247. We find the hazardous condition of the floor in the instant case to have "special aspects" for two reasons.

First, the evidence shows that plaintiff could not have performed the maintenance that defendant required on defendant's machine without traversing the hazards that existed in the plant. Thus, the condition was effectively unavoidable. Plaintiff would not have been able to perform his own job, at a risk to his own employment – which is hardly an idiosyncratic decision. Perhaps more importantly, defendant's *own* needs could not have been met without requiring *someone* to brave the dangers it created. Even if plaintiff could realistically have refused to face the risk, *defendant* needed *someone* to do so in order to have the machine repaired. In other words, the sloped, coolant-covered floor could conceivably have been avoided by plaintiff had he chosen to face other severe risks, but defendant required someone to face that danger.

Second, the evidence reveals at least a genuine question of fact whether the slippery and sloped condition of the floor presented a uniquely high likelihood of severe harm. Plaintiff, who was apparently summoned to perform diagnosis on this machinery in part because of his expertise, needed to shuffle his feet, hold onto a piece of equipment, and use his other arm for balance *just on the flat part of the floor*. Again, the evidence is ambiguous whether the slope could easily be discerned, particularly where visibility was less than optimal. The critical fact in our view is that slippery floors and sloped floors are, independently, potentially dangerous conditions. Here, the evidence shows that simply traversing the flat portion of the floor was already a considerable challenge. Adding an unannounced slope to part of the floor is enough of an additional challenge to raise a genuine question of fact whether the total risk presented was unreasonable.

We therefore find a genuine issue of material fact regarding the existence of "special aspects" giving rise to potential premises liability for defendant irrespective of the openness and obviousness of the hazards presented by the slippery and sloped floor here. There is a genuine question of fact whether the slippery, sloped surface was effectively unavoidable or unreasonably hazardous. Summary disposition should therefore not have been granted.

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Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis

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STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH BECKER,

Plaintiff-Appellant,

v

PATRICIA GLAISTER, TROY BRAMAN, and BRAMAN CONSTRUCTION, INC.,

Defendants-Appellees.

UNPUBLISHED
January 22, 2009

No. 281481
Clinton Circuit Court
LC No. 06-010053-NO

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the October 12, 2007, order granting summary disposition to defendant Patricia Glaister and the October 15, 2007, order granting summary disposition to defendants Troy Braman and Braman Construction, Inc. We affirm.

This case arises out of injuries plaintiff sustained when she slipped and fell while visiting plaintiff's house, which was under construction and for which Troy Braman's company, Braman Construction, was the general contractor. Plaintiff, a medical receptionist, testified that Glaister, who had hired plaintiff as a decorating consultant, called plaintiff on April 5, 2004, requesting plaintiff to deliver carpet samples to the house. When plaintiff arrived at the house around 5:30 p.m., it was still daylight. Upon her arrival, plaintiff noticed that the front door was nailed shut and that standing water and construction debris blocked the entrance to the walkout basement. Thus, plaintiff elected to enter the house by walking up a ramp, approximately one foot in width, leading to the laundry room. Plaintiff dropped off the samples and while walking down the ramp, fell and injured her rotator cuffs and knees. Plaintiff testified that she decided to use the ramp, which was covered with dry dirt and did not have a railing,[1] despite her misgivings because Glaister was "very adamant" that the samples be delivered that night. Glaister, who was not present because she was attending class at a nearby community college, denied that she asked plaintiff to deliver carpet samples that night or that she paid plaintiff, who was her friend.

[1] Although Troy Braman testified that a support beam for a sump pump line and a stud wall near the ramp could be used for support, he admitted that no handrail was constructed because the ramp was designed only for use by construction workers.

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On appeal, plaintiff first argues that there is a genuine issue of material fact concerning whether special aspects of the ramp rendered the risk of harm unreasonably dangerous and unavoidable thereby precluding application of the open and obvious doctrine. We disagree. This Court reviews de novo an appeal from an order granting a motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

To establish premises liability, a plaintiff must prove the following: "(1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages." *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Where a condition on the land is open and obvious, a premises possessor owes no duty to an invitee[2] unless special aspects exist making the condition unreasonably dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). Two types of open and obvious conditions may render a condition unreasonably dangerous: unavoidable conditions and those creating a severe risk of harm. *Lugo v Ameritech Corp*, 464 Mich 512, 518-519; 629 NW2d 384 (2001). *Lugo* provides two examples illustrating these conditions. First, a commercial building with its only exit for the general public covered in standing water would be an unavoidable condition because a customer wishing to leave the store must depart through the standing water. *Id*. Second, a 30-foot deep hole in a parking lot would create a severe risk of harm because although one could avoid the condition, it would present a uniquely high likelihood of severe injury or even death absent remedial measures. *Id*.

At the outset, we note that plaintiff does not challenge whether the conditions causing her fall were open and obvious. Rather, plaintiff asserts the ramp was unreasonably dangerous because the ramp was too narrow, was slippery due to the presence of dry dirt, and was unsafe because it lacked handrails. However, even viewing the facts in the light most favorable to plaintiff, none of these conditions was unreasonably dangerous. On the contrary, these conditions are similar to other types of conditions that, while potentially causing one to slip and fall, are not unreasonably dangerous. For example, this Court has found that an icy stairway

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[2] We note that Glaister maintains that even if there were a commercial relationship, plaintiff's status at the time of her fall was one of licensee because any commercial relationship extended only to plaintiff's assistance at the home furnishing store. However, no evidence in the record supports this assertion. Thus, given plaintiff's and Glaister's contrary assertions regarding whether any commercial relationship existed, a genuine issue of fact exists on this point. Regardless, assuming without deciding that plaintiff is an invitee as she claims, her claim still fails.

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elevated only a couple of feet did not create the severe risk of harm envisioned by *Lugo* because "'[u]nlike falling an extended distance, it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury' or a substantial risk of death." *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 6-7; 649 NW2d 392 (2002), quoting *Lugo*, *supra* at 518, 520.

Here, plaintiff testified she fell approximately four feet. The ramp was nearly one foot in width with dry dirt on the surface. These conditions are akin to the icy stairs of *Corey* rather than the 30-feet deep pit of *Lugo*. Moreover, while the ramp contained no handrails, the absence of a handrail on a construction ramp, which was *at most* four feet high, is hardly a unique condition of unreasonable risk. *Lugo*, *supra* at 519. We note that while plaintiff injured her rotator cuffs and knees as a consequence of the fall, the risk posed by the conditions must be considered *a priori*, i.e., without examining a plaintiff's injuries in hindsight. *Id*. at 518-519 n 2. Thus, plaintiff's injuries are not relevant to our conclusion. Consequently, plaintiff has failed to demonstrate that the ramp contained special aspects creating an unreasonable risk of harm.

Plaintiff relies upon her expert's conclusion that the ramp contained special aspects that were unreasonably dangerous and that the conditions causing plaintiff's fall violated the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq*. This reliance, however, is unavailing. First, despite the expert's repeated conclusions that the conditions constituted special aspects rendering the ramp unreasonably dangerous, whether special aspects exist is a legal conclusion, and "[t]he opinion of an expert does not extend to legal conclusions." *Maiden*, *supra* at 130 n 11. Only after a condition is deemed a special aspect may the factual determination of whether the aspect was unreasonably dangerous be made. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003); *Woodbury v Bruckner*, 248 Mich App 684, 694; 650 NW2d 343 (2001). Moreover, "if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous." *Lugo*, *supra* at 525. Consequently, because the conditions at issue are not special aspects as a matter of law, the expert's opinion that they are unreasonably dangerous is irrelevant.

Second, plaintiff's reliance on MIOSHA standards is misplaced. While plaintiff is correct that a violation of statute may create a rebuttable presumption of negligence, *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 720-721; 737 NW2d 179 (2007), plaintiff did not premise her negligence claim on a violation of statute. Rather, plaintiff alleges MIOSHA violations to support her common law theory of negligence – specifically, that special aspects existed. In any event, even when premising a negligence claim on violation of MIOSHA standards, MIOSHA does not create a statutory duty in favor of third parties in premises liability cases because "MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees . . . ." *Id*. at 721. Consequently, as the ramp was in place for Braman Construction's workers, the alleged violation of MIOSHA does not support plaintiff's action. In light of this, even if the ramp were defective as plaintiff's expert opined,

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this conclusion fails to create a genuine issue of material fact regarding the existence of special aspects.[3]

Plaintiff also cites *O'Donnell* and *Woodbury*, in which this Court found that despite an open and obvious condition, special aspects existed rendering the condition unreasonably dangerous, in support of her argument. Both cases, however, are distinguishable. In *O'Donnell*, this Court found special aspects existed where the plaintiff fell from an upstairs loft while attempting to alight down a partially unguarded narrow staircase. *O'Donnell*, *supra* at 571. Besides the incomplete guardrail, the Court noted the following factors that supported its conclusion:

> an open unguarded area existed between the loft guardrail and the edge of the steps; the stairway was unguarded on the open side opposite the wall; the stair treads were irregularly narrow; the stairs were unusually steep and the risers were of insufficient height; the handrail was an uneven tree branch that did not extend the length of the stairs; the loft had a low ceiling that forced adults to walk in an unnatural manner; and the stairway lacked a light switch at the top of the stairs. [*Id*. at 577.]

Similarly, in *Woodbury*, this Court found special aspects existed where the plaintiff fell "an extended distance" from a rooftop porch lacking guardrails outside her second story apartment. *Woodbury*, *supra* at 694.

Regarding the situation at hand, while the ramp lacked guardrails, a fall from a maximum height of four feet is hardly comparable to falling from an upstairs loft or a second story apartment. Further, plaintiff encountered no lighting problems and provided no testimony that the ramp caused her to walk in an awkward fashion or was unusually steep. Thus, reliance on these cases is not persuasive.

Next, plaintiff contends that because the ramp constituted the only means of ingress and egress into the house, use of the defective ramp was unavoidable rendering her effectively trapped. However, even assuming the ramp constituted the only means of ingress and egress, plaintiff has failed to show the ramp was unavoidable.[4] In making her argument, plaintiff

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[3] While plaintiff asserts the trial court failed to distinguish between the objective nature of the conditions and plaintiff's subjective degree of care, her reliance on the court's finding that the ramp was defective does nothing to support this contention. Indeed, whether the ramp was defective does not account for plaintiff's subjective degree of care. Thus, such conclusive reasoning is of no assistance to plaintiff's case.

[4] Troy Braman testified that a walkout basement permitted an alternative entry to the house. However, after Braman's deposition, plaintiff filed an affidavit claiming that standing water and debris blocked this entrance. It is worth noting that plaintiff's affidavit was filed after plaintiff gave her deposition in which she made no mention of a walkout basement. Regardless, an issue of fact exists concerning whether the walkout basement was a viable means of entry. In any event, because plaintiff's claim fails even if the walkout basement were not a viable means of entry, resolution of this issue is unnecessary.

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correctly observes that a court should "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, *supra* at 524. However, an unreasonably high risk of harm caused by an effectively unavoidable condition "must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005) (citation omitted).

Here, nothing in the record suggests plaintiff, upon observing the ramp, could not have delayed her delivery of carpet samples until another time or simply dropped off the carpet samples in the garage without going up the ramp. Indeed, while plaintiff noted that Glaister sounded desperate and "very adamant" that she deliver the samples, underlying plaintiff's decision to make the delivery was because, as plaintiff described, "I'm just the type of person, when somebody asks me to do something, I try to follow through with it." Such an idiosyncrasy is insufficient to render plaintiff effectively trapped in this situation. *Id*. Moreover, this case differs markedly from *Lugo's* example of a store customer facing a pool of standing water at the only exit. The difference is that, here, plaintiff was aware of the danger before entering the house in the first place, and as a consequence had a choice of whether to enter or not. Had plaintiff encountered the ramp only after making the delivery, she may have been effectively trapped, but that is not what happened.

Contrary to plaintiff's argument, *Robertson* is unhelpful to her cause. In *Robertson*, the plaintiff slipped on ice in a gas station parking lot while walking toward the station's convenience store to purchase windshield washer fluid. *Id*. at 591. In finding the open and obvious doctrine inapplicable, this Court rejected the defendant's argument that the condition was not unavoidable because the plaintiff could have gone to a different gas station. Specifically, the Court held that not only was the icy condition effectively unavoidable, but the plaintiff was also effectively trapped because the weather conditions rendered it unsafe for the plaintiff to drive away without windshield washer fluid. *Id*. at 593-594.

In contrast to *Robertson*, plaintiff here was not effectively trapped. Indeed, plaintiff could have decided to make the delivery a different day or drop off the samples in the garage without utilizing the ramp. Further, no evidence in the record shows plaintiff was contractually bound to make any delivery. Rather, her decision was an idiosyncratic one for which, although a kind gesture, she may not now in retrospect decide was a bad idea.[5]

Finally, plaintiff asserts Troy Braman and Braman Construction owed her a duty of care because it was foreseeable she would use the ramp. Even assuming plaintiff's claim is premised solely on ordinary negligence, her argument fails.[6] The elements of negligence are 1) a duty; 2)

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[5] Plaintiff also cites *Wiater v Great Lakes Recovery Ctrs, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2005 (Docket No. 250384). However, we decline to address this unpublished opinion, which is not binding under stare decisis. MCR 7.215(C)(1).

[6] Assuming plaintiff's claim against Troy Braman and Braman Construction is premised upon ordinary negligence rather than premises liability, the open and obvious doctrine is inapplicable. *Laier v Kitchen*, 266 Mich App 482, 490; 702 NW2d 199 (2005).

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a breach of that duty; 3) causation; 4) and damages or injuries. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). In determining the existence of a duty, the Court considers not only the foreseeability of the risk, but most importantly the relationship of the parties. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).[7]

Here, plaintiff failed to establish any relationship between herself and Troy Braman and Braman Construction that would impose a duty. Rather, plaintiff focuses exclusively on whether any danger was foreseeable. However, where there is no relationship between the parties, liability may not be imposed on a defendant, *In re Certified Question*, 479 Mich 498, 507; 740 NW2d 206 (2007), and it is not our responsibility to search for case law to craft plaintiff's argument on this issue, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). While plaintiff cites *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), and *Johnson v A & M Custom Built Homes*, 261 Mich App 719; 683 NW2d 229 (2004), the plaintiffs in those cases had some contractual relationship with the defendants. Similarly, although plaintiff relies on *Schultz*, *supra*, that case involved a special relationship because the defendant was engaged in a unique activity with inherently dangerous properties. Consequently, plaintiff's claim against Troy Braman and Braman Construction fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell

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[7] Although the determination of whether contractors owe duties to third parties is premised upon whether "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations," *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 683 NW2d 587 (2004), plaintiff's claim against Troy Braman and Braman Construction is not based in contract.

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STATE OF MICHIGAN

COURT OF APPEALS

GREGORY BROWN and RUBEANA BROWN,

Plaintiffs-Appellants,

v

EASTMAN OUTDOORS, INC.,

Defendant-Appellee.

UNPUBLISHED
January 7, 2010

No. 286844
Genesee Circuit Court
LC No. 07-086351-NF

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's order granting defendant's motion for summary disposition. We reverse.

Plaintiff was making deliveries in the course of his employment when he slipped and fell on ice at defendant's premises. He attempted to continue to make deliveries, but ultimately had to call another driver to finish his route because of the injury to his knee. During his deposition, plaintiff acknowledged that he saw the icy condition, but claimed that he was unable to deliver to any other location. Specifically, plaintiff testified that he tried to deliver to a different door on another occasion, but was told that he had to deliver to the door in question. On the contrary, defendant's agents testified that delivery would be accepted at different locations. Defendant moved for summary disposition, alleging that the condition was open and obvious and the condition was not effectively unavoidable because of the option to deliver to a different door. Plaintiff asserted that factual issues precluded summary disposition. The trial court granted defendant's motion.

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich

[1] Because Rubeana Brown raises only a derivative claim of loss of consortium, *Wilson v Alpena Co Road Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006), the singular plaintiff in this opinion refers to Gregory Brown.

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358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distributing Co*, 482 Mich 136, 139; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id*. at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, *supra* at 142-143. Rather, application of disputed facts to the law present proper questions for the jury or trier of fact. *Id*. at 143.[2]

A premises possessor owes a duty to protect invitees from unreasonable risks of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the duty does not extend to open and obvious conditions. *Id*. An exception to the open and obvious doctrine exists when "special aspects" make a condition either effectively unavoidable or pose an unreasonably high risk of harm. *Id*. at 517-519. In the context of accumulations of ice that are open and obvious, the premises possessor must take reasonable action within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to the plaintiff only when there is some special aspect that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

In the present case, plaintiff testified that the icy condition that caused his fall was effectively unavoidable because he was told that deliveries had to occur at the location where the ice was located. Additionally, plaintiff testified that ice was able to form in that location because there were no gutters or downspout in that particular location. He indicated that he had spoken to an employee in the shipping department about the missing gutters. On the contrary, defendant's representatives testified that plaintiff would have been entitled to make deliveries elsewhere. The resolution of the credibility of the witnesses regarding the location of the deliveries presents a question for the trier of fact. *Foreman*, *supra*. Moreover, plaintiff has raised a material question of fact regarding special aspects and whether the condition was

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[2] We note that defendant's brief on appeal contains additional transcript pages that were not submitted to the trial court when deciding the dispositive motion. Appellate review is limited to the record established in the trial court, and a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

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effectively unavoidable. *White, supra*. Defendant did not present any evidence in response to the assertion that it was on notice of missing gutters and downspouts that allowed water to accumulate in the area and re-freeze.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

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STATE OF MICHIGAN

COURT OF APPEALS

KENNETH GANAWAY,

Plaintiff-Appellant,

v

TONI BRUSTICK-OLDE HANHOF and RUDI ARTHUR OLDE HANHOF,

Defendants-Appellees.

UNPUBLISHED
February 25, 2010

No. 288072
Oakland Circuit Court
LC No. 2008-088441-NO

Before: Gleicher, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the lower court's order granting summary disposition in favor of defendants. We affirm.

Defendants own a house in Keego Harbor, Michigan, that they maintain as a rental property. Plaintiff, a meter reader, slipped and fell on a snow-covered icy patch on the driveway of the rental property while trying to exit the property after reading an electrical meter located at the back of the house. On appeal, plaintiff argues that the lower court should not have granted defendants' motion for summary disposition under MCR 2.116(C)(10) because genuine issues of material fact exist regarding whether the snow-covered ice was open and obvious and if special aspects existed. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Additionally, we only consider what was properly presented to the trial court before its decision on the motion." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, *supra* at 111. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

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"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

At the outset, we note that defendants argue that plaintiff was a licensee, rather than an invitee. Our Supreme Court discussed the three categories of individuals who enter the premises of another:

> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct.
>
> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit.
>
> The final category is invitees. An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

The *Stitt* Court then noted that to establish invitee status, "a plaintiff must show that the premises were held open for a *commercial* purpose," explaining, "[i]t is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. [T]he prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees." *Id.* at 604 (emphasis in original).

Plaintiff did not receive defendants' consent to enter the property in the manner of a social guest. Rather, plaintiff entered the property for the commercial or business purpose of reading the electric meter. Defendants enjoy a mutually beneficial relationship in having a meter reader come onto their land because they continue to receive electricity to the house.[1] Therefore,

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[1] We assume that defendants, as owners of a rental property, would provide access to electricity
(continued…)

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plaintiff was an invitee on defendants' land at the time the incident occurred. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But, a premises possessor does not owe a duty to protect an invitee from a danger that is open and obvious. *Id*. at 517.

The test for whether something is "open and obvious" is objective. *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]'" *Kennedy*, *supra* at 713, quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993). This means that the test is not "whether a particular plaintiff should have known the condition was hazardous," but "whether a reasonable person in [the plaintiff's] position would have foreseen the danger." *Id.*

Although the general rule is that a premises possessor owes no duty to protect an invitee from open and obvious dangers, if "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, *supra* at 517. "Special aspects" may exist when, for example, the open and obvious condition is "effectively unavoidable" or poses "an unreasonably high risk of severe harm." *Id.* at 518. In such situations, the premises possessor remains liable to the invitee to protect him from the danger. *Id.* at 517-518. The *Lugo* Court gave two illustrations of special aspects: 1) "a commercial building with only one exit for the general public where the floor is covered in standing water" would create a high likelihood of harm for a customer wishing to exit the store because the condition is effectively unavoidable; and 2) "an unguarded thirty foot deep pit in the middle of a parking lot" would present "such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken." *Id*. at 518. "[T]he risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). "[O]nly those special aspects that give rise to an uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, *supra* at 519.

An open and obvious accumulation of snow and ice does not, by itself, contain any special aspects that will give rise to liability. *Robertson*, *supra* at 593; see also *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004). Furthermore, it is the condition of the premises, not the condition of the plaintiff, to which the fact-finder must apply an objective standard. *Mann*, *supra* at 329. This means that "the only inquiry is whether the condition was effectively unavoidable *on the premises*." *Robertson*, *supra* at 593 (emphasis in original).

In looking specifically at cases involving ice and snow in Michigan, the courts have generally held that absent special circumstances, "the hazards presented by snow, snow-covered

(…continued)

as a condition of a rental agreement.

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ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 481; 760 NW2d 287 (2008).

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the dangerous condition of the snow-covered ice was open and obvious, or if special aspects existed. Plaintiff was walking down the driveway after reading the meter in the back of the house. The snow was open and obvious to plaintiff because he stated in his deposition that he could see the three to four inches of snow on the ground and that it was still snowing in the community. Plaintiff also indicated that he is familiar with the ice and snow conditions that exist during Michigan winters. Also, plaintiff could have walked down the same path after reading the meter that he used to enter the backyard without incident. Therefore, the evidence provided does not establish a question of fact regarding whether the dangerous condition of the snow-covered ice was open and obvious, or whether special aspects existed. The lower court did not err when it granted defendant's motion for summary disposition.

Because we agree with the lower court's ruling on plaintiff's first issue on appeal, we need not address plaintiff's second issue on appeal.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

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STATE OF MICHIGAN

COURT OF APPEALS

ANDREW BARRETT,

Plaintiff-Appellant,

v

TAMARA ALLEN,

Defendant-Appellee.

UNPUBLISHED
February 10, 2011

No. 295342
Eaton Circuit Court
LC No. 09-000520-NO

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this premises liability case. Because the icy conditions of defendant's driveway were open and obvious and no special aspects existed, we affirm.

Plaintiff was employed as a tow truck driver. On January 5, 2008, plaintiff was dispatched to defendant's house at around 8:00 or 9:00 a.m. Defendant's father called because defendant's truck would not start. Defendant was not at her house at the time. According to plaintiff, the weather that day was clear, sunny, and cold, and the road conditions on the way to defendant's house were icy. When plaintiff arrived, he parked in front of defendant's driveway. He stated that the driveway was about 30 to 40 feet long, very steep, and covered with patches of ice. There was also snow on defendant's lawn. Plaintiff proceeded to walk up the middle of the driveway to meet defendant's father, who was at the top of the driveway. Plaintiff stated that he chose to walk up the middle of the driveway because he saw dirt along that path. When he reached the top of the driveway, plaintiff told defendant's father that he would not be able to get the tow truck up the driveway because of the icy conditions. However, plaintiff stated that he would still be able to tow the truck if they rolled it down the driveway into the street. As plaintiff attempted to walk down the same path that he had walked up, he slipped and fell, landing on his left shoulder. As a result of his fall, plaintiff suffered a broken shoulder blade and a torn rotator cuff.

Plaintiff argues that there was a question of fact that existed regarding whether he fell on black ice, that special aspects existed that would preclude granting summary disposition, and that there is factual support for a claim of gross negligence. A trial court's decision to grant summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73

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(2006). Summary disposition of all or part of claim may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition." *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not extend to dangers which are open and obvious. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329-328; 629 NW2d 573 (2004). Liability will only be imposed if special aspects exist that "differentiate the risk from typical open and obvious risks so as to create an unreasonable risk or harm." *Lugo*, 464 Mich at 517-518. An unreasonable risk of harm exists if the condition is "effectively unavoidable" or poses an "unreasonably high risk of severe harm." *Id.* at 218.

The test to determine whether a condition is open and obvious is whether an average person of reasonable intelligence would have been able to discover the danger upon casual inspection of the premises. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 350 (2002). It is an objective test and the inquiry is whether a reasonable person in plaintiff's position would have perceived the danger, not whether this particular plaintiff perceived it. *Corey v Davenport College* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002).

We conclude, after viewing the evidence in the light most favorable to plaintiff, that the condition was open and obvious without special aspects. Although the concept of "black ice" is inherently inconsistent with the open and obvious doctrine because it is invisible, *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), black ice may be open and obvious if there is evidence that the black ice was "visible upon casual inspection," or if there is "other indicia of a potentially hazardous condition." *Id.* The simple fact that plaintiff stated that the ice he slipped on was black ice or clear ice does not mean that the danger was not open and obvious. Plaintiff was called to defendant's house in early January. He stated that the weather was clear, but that it was cold, as would be expected in January. Also, he testified that the road conditions were slippery that day, and that when he arrived at defendant's house he noticed that the road in front of defendant's driveway was icy, as was defendant's driveway. He also stated that there was snow in defendant's yard. "These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." *Janson v Sajewski Funeral Home Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). Indeed, having parked in front of the driveway because he had to assess the situation, plaintiff perceived the dangers of walking in the driveway. He decided that he would not be able to get his truck up the driveway because of the steepness and icy conditions. He also stated that he walked along the middle of the driveway because he saw dirt, and that he kept looking at the ground in order to try and avoid the icy patches. It is clear that plaintiff realized the potential danger. See *Mann*, 470 Mich at 329-329; *Joyce*, 249 Mich App at 238. Therefore, the trial court did not err when it determined the ice was an open and obvious hazard, and summary disposition was appropriate.

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Furthermore, no special aspects existed in this case. Plaintiff argues that the condition in this case was effectively unavoidable. *Lugo*, 464 Mich at 518. 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."

Finally, plaintiff argues that application of the open and obvious doctrine should be precluded because defendant acted in a grossly negligent manner. While plaintiff mentioned the concept of gross negligence in his response to defendant's motion for summary disposition, it was a single comment raised in context of whether special circumstances existed to remove the case from the application of the open and obvious doctrine. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, plaintiff has cited no authoritative support for his argument that gross negligence would remove the application of the open and obvious doctrine. Therefore, any claim of plain error has been abandoned. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

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Court of Appeals, State of Michigan

ORDER

Paul Mission v Estate of John Corbett

Docket No. 294905

LC No. 08-105140-NO

Kathleen Jansen
Presiding Judge

Donald S. Owens

Douglas B. Shapiro
Judges

The Court orders that the February 8, 2011 opinions are hereby VACATED, and a new opinion and concurring opinion are attached.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

FEB 17 2011
Date

Chief Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

PAUL MISSON,

Plaintiff-Appellant,

v

JULIE CORBETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN CORBETT,

Defendant-Appellee,

and

JULIE CORBETT,

Defendant-Appellee.

UNPUBLISHED
February 17, 2011

No. 294905
Wayne Circuit Court
LC No. 08-105140-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this premises liability matter, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing plaintiff's cause of action in negligence. We affirm.

Plaintiff, a subcontractor contracted to clean the gutters on defendants' home, suffered serious injuries when he fell from defendants' two to three story low to medium pitch roof after encountering a swarm of bees. Plaintiff was aware that bees might be present on the roof before he started the job because defendant warned him that she had observed bees on the premises and provided him with bee spray. Plaintiff, contrary to the contractor's instructions, proceeded to go onto defendants' roof to clean out the gutters without the use of a harness and lanyard or "roping off" to protect him in the event of a fall. Plaintiff felt the available harness was unsafe, and his coworker indicated that plaintiff, whom he characterized as stubborn, felt comfortable and confident that he did not need to "rope off." For the next three to four hours, plaintiff worked on the roof cleaning the gutters without issue. During this time, although he observed a "few bees" and hives, they did not bother him. When there was only a small area left to clean, plaintiff discovered a beehive in the gutter and on the outside edge of the house with bees "flying up under the roof." He proceeded to spray the hive with bee spray and "knock off" "a small cone where the beehive started" with a long broom handle, after which he observed a "cloud" or

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"swarm" of bees come from between the gutter and the roof boards. He then walked up to the peak of the roof where he encountered the swarm of bees. While backing up, he attempted to spray the bees and fell off the roof "roughly twenty-five to thirty feet" to the ground. Although plaintiff did not know what specifically caused him to fall, there was "no question in his mind" that he would not have fallen but for the presence of the swarm of bees on the roof. Unfortunately, he suffered serious injuries as a result of the fall.

Plaintiff filed the instant suit in negligence against defendants alleging that they breached their duty to warn him of the existence of a beehive on the roof and to remove the hive before he began working on the roof. Plaintiff alleged that defendants' breach of duty was the direct and proximate cause of his injuries. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was barred under MCL 600.2959 because plaintiff's conduct in failing to take safety precautions to protect himself and deliberately disturbing the hive rendered him more than 50 percent comparatively negligent, thereby precluding recovery for noneconomic damages. Defendants also argued that plaintiff's claim was barred by the open and obvious doctrine because the danger posed by the height of the roof and the presence of bees were open and obvious dangers associated with working on a roof lacking any "special aspects" that made it unreasonably dangerous. The trial court granted defendants' summary disposition motion on both bases.

We review a trial court's decision on a motion for summary disposition de novo. *Perkoviq* v *Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11, 15; 643 NW2d 212 (2002), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden*, 461 at Mich 120. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Plaintiff first claims that the trial court misapplied the open and obvious doctrine to preclude his negligence claim. We disagree.

The owner or possessor of land owes a duty to an invitee "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Perkoviq*, 466 Mich at 16, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "Where a condition is open and obvious, the scope of the possessor's duty may be limited." *Perkoviq*, 466 Mich at 16, quoting *Bertrand*, 449 Mich at 610. "While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions." *Perkoviq*, 466 Mich at 16-17, quoting *Bertrand*, 449 Mich at 610-611. "[T]he 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

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precautions." *Perkoviq*, 466 Mich at 17, quoting *Bertrand*, 449 Mich at 611 (emphasis in original). That is, "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." *Perkoviq*, 466 Mich at 18, quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A condition has "special aspects" rendering it unreasonably dangerous where it is "effectively unavoidable" or where it presents "a substantial risk of death or severe injury" to an invitee who encounters the dangerous condition. *Lugo*, 464 Mich at 518. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519. If such special aspects do not exist, the open and obvious condition is not unreasonably dangerous. *Id.*

The hazards that led to plaintiff's injuries were the height of the roof and the swarm of bees he encountered while working on the roof, which caused him to fall. We find no question of fact that the height of the roof and the presence of bees and hives on the roof were "open and obvious" dangers associated with working on defendants' roof. Clearly, the average person with ordinary intelligence would realize that there was a danger of falling and sustaining serious injury when performing work on a two to three story roof. Further, where the homeowner warned plaintiff about the presence of bees on the premises and plaintiff observed bees and hives while on the roof, it is evident that he knew that there were bees in the area, making the danger posed by the presence of bees open and obvious.

We also find no factual dispute that the roof lacked any special aspects that made the open and obvious risk posed by its height and the presence of bees unreasonably dangerous. The danger posed by the height of the roof and the presence of bees did not create a "uniquely high likelihood of harm or severity of harm" nor was it "effectively unavoidable." *Lugo*, 464 Mich at 518-519. To the contrary, the risk of harm could have been minimized or eliminated had plaintiff utilized safety precautions to protect himself in the event of a fall or simply stopped working on the roof after discovering the hive and notified defendants so that they could take steps to remove it. Instead, he attempted to eradicate it himself, which apparently caused the bees to swarm and led to his fall from the roof. On these facts, the presence of the bees on the roof created a dangerous condition only because plaintiff apparently did not realize the obvious danger of deliberately disturbing the beehive while on top of a two to three story roof without safety precautions in place. Under such circumstances, we fail to find that special aspects existed rendering the open and obvious danger unreasonably dangerous. Accordingly, defendants did not have a duty "to undertake reasonable precautions to protect" plaintiff from the risk posed by the height of and the presence of bees the roof. *Perkoviq*, 466 Mich at 18; *Lugo*, 464 Mich at 516-517. Defendants, as owners and occupiers of the premises, could not have "reasonably foreseen" that plaintiff, as a subcontractor hired to clean the gutters of their house, would attempt to eradicate a beehive by spraying it and "knocking it off" with a broom handle while on top of a two to three story roof without appropriate safety precautions in place to protect him from the obvious danger posed by the height of the roof. We find summary disposition of plaintiff's cause of action in negligence to be proper.

Plaintiff next claims that the trial court erred in concluding that he was more than 50 percent comparatively negligent, thereby precluding recovery of damages for his personal

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injuries as a matter of law. Having found that plaintiff's negligence claim was precluded by the open and obvious doctrine, we need not address whether his claim was also precluded by Michigan's comparative negligence law. However, because the issue was raised before and addressed by the trial court, we will consider it.

"[T]he doctrine of pure comparative negligence distributes responsibility according to the proportionate fault of the parties. It requires that a plaintiff's damages be reduced in the same proportion by which the plaintiff's own conduct contributed to his or her injuries." *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005), citing MCL 600.2959; *Placek v Sterling Heights*, 405 Mich 638, 660-661, 681; 275 NW2d 511 (1979). Under MCL 600.2959, where the plaintiff's fault exceeds 50 percent, he cannot recover noneconomic damages.[1] "The standards for determining the comparative negligence of a plaintiff are the same as those of a defendant—the jury must consider the nature of the conduct and its causal relationship to the damages—and the question is one for the jury unless all reasonable minds could not differ or because of some ascertainable public policy consideration." *Laier*, 266 Mich App at 496. Causation in a negligence action requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Proximate cause involves an examination of the foreseeability of consequences and a determination whether a defendant should be held legally responsible for those consequences. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475(1994).

Considering the nature of the conduct and its causal relationship to plaintiff's injuries, we find no error in the trial court's conclusion that plaintiff was greater than 50 percent comparatively negligent as a matter of law. Here, there was no genuine issue of material fact that plaintiff failed to use a safety harness or rope, despite instructions to do so, and deliberately disturbed a beehive by spraying it with bee spray and knocking it with a broom handle while on top of a two to three story roof with the knowledge that bees were present. The subsequent bee swarm caused his eventual fall. On these facts, reasonable minds could not differ that plaintiff's negligent conduct was the cause in fact as well as the proximate cause of his injuries. There was minimal, if any, evidence tending to indicate that defendants' conduct contributed to plaintiff's

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[1] Specifically, MCL 600.2959 provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

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injuries. To the contrary, defendants warned plaintiff of the presence of bees on the premises, and it was not reasonably foreseeable that a subcontractor would work on the two to three story roof without taking safety precautions. On such facts, we find, as a matter of law, that plaintiff's fault in deliberately disturbing the hive and failing to take safety precautions to protect himself in the event of a fall exceeded defendant's fault, if any. Accordingly, under MCL 600.2959, plaintiff was precluded from recovering noneconomic damages for his personal injuries, making summary disposition of his action in negligence proper.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens

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STATE OF MICHIGAN

COURT OF APPEALS

MYRA WALKER,

Plaintiff-Appellant,

v

MARY A. KILPATRICK,

Defendant-Appellee.

UNPUBLISHED
March 1, 2011

No. 293626
Macomb Circuit Court
LC No. 2008-002722-NO

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition on the basis of the open and obvious danger doctrine. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that the trial court erred in granting defendant's summary disposition motion under MCR 2.116(C)(10) and dismissing her claim on the basis of the open and obvious danger doctrine. Plaintiff argues that a reasonable person would have been unable to see the black ice that had formed on defendant's driveway upon casual inspection. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a reviewing court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not generally required to protect an invitee from open and obvious dangers, unless "special aspects" of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Id*. Special aspects exist only when the conditions give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Id.* at 518-519.

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The question of whether a condition is "open and obvious" depends on whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective; thus, "the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger . . . ." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts . . . 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." *Lugo*, 464 Mich at 523-524. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004).

Michigan courts have applied the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, holding that knowledge regarding the existence of a condition "should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter*, 281 Mich App at 479. However, the courts have declined to extend the open and obvious doctrine to "black ice," which is, by its nature, invisible or nearly invisible, without evidence that the black ice in question would have been visible on casual inspection before the fall or without "other indicia" of a potentially hazardous condition. *Id.*; see also *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010).

The open and obvious danger doctrine was most recently applied in the context of black ice in *Janson*, 486 Mich at 934. The Michigan Supreme Court in that case reversed the decision of this Court[1] which had found a condition of black ice was not open and obvious, and reinstated the trial court's grant of summary disposition. The facts in *Janson* were described by this Court:

> [W]eather records and testimony indicated that the temperature remained below freezing on the day of the incident, but the precipitation was light and had tapered off earlier that day. Plaintiff testified that the roads leading to defendant's funeral home were clear. Defendant's parking lot also appeared to be clear. Plaintiff testified that he had not encountered any other patches of ice in defendant's parking lot before his fall. Defendant's operator testified that he salted the parking lot and that the area where plaintiff fell seemed slippery even though he did not see any ice there. Merrow testified that there were patches of ice throughout the parking lot and that although he encountered them, he did not see any of them. We find nothing in the record to show that plaintiff saw anyone else slip on the parking lot surface, nor do we find any indication that there was any snow around the area where plaintiff fell. [*Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 399-400; 775 NW2d 148 (2009).]

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[1] *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396; 775 NW2d 148 (2009).

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The Supreme Court held that the Court of Appeals panel had failed to adhere to the governing precedent, as established in *Slaughter*, that black ice conditions are open and obvious where there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." *Janson*, 486 Mich at 935. The Court noted that the slip and fall occurred "in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." *Id.* It concluded that the wintry conditions would have alerted a reasonable person of ordinary intelligence to discover the danger upon casual inspection. *Id.*, citing *Novotney*, 198 Mich App at 475.

In the instant case, plaintiff argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether the black ice was open and obvious. First, it should be noted that the evidence presented does not entirely support plaintiff's assertion that the accumulated ice was "black ice," that is, invisible or nearly invisible ice. Both plaintiff and her supervisor admitted that the ice was clearly visible upon fairly close inspection. The photographic evidence, furthermore, clearly shows a darker area on the pavement in the spot where plaintiff fell. This difference in color, under the circumstances, implies the presence of ice.

Even assuming, however, as the trial court did, that the ice was "black ice," plaintiff argues that the trial court erred in considering several facts as "other indicia of a hazardous condition." First, plaintiff argues that the trial court erred in considering as "other indicia" the presence of ice and snow and recent heavy precipitation. Given the Supreme Court's decision in *Janson*, plaintiff's argument lacks merit. As emphasized in *Slaughter*, 281 Mich App at 483, "the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant" in determining whether black ice can be open and obvious.

Plaintiff also argues that the trial court erred in considering her longtime Michigan residency and experience with Michigan weather as "other indicia." However, in *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007), the Michigan Supreme Court reversed this Court's decision[2] affirming denial of summary disposition to the defendant, and it adopted this Court's dissenting opinion. The dissent had concluded that the existence of black ice was open and obvious where the plaintiff, "a lifelong Michigan resident" who had "considerable experience with [Michigan] weather," observed snow on a driveway following a day of sunshine and fluctuating temperatures, and knew that the temperature was dropping. Notably, in *Kaseta*, there was no evidence of visible ice or snow in the driveway where the plaintiff fell.

Finally, plaintiff disputes the propriety of the trial court's consideration of her previous slip and fall on ice years before as "other indicia" of a hazardous condition. While plaintiff is correct that the analysis of open and obvious conditions must focus on the objective nature of the condition of the premises at issue, and not the subjective degree of care used by the plaintiff,

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[2] *Kaseta v Binkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2007 (Docket No. 273215).

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Lugo, 464 Mich at 523-524, the standard nonetheless requires the court and the fact-finder to consider whether "a reasonable person *in the plaintiff's position*" would have foreseen the danger. *Slaughter*, 281 Mich App at 479. The trial court in this case considered plaintiff's previous fall in order to examine whether a person with her experience would have been on notice of the hazardous condition on casual inspection, and not in order to determine whether she actually took appropriate precautions as a result of her previous experience. This was not error.

The evidence presented in this case revealed that there was noticeable snow and ice in the vicinity of plaintiff's fall, both in neighbors' driveways and sidewalks, and along defendant's partially cleared driveway. There had been a significant accumulation of snow the day before plaintiff's fall. Photographic evidence depicted a darker area visible on the pavement at the point where plaintiff reported that she fell. Plaintiff admits that the ice was visible once she was on the ground, and her supervisor stated that the ice was obvious once it was pointed out to him. Furthermore, a longtime Michigan resident whose job requires her to be in the elements year-round, particularly one who has slipped and fallen on black ice in the past, would have realized that the path along the driveway was potentially icy. These facts, viewed most favorably to plaintiff, support the conclusion that the alleged black ice was open and obvious because there was sufficient indicia of a potential hazard to alert a reasonable person of ordinary intelligence that a dangerous condition existed. *Janson*, 486 Mich at 934; *Slaughter*, 281 Mich App at 483. Accordingly, summary disposition was proper.

Plaintiff next argues that, even if the black ice was open and obvious, summary disposition was still improper because the danger it posed was effectively unavoidable. Again, we disagree.

When a court finds that a condition is open and obvious, it must consider whether there are any "special aspects" that create an unreasonable risk of harm despite the condition being open and obvious. *Lugo*, 464 Mich at 517. The inquiry in such cases is "whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id*. at 517-518. To be a special aspect, the harm must be "effectively unavoidable," giving rise to a uniquely high likelihood of harm, or constitute "an unreasonably high risk of severe harm." *Id*. at 518.

Here, plaintiff argues that, even if the hazard posed by the black ice was open and obvious, the condition was effectively unavoidable because plaintiff had no choice but to traverse the hazardous driveway in order to deliver the defendant's mail.[3] In similar cases where hazards were found to be effectively unavoidable, however, there was no ice-free path for the plaintiff to walk. See, e.g., *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-594; 708 NW2d 749 (2005). In this case, the evidence suggests that despite the visible ice present in places on the driveway, there was nothing preventing plaintiff from stepping around the icy spots or stepping off of the driveway onto the snow in order to avoid icy patches. While doing so may have been mildly inconvenient, public policy requires that people take reasonable care for their

[3] Plaintiff does not argue that the ice posed an unreasonably high risk of severe harm.

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own safety. See *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002).

Because there were ice-free alternative paths for plaintiff to traverse in order to deliver defendant's mail, the hazard posed by the patch of ice plaintiff ultimately slipped on was not "effectively unavoidable." Accordingly, the trial court did not err in finding no "special aspects" that would impose liability upon the defendant.

The dissent maintains that the hazard was effectively unavoidable because there was no safer alternative to the path taken by plaintiff where the plaintiff would have needed to walk on a shoveled strip of driveway or traverse snow-covered areas. We respectfully disagree. The pictures of the scene taken after the incident show tracks in the driveway that are clear of snow, which tracks appear to also have many dry areas free of ice. Regardless, plaintiff could have avoided the ice patch by walking on surrounding snow, and we cannot agree with the dissent that a patch of ice is effectively unavoidable if an alternative route involves traversing snow. Simply because snow presents an open and obvious danger giving rise to a need to watch one's footing and proceed with some care does not mean that walking upon it is not a safe and viable alternative such that traversing nearby ice is deemed unavoidable. As Michiganders, we have all treaded on snow during our lifetimes, absent incident for most of us, and there can be no reasonable dispute that ice presents a greater danger than simple snow. The question is whether walking on the ice patch was effectively unavoidable, and it was not. If plaintiff was completely surrounded by ice and was forced to walk on ice regardless of what direction was taken, plaintiff's argument might have some merit, but this was not the case.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

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STATE OF MICHIGAN

COURT OF APPEALS

SABAH JAJO,

Plaintiff-Appellant,

v

VILLAGE BANQUET HALL,

Defendant-Appellee.

UNPUBLISHED
May 5, 2011

No. 296917
Oakland Circuit Court
LC No. 2008-090237-NO

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this personal injury claim, plaintiff Sabah Jajo appeals as of right the trial court's award of summary disposition to defendant Village Banquet Hall under MCR 2.116(C)(10). We affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

For purposes of its motions for summary disposition, defendant accepted the facts set forth in plaintiff's deposition testimony as true. According to plaintiff's testimony, Alfred Yousif, defendant's owner and manager, hired him to frame two bathrooms located in the basement of defendant's facility. Plaintiff began work on the project on March 24, 2006. Although plaintiff had two ladders in his work van, neither ladder was suitable for the project. Plaintiff asked defendant's employees for a stepladder. Bedal Sulima,[1] an employee of defendant, provided plaintiff with a stepladder, which plaintiff used without incident on March 24 and 25. Plaintiff felt very comfortable using the stepladder and believed it was suitable to use for the project. On March 27, after plaintiff had worked for two and a half to three hours, the stepladder slid on the smooth ceramic tile on the floor of one of the bathrooms. Plaintiff fell backwards off of the stepladder and landed on his right side, breaking his right hip.

[1] Throughout his testimony, plaintiff referenced defendant's cook, who was later identified as Sulima.

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Immediately after falling, plaintiff screamed in pain. Alfred Yousif, an electrician, and two painters ran downstairs and found plaintiff lying on the floor. When they asked him what happened, plaintiff indicated that he thought he had broken his right leg. Because plaintiff was in too much pain to move, the men placed him on a chair and carried him upstairs. Once upstairs, plaintiff asked the men to call an ambulance, but they refused. Plaintiff then asked the men to call his brother, Raad Jajo ("Raad"). Raad quickly arrived at defendant's facility, but shortly thereafter, Yousif Rayrs, a "traditional healer," also arrived. When Raad asked the men why they had not called an ambulance, Alfred Yousif said that an ambulance was unnecessary because Rayrs could heal plaintiff. Plaintiff believed that Alfred Yousif had asked Sulima to call Rayrs.

Plaintiff refused Rayrs's healing services, stating that he was in severe pain and believed his leg was broken. Raad called for an ambulance. Rayrs then told Alfred Yousif that he might be able to heal plaintiff by pulling his right leg. Alfred Yousif ordered the electrician and painters to hold plaintiff's shoulders and left leg and told Rayrs to do whatever was necessary to heal plaintiff. Against plaintiff's will, the three men held him down while Rayrs pulled his right leg. Plaintiff lost consciousness and did not regain consciousness until that night in the hospital.

On March 28, 2006, plaintiff had surgery on his right hip. He was hospitalized for a total of five days. Plaintiff testified that he had no medical problems before this injury. As a result of the injury, his right leg is shorter than his left leg, he experiences severe pain, and he cannot live normally. He has not done carpentry work since he was injured. Although plaintiff believes that Rayrs made his leg worse by pulling it, plaintiff's doctor never said that the pulling made the injury worse.

Plaintiff sued defendant on March 8, 2008. Plaintiff's count I alleged that defendant was negligent when it failed to: 1) provide him a safe place to work, 2) provide him a proper ladder, and 3) inspect his work area and ensure that he could safely stand on a ladder[2] to work. Plaintiff asserted that defendant's negligence caused his injury. In count II, plaintiff alleged that defendant was negligent when it: 1) failed to call an ambulance, 2) called Rayrs to heal him, and 3) had him held down against his will while Rayrs pulled his right leg. He asserted that defendant's negligent actions made his injury worse. Plaintiff's count III alleged that defendant's negligence in ordering its employees to hold him down and allowing Rayrs to pull his leg caused him to suffer severe pain and possibly aggravated his injury.

On October 8, 2008, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). On December 9, 2008, the trial court granted in part defendant's motion under MCR 2.116(C)(10). The trial court held that there was no genuine issue of material fact regarding count I because the evidence would "not support a finding of any breach of duty or causation attributable to [d]efendant." The stepladder provided was not defective nor was there

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[2] Although plaintiff's complaint referred to a chair rather than a ladder or stepladder, plaintiff's counsel later explained that the reference to a chair was an error, which resulted from an improper translation of plaintiff's allegations into the English language.

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an unreasonably dangerous condition on the premises that caused plaintiff's injury. Therefore, the trial court found that defendant was entitled to summary disposition of count I. Regarding counts II and III, the court agreed with defendant that plaintiff failed to provide any evidence establishing that the pulling of his leg "caused any damage" to him. The court further held, however, that plaintiff's testimony supported his assertion that defendant ordered its employees to hold plaintiff down while Rayrs pulled on his leg and that the pulling caused him intense pain. Accordingly, the court limited plaintiff's recovery to pain suffered as a result of the pulling.

Thereafter, both parties moved for reconsideration. In a February 3, 2009, opinion and order, the trial court denied defendant's motion, which pertained to the court's refusal to dismiss counts II and III in their entirety. In regard to plaintiff's motion, the court stated that while plaintiff technically requested to amend his complaint in his response to defendant's motion for summary disposition, the request was conclusory and devoid of justification. Therefore, reconsideration on that basis was not appropriate. The court also clarified its holding regarding counts II and III, stating: "Plaintiff could not recover for the broken hip under Counts II and III, but rather could recover, if at all, only for the pain inflicted by the healer [Rayrs]." Finally, regarding count I, the trial court raised sua sponte the open and obvious danger doctrine, stating:

> Finally, Plaintiff seeks reconsideration of the Court's conclusion that Defendant could not be liable under Count I, based upon Defendant's provision of a step ladder lacking "nonskid rubber feet." The problem with this theory is that it is undisputed that Plaintiff used the step ladder on the ceramic floor for two full days before his injury occurred. In this context, it is difficult to see how any danger posed by the lack of "non-skid rubber feet" could have been anything but readily apparent to an average user of ordinary intelligence, i.e., open and obvious.
>
> The problem, of course, is that Defendant did not explicitly challenge Plaintiff's claim on this basis. In light of the foregoing, the Court shall raise this issue on its own, and shall request briefing from the parties. . . . Until then, the Court shall not rule on this aspect of Plaintiff's motion for reconsideration.

At a March 25, 2009, hearing on the parties' supplemental briefs, the trial court stated that it was not necessary to consider the open and obvious danger doctrine because count I did not sound in premises liability and the evidence did not support a finding that there was a defective or unreasonably dangerous condition of the property. On April 1, 2009, the court issued an order dismissing count I for the reasons stated on the record.

Defendant filed a second motion for summary disposition under MCR 2.116(C)(10) on January 28, 2010. Defendant requested that the trial court dismiss counts II and III, asserting that it could not be held vicariously liable for Alfred Yousif's attempt to provide plaintiff medical care because Alfred Yousif's actions were committed outside the scope of his employment. On February 19, 2010, the court granted the motion, holding that is was "beyond factual dispute that [d]efendant's employees were acting outside the scope of their employment" and, therefore, defendant could not be held vicariously liable. The court dismissed the case against defendant. Plaintiff now appeals as of right.

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II. THE COURT'S DISMISSAL OF COUNT I

Plaintiff argues that the trial court erred in dismissing count I of his complaint, which related to defendant's liability for injuries he sustained in his fall from the stepladder. According to plaintiff, because he was an independent contractor engaged in construction work on defendant's premises, defendant owed him a duty to take reasonable precautions to protect him from dangers associated with his use of the stepladder, even if such dangers were open and obvious. Plaintiff further asserts that his claim is one of ordinary negligence and, therefore, that the open and obvious danger doctrine does not apply. We disagree.

We review a trial court's award of summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim, *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004), and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party," *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

Initially, we hold that plaintiff's count I sounds in premises liability, rather than ordinary negligence as he asserts on appeal. Michigan law distinguishes between claims resulting from premises liability and ordinary negligence. See, e.g., *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). "'The gravamen of an action is determined by reading the claim as a whole' and looking 'beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). Thus, when an injury develops from a condition of the land, rather than from an activity or conduct that created the condition, the action sounds in premises liability. *James*, 464 Mich at 18-19. Liability with respect to an ordinary negligence claim stems from "the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), rev'd on other grounds 379 Mich 251 (1967).

In his complaint, plaintiff labeled count I "negligence" and asserted that defendant was negligent for failing to supply plaintiff with a safe workplace and proper ladder and failing to inspect his work area. But the labels attached to claims by the parties do not bind our courts. See *Randall v Harrold*, 121 Mich App 212, 217; 328 NW2d 622 (1982). Plaintiff testified that on his first day of work, he asked defendant's employees for a stepladder, which Sulima provided to him and he found suitable for his needs. Plaintiff used the stepladder for two days without incident. On the third day, the stepladder suddenly slipped on the ceramic tile floor while plaintiff was standing on it and, when he fell, he broke his right hip. Based on the evidence presented by plaintiff, it was the stepladder and the floor surface the stepladder was resting on, and not defendant's conduct, that caused him to fall and break his hip. Although defendant's employee provided plaintiff with the stepladder, that conduct did not produce the resulting harm. Rather, it was plaintiff's act of standing on a stepladder resting on a ceramic tile

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floor that produced the resulting harm. Because defendant's alleged liability under count I emanated from the stepladder and its placement on the floor, the claim sounds in premises liability. See generally *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261; 532 NW2d 882 (1995) (observing that a premises liability action may be founded on an allegedly defective ladder used on the premises, at the invitation of the premises owner).

The applicability of the open and obvious danger doctrine is dependent on the theory of liability presented by the pleader and on the nature of the duty at issue. See *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). The doctrine is applicable to premises liability actions, but does not apply to actions involving claims of ordinary negligence. *Id*. Because plaintiff's claim sounds in premises liability, his argument suggesting that the open and obvious danger doctrine is inapplicable fails.

The trial court ultimately dismissed count I based on plaintiff's ordinary negligence theory and, contrary to plaintiff's argument on appeal, did not apply the open and obvious danger doctrine. However, this Court will affirm the trial court where it came to the right result for the wrong reason. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009). Thus, although plaintiff's claim should have been dismissed under the open and obvious doctrine, discussed *infra*, we affirm the trial court's dismissal of count I.

In a premises liability action, the plaintiff must prove: (1) the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of duty caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

The trial court never determined plaintiff's status on defendant's premises. Plaintiff entered the premises for the commercial or business purpose of doing carpentry work. Thus, plaintiff's status was that of an invitee. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 605; 614 NW2d 88 (2000), on remand 243 Mich App 461 (2000). In general, a premises possessor owes a duty to protect invitees from unreasonable risks of harm caused by dangerous conditions of the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). But a premises possessor is not an absolute insurer of an invitee's safety to the extent that the danger is open and obvious. *Id*.

The test for whether something is "open and obvious" is objective. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]'" *Kennedy*, 274 Mich App at 713 (citation omitted). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id*.

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Accepting plaintiff's deposition testimony as true[3] and viewing all of the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether any danger caused by use of the stepladder on the ceramic tile floor was open and obvious. Plaintiff broke his hip when he fell off of the stepladder that he placed on the ceramic tile floor. Plaintiff received the stepladder from one of defendant's employees after requesting it himself. He testified that he found the stepladder suitable for his work needs and used it, by placing it on the ceramic tile floor and standing on it, for two days before falling. A reasonable person would have been able to see that standing on a stepladder placed on a ceramic tile floor could pose a danger and, thus, the danger was open and obvious. See *id*.; see also *Eason*, 210 Mich App at 265 (stating that "[t]he danger that an extension ladder might slip and telescope down because of inadequate bracing at its base . . . is a danger readily apparent to persons of ordinary intelligence and experience").

Also, contrary to plaintiff's assertion, the fact that the stepladder may or may not have had non-skid rubber feet did not create an unreasonable risk of harm from which defendant had a duty to protect plaintiff. Rather, the use of a stepladder on a ceramic tile floor is a common occurrence and the danger associated with standing on top of a stepladder, with or without non-skid rubber feet, placed on a ceramic tile floor is foreseeable to reasonable people. See *id*. Therefore, the evidence submitted by the parties does not raise a question of fact regarding whether the stepladder posed an open and obvious danger.

Plaintiff also argues that because he was an independent contractor engaged in construction work on defendant's premises, defendant had a duty to take reasonable precautions to protect him despite the open and obvious nature of the danger. In so arguing, plaintiff cites *Hottmann v Hottmann*, 226 Mich App 171; 572 NW2d 259 (1997), and *Hughes v PMG Bldg*, 227 Mich App 1; 574 NW2d 691 (1997). Both cases rely on our Supreme Court's rationale in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, the Court clarified *Bertrand* in *Lugo*, 464 Mich at 516-517. The *Lugo* Court concluded that whether a duty exists despite the open and obvious nature of a danger depends on whether the danger has a special aspect that creates an unreasonable risk of harm. *Id*. at 517. The general rule is that 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*. There are "special aspects" when an unreasonable risk of harm exists, such as a condition that is "effectively unavoidable" or poses a unique and "unreasonably high risk of severe harm." *Id*. at 517-518. In such situations, the premises possessor remains liable to the invitee to protect him from the danger. *Id*.

Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether special aspects existed to preclude application of the open and obvious danger doctrine. The condition of the stepladder was not effectively unavoidable. Plaintiff could have chosen not to work with a stepladder. He could have obtained a different

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[3] As indicated, for purposes of its motions for summary disposition, defendant agreed to accept plaintiff's version of the facts as true.

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ladder or attempted to further stabilize the stepladder to prevent it from slipping on the ceramic tile floor. The condition of the stepladder also did not create an unreasonably high risk of severe harm. Plaintiff admitted that he used the stepladder for two days without incident. Further, the severity of harm from falling off of a stepladder is not the same as falling into a 30-foot deep pit. See *id*. at 518. Therefore, the record provided does not raise a question of fact regarding whether special aspects existed.

Accordingly, we conclude that the trial court did not err in granting defendant summary disposition of count I.

III. THE COURT'S DISMISSAL OF COUNTS II AND III

Plaintiff next argues that the trial court erred in dismissing counts II and III of his complaint because there is a genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment in attempting to provide him medical care. The trial court did not err.

As indicated, we review an award of summary disposition de novo. *Allen*, 281 Mich App at 52. Summary disposition under MCR 2.116(C)(10) is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111.

Under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's act committed within the scope of his or her employment. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). An employer is not liable, however, for an employee's act committed outside the scope of employment. *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). An act is considered to be outside the scope of employment if the employee acts to accomplish a purpose of his own. *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). Vicarious liability may arise where the employee's act was not specifically authorized if the act is similar or incidental to conduct that is authorized, considering factors such as whether the act is commonly done by the employee or whether the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-100; 446 NW2d 847 (1989), citing 1 Restatement Agency, 2d, § 229, p 506. Liability may arise where the employee commits the act while involved in a service of benefit to the employer. *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). "While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Bryant*, 180 Mich App at 98.

Accepting plaintiff's deposition testimony as true and viewing all of the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment when they attempted to provide plaintiff medical care. According to plaintiff's testimony, after his fall, Alfred Yousif indicated that calling an ambulance was unnecessary because Rayrs could heal plaintiff. Instead of calling an ambulance, Alfred Yousif had Sulima call Rayrs. When Rayrs arrived, Alfred Yousif told him to do whatever was necessary to heal plaintiff and ordered the electrician and painters to hold plaintiff down so that Rayrs could pull on his leg. Alfred Yousif's orders, and

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Sulima's act of calling Rayrs, did not confer a benefit on defendant. Their actions did not promote or further defendant's business, which involved hosting events such as weddings and birthdays. Rather, their actions were to fulfill Alfred Yousif's own purpose of providing plaintiff "traditional" medical care. Plaintiff has not pointed to any corporate interest that their actions were meant to fulfill.

Plaintiff emphasizes that Alfred Yousif is the owner and manager of the defendant company. Therefore, according to plaintiff, Alfred Yousif's orders and the acts committed pursuant to those orders had "corporate authorization," were committed in furtherance of a corporate interest, and fell within the scope of employment. But plaintiff has not presented any authority in support of this assertion. Under plaintiff's rationale, a defendant company would be vicariously liable for *any* act committed by an owner or manager or pursuant to an owner's or manager's instruction, and our Supreme Court has declined to impose strict liability on defendant employers. See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006). Additionally, we note that plaintiff did not specifically name Alfred Yousif or any other person as defendants in this action.

There is no genuine issue of material fact regarding whether Alfred Yousif and Sulima acted in the scope of their employment. Therefore, defendant is not vicariously liable for plaintiff's injury, and the trial court properly awarded defendant summary disposition of counts II and III.[4]

IV. PLAINTIFF'S REQUEST TO AMEND HIS COMPLAINT

Plaintiff argues that the trial court abused its discretion in denying his request to amend his complaint. We disagree.

A trial court's decision regarding a party's motion to amend its pleadings is reviewed for an abuse of discretion. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.118(A)(2) provides: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be

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[4] Plaintiff indirectly suggests in his brief and reply brief on appeal that defendant is also vicariously liable for the acts of the electrician and painters who held him down per Alfred Yousif's request. But according to plaintiff's own testimony, the electrician and painters were not defendant's employees. In general, "one who employs an independent contractor is not vicariously liable for the contractor's negligence." *Janice v Hondzinski*, 176 Mich App 49, 53; 439 NW2d 276 (1989). Moreover, even if defendant could be held liable for their actions, plaintiff's claim would fail on the same basis that his vicarious liability claim regarding Alfred Yousif and Sulima fails.

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freely given when justice so requires." A motion to amend should only be denied if there is: "'[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .'" *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (citation omitted).

Furthermore, a trial court may deny a motion to amend if it would prejudice the non-moving party. Our Supreme Court explained:

> [A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Id*. at 659-660.]

Here, in the "relief" section of his brief in response to defendant's first motion for summary disposition, plaintiff requested that he "be allowed to amend his Complaint to state the premises liability cause of action and the civil conspiracy causes of action." In its December 9, 2008, opinion and order granting in part defendant's motion, the trial court stated:

> The Court makes a similar observation with respect to the theories of liability. Specifically, Plaintiff has claimed in his response that Defendant may be liable on theories such as civil conspiracy and assault and battery. The problem, however, is that these theories are not pled in Plaintiff's complaint, and there has been no request to amend. Therefore, these theories shall not be presented to the jury, and Plaintiff may not recovery on this basis.

Thereafter, plaintiff moved for reconsideration, arguing among other things that the trial court mistakenly stated that plaintiff made no request to amend his complaint. In its February 3, 2009, opinion and order, the court stated:

> In his motion, Plaintiff first takes issue with the Court's observation regarding the additional parties and theories of liability that Plaintiff raised in response to the motion, but which were not raised in his complaint. Specifically, "the Court was mistaken in finding that there was no request for amend [sic] because Plaintiff did request to amend in the Relief section of Plaintiff's brief in Response."
>
> Plaintiff is correct in this regard. Specifically, in the "Relief" section of his brief, Plaintiff asks that he "be allowed to amend his Complaint to state the premises liability cause of action and the civil conspiracy causes of action." This was, however, the only reference to any request to amend in Plaintiff's brief. Moreover, the "request" does not refer to the assault and battery theory of liability, nor does it ask that the corporation's owner or the healer be named as defendants. Finally and most significantly, Plaintiff failed to address in any way the criteria for requesting leave to amend, such as undue delay or prejudice to the opposing party. See *In re Estate of Kostin*, 278 Mich. App. 47 (2008). In

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> particular, Plaintiff offered no explanation of any kind for his failure to raise these theories and claims earlier, nor did he explain why adding them at this point would not prejudice Defendant by, at the very least, requiring that depositions be re-taken and discovery otherwise extended.
>
> In other words, Plaintiff is technically correct in asserting that he requested leave to amend. His request, however, was so conclusory and devoid of justification that it cannot be considered legally significant. Therefore, reconsideration on this basis is not appropriate.

The trial court did not abuse its discretion in denying plaintiff leave to amend his complaint. Plaintiff did not make the request until after defendant filed its first motion for summary disposition. He requested to add two new theories of liability, and it is likely that defending against the new theories would have required additional rounds of discovery. Moreover, even if defendant would have had a reasonable opportunity to respond, plaintiff did not articulate with any specificity the grounds for the new claims. Therefore, we find no abuse of discretion. See *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000) (holding that the trial court did not abuse its discretion in denying the plaintiffs leave to amend their complaint because they did not articulate with specificity the grounds for the new claim and delaying the proceedings would have prejudiced the defendants and public).

V. PLAINTIFF'S DUE PROCESS CLAIM

Plaintiff finally argues that he was denied due process when the trial court requested sua sponte that the parties submit supplemental briefing regarding the open and obvious danger doctrine and then awarded defendant summary disposition of count I of his complaint. We disagree.

This issue is unpreserved. We review unpreserved constitutional issues for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). Reversal is warranted only if the plain error seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Due process is a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). In a civil case, the basic requirements of due process include notice of the proceeding and a meaningful opportunity to be heard. *Id*. "Where a court considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing." *Id*. at 485-486.

In its answer to plaintiff's complaint, defendant raised the open and obvious danger doctrine as an affirmative defense. Thereafter, in response to defendant's first motion for summary disposition, plaintiff attempted to raise a premises liability claim. In its motion for reconsideration, plaintiff argued that defendant was negligent for providing him with a stepladder lacking "nonskid rubber feet." He did not specifically address the open and obvious danger doctrine. In its February 3, 2009, opinion and order addressing the parties' motions for reconsideration, the trial court noted that the lack of "nonskid rubber feet" could not have been

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anything but open and obvious. But because the parties had not addressed the open and obvious danger doctrine, the court requested that they submit briefing on the issue.

The trial court did not err in requesting sua sponte that the parties submit supplemental briefing on the open and obvious danger doctrine. The court provided both parties the opportunity to submit a brief and held a hearing on the open and obvious danger issue. Considering that plaintiff received notice and had a meaningful opportunity to be heard, we cannot conclude that he was denied due process. See *id*. Furthermore, while plaintiff's argument on appeal suggests that the trial court applied the open and obvious danger doctrine to count I of his complaint in awarding defendant summary disposition, the trial court ultimately dismissed count I based on plaintiff's ordinary negligence theory and did not apply the doctrine, as explained above. There was no plain error affecting plaintiff's substantial rights.[5]

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck

[5] Given our conclusions on the foregoing issues, we need not address the remaining issues raised by plaintiff on appeal.

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STATE OF MICHIGAN

COURT OF APPEALS

MARY A. WALDER,

Plaintiff-Appellant,

v

ST. JOHN THE EVANGELIST PARISH, a/k/a THE ORDINARY (BISHOP) OF THE ROMAN CATHOLIC DIOCESE OF LANSING IN TRUST FOR ST. JOHN THE EVANGELIST,

Defendant-Appellee.

UNPUBLISHED
September 27, 2011

No. 298178
Genesee Circuit Court
LC No. 09-091572-NO

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was on her way to help out with a bingo game when she slipped and fell in defendant's parking lot. She broke her ankle and required surgery. On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant on the basis of the open and obvious doctrine. Plaintiff argues that there were "special aspects" that made the icy condition of the parking lot effectively unavoidable. Plaintiff contends that, in order to reach the alternative rear entrance, she would still have had to cross the icy parking lot from her handicap parking spot; the alternative rear-entrance area and alternative parking lot were also ice-covered; and she was scheduled to work and thus had to cross the ice in order to enter the building. Plaintiff asserts that she raised a genuine issue of material fact regarding whether there was a "special aspect" of the open and obvious danger that precluded summary disposition.

We review de novo the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006). In *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), the Michigan Supreme Court explained the evidentiary requirements applicable to MCR 2.116(C)(10):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at

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> trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not required to protect an invitee from open and obvious dangers, unless there are special conditions making the danger unreasonable. *Id*. at 517. An open and obvious danger is one that an average user with ordinary intelligence would have been able to discover upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). This is an objective test, and the court considers whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id*. at 238-239.

In this case, plaintiff does not dispute that the icy condition of defendant's parking lot was an open and obvious danger, but she contends that special aspects of the condition created an unreasonable risk of harm. A premises possessor has a duty to undertake reasonable precautions to protect invitees if special aspects of a condition make even an open and obvious risk unreasonably dangerous. *Lugo*, 464 Mich at 517.

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. *Joyce*, 249 Mich App at 242. 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. *Id*. at 593-594. Consequently, the ice was effectively unavoidable. *Id*. 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.

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Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter

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STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MILLER,

Plaintiff-Appellant,

v

S M HONG ASSOCIATES, INC., d/b/a PRO-CLEAN, INC.,

Defendant-Appellee.

UNPUBLISHED
May 10, 2012

No. 302016
Genesee Circuit Court
LC No. 09-091086-NO

Before: M.J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this premises liability action. Because the trial court did not err by determining that there was no genuine issue of material fact that the drain cover that caused plaintiff's fall was open and obvious, we affirm.

While carrying a laundry basket at defendant's laundromat, plaintiff tripped and fell on a drain cover, that was slightly elevated and not flush with the floor. 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. The trial court granted summary disposition for defendant on the basis that there was no genuine issue of material fact that the drain cover was an open and obvious condition. Plaintiff appeals the trial court's ruling.

We review de novo a trial court's decision granting on a motion for summary disposition. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition under subrule (C)(10) is properly granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*. at 552.

Generally, a premises owner is liable for physical harm that a dangerous condition on his land caused to invitees if he knew about the condition or could have discovered it through the exercise of reasonable care, and if he should have realized that the condition created an unreasonable risk of harm. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner's duty to exercise reasonable care, however, does not extend to open and

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obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Where the dangers are . . . so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*., quoting *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Courts utilize an objective test to determine whether a condition is open and obvious. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), adopted in 472 Mich 929 (2005). A condition is open and obvious if "an 'average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (brackets omitted). *Random House Webster's College Dictionary* (2001) defines "casual" as "happening by chance," "without definite or serious intention," and "off hand."

Applying these principles, the drain cover at defendant's laundromat was an open and obvious condition, and defendant therefore owed plaintiff no duty to protect him from harm caused by the cover. The photographs of the drain cover that plaintiff took a few days after his fall show that the cover is elevated from the floor, is a different color than the surrounding floor, and is made of a different material than the surrounding floor. Although many of the photos were taken inches from the floor and clearly depict that the cover was not flush with the floor, one photo appears to have been taken from eye-level and illustrates that a person looking down at the floor while walking would have seen that the drain cover was elevated.[1] This is not a case in which the parties contest that which is depicted in the photographs. Rather, both parties acknowledge that the photographs accurately depict the condition. Thus, plaintiff's own photographs demonstrate that an average person of ordinary intelligence would have been able to notice the cover with an "off hand" glance and "without definite or serious intention" to discover it. Further, plaintiff has presented no other documentary evidence, expert evidence, or lay opinion evidence addressing the objective nature of the condition on the premises.

Moreover, plaintiff testified that the lighting was adequate and that no light bulbs were out. No evidence indicates that he would have been unable to see the drain cover if he had been looking where he was walking. In fact, plaintiff testified that he would have been able to see the cover:

> *Q.* Okay. Now, when you're standing up looking down at the sewer cover, do you have any trouble seeing the sewer cover?
>
> *A.* When I'm standing up?
>
> *Q.* Yeah.

[1] In that photo, which plaintiff took a few weeks before his deposition, the drain cover was covered with duct tape. This is consistent with testimony indicating that duct tape was placed around the edge of the drain cover at some point after plaintiff's fall. The outline of the raised drain cover is clearly visible through the duct tape.

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A. If I know it's there, I wouldn't have a problem with seeing it.

The fact that plaintiff did not discover the condition does not mean that a reasonably prudent person would not have discovered the condition with a quick glance at the floor. In fact, Sydney Kreklau, a longtime patron of the laundromat, testified that the drain cover was not difficult to see, she had noticed it many times, and she could see the cover "sticking up above the floor" from a standing position. Sydney's daughter, Karen Kreklau, similarly testified that she saw that the drain cover was "sticking up" from the floor.[2] Accordingly, the record shows that the condition itself, and any danger or risk associated with it, was readily noticeable to an "average user of ordinary intelligence . . . upon casual inspection." *Joyce*, 249 Mich App at 238.

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. *Lugo*, 464 Mich at 523-524. 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. See, e.g., *Kenny*, 264 Mich App at 119-120 (GRIFFIN, J., dissenting), adopted in 472 Mich.

Plaintiff also argues that the condition was not open and obvious because Teresa Edwards, defendant's employee, testified that she had never noticed that the drain cover was raised. Because the open and obvious test is an objective one, the testimony of a witness's subjective impression, while evidence that a court may consider, is not dispositive of whether a condition is open and obvious. In any event, although Edwards never noticed that the drain cover was elevated, she also testified that nobody else had tripped on the drain cover during the nine years she had worked at the laundromat. Further, both Sydney Kreklau and Karen Kreklau testified that they had been coming to the laundromat for years and had noticed the drain cover many times. Sydney noticed it the first time that she used the restroom because the restroom is located around the corner from the drain cover, and Karen testified that she was worried that someone might trip on it. Edwards's testimony that she did not notice that the drain cover was

[2] While Karen did not see plaintiff fall, Sydney witnessed his fall, but did not see his foot touch the drain cover. Sydney merely assumed that plaintiff had tripped over the drain cover, which caused him to fall.

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elevated, without more, was insufficient to create a question of fact regarding whether it was objectively open and obvious.

Finally, plaintiff argues that the trial court's ruling is at odds with Michigan's comparative negligence scheme, embodied in MCL 600.2958 and MCL 600.6304. To the contrary, in *Lugo*, 464 Mich at 524, our Supreme Court made clear that "any comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee's comparative negligence can only serve to reduce, not eliminate, the extent of liability." In other words, comparative negligence will come into play only after a determination that a defendant was liable, which in turn requires a finding that the defendant owed a duty to invitees. Because "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," when a court finds that a hazard was open and obvious, comparative negligence will not be part of the analysis in the first instance, because the plaintiff will have failed to establish a prima facie case. *Id*. at 516. Thus, the trial court's ruling is not at odds with Michigan's comparative negligence scheme, as plaintiff contends.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio

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STATE OF MICHIGAN

COURT OF APPEALS

HADI NAZAL,

Plaintiff-Appellant,

v

AUTOALLIANCE INTERNATIONAL, INC.,

Defendant-Appellee.

UNPUBLISHED
February 26, 2013

No. 306690
Wayne Circuit Court
LC No. 10-007210-NI

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this premises liability case, plaintiff Hadi Nazal appeals as of right the trial court's order granting defendant AutoAlliance International, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10). Because we conclude that the trial court did not rely on inadmissible evidence and because there is no genuine issue of material fact in regard to whether the dangerous condition had any special aspects, we affirm.

The basic facts of this case are not in dispute. On December 28, 2009, plaintiff was operating a tractor-trailer on defendant's premises in the course of his employment. Plaintiff was working in defendant's container yard with Dave David, a crane operator. It was snowing, and the ground was covered in snow. Plaintiff was waiting for David to load an empty container onto his vehicle when David honked his horn and lowered his window, indicating that he wanted to speak with plaintiff. In his deposition, plaintiff explained that he could not hear David over the wind and engine noise. Plaintiff also explained that one of his job responsibilities was to communicate with David; thus, he could not simply ignore David's request. In order to talk to David, plaintiff exited his vehicle and started to walk across the container yard. Plaintiff testified during his deposition that their vehicles were about 15 to 20 feet apart, and that after walking about ten feet, he slipped and fell on a patch of ice that was covered by the snow, falling to the ground and sustaining injuries.

As a result of the slip and fall accident, plaintiff filed a complaint on June 23, 2010, alleging that defendant was negligent for breaching its duty to maintain its premises in a reasonably prudent manner. Defendant answered plaintiff's complaint, and the case proceeded to discovery. On May 26, 2011, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that summary disposition was appropriate because there

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was no genuine issue of material fact, and the evidence demonstrated that plaintiff's claim was barred by the open and obvious doctrine.

On July 8, 2011, the trial court held a hearing on defendant's motion for summary disposition. Plaintiff did not specifically concede that the hazard was open and obvious, but he did not argue otherwise. Rather, plaintiff argued that the hazard was effectively unavoidable because communication with David was one of his job duties. Accordingly, plaintiff argued that special aspects existed, and the open and obvious doctrine did not bar his lawsuit. After hearing arguments from both parties, the trial court granted summary disposition in favor of defendant because it found there were no special aspects present to preclude application of the open and obvious doctrine. Specifically, the trial court stated that there were other ways plaintiff could have communicated with David, as set out in David's affidavit. Thus, plaintiff did not have to walk across the container yard, and the hazardous condition was avoidable. A conforming order was entered on July 8, 2011.

Plaintiff filed a motion for reconsideration on July 21, 2011. In his motion for reconsideration, plaintiff challenged David's affidavit, arguing that it should not have been considered by the trial court because it did not satisfy MRE 602 because David lacked personal knowledge in regard to plaintiff's options. On September 27, 2011, the trial court denied plaintiff's motion for reconsideration because even though its ruling was based in part on David's affidavit plaintiff failed to challenge the affidavit at the time it was filed or in the six-week period between the filing of defendant's motion for summary disposition and the hearing on the motion. Accordingly, the trial court denied plaintiff's motion for reconsideration. This appeal ensued.

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant because the dangerous condition had a special aspect precluding application of the open and obvious doctrine. Specifically, plaintiff argues that because he was required by his employment duties to communicate with David, the crane operator, the icy condition in the container yard was unavoidable because he had to cross the yard to hear what David was saying to him; thus, he had no choice but to confront the danger.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Owners and occupiers of property have a duty to maintain their premises in a reasonably safe condition and to exercise ordinary care in keeping the premises safe. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A defendant does not breach the duty of care when the dangerous condition is open and obvious. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). A condition is open and obvious when the invitee has actual knowledge of it or when a reasonable person of ordinary intelligence would discover the condition upon a casual inspection. *Id.*

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The special aspects doctrine is an exception to the open and obvious rule, and it imposes a duty on a landowner who permits an unreasonable risk of harm to exist regardless of whether the danger is open and obvious. *Lugo*, 464 Mich at 525. Our Supreme Court has recently made clear that "liability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*." *Hoffner v Lanctoe*, 492 Mich 450, 455; 821 NW2d 88 (2012) (emphasis in original). There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id.* at 463 (emphasis in original). In both cases, the danger must "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* (quotation marks and citation omitted). "[A]n 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Id.* at 456. Common or avoidable conditions are not uniquely dangerous. *Id.* at 463. Further, the determination that a special aspect is present must be based on the nature of the condition at issue, and must not be based retrospectively on the fact that a particular plaintiff in fact suffered severe harm. *Lugo*, 464 Mich at 518, n 2, 523-524.

Here, the dangerous condition was ice underneath snow. It is not disputed that the dangerous condition was open and obvious; however, plaintiff argues the condition was effectively unavoidable because he was compelled to cross the icy yard to communicate with David because such communication was part of his job. Further, plaintiff argues that the alternatives suggested by David were not actually viable.

Contrary to plaintiff's claim, the Michigan Supreme Court in *Hoffner* rejected the notion that a preexisting contractual or other relationship alters the analysis of whether a condition is effectively unavoidable. *Hoffner*, 492 Mich at 469. The Court explained that 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." *Id.* (emphasis in original). See also *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002) (holding that the open and obvious doctrine applied, and no special aspect existed, despite the fact that the plaintiff's employment required him to work around an icy condition). Thus, plaintiff's duty to communicate with David because of their employment relationship was not sufficient to render the dangerous condition effectively unavoidable.

Moreover, the evidence before the trial court at the time of the hearing on defendant's motion for summary disposition demonstrated that plaintiff could have communicated with David without crossing the icy container yard. In his affidavit, David offered several alternative ways plaintiff could have communicated with him, such as driving plaintiff's vehicle up to David's, cutting the engine to reduce the background noise, or motioning for David to come to plaintiff. Plaintiff did not challenge David's affidavit at the time of the motion hearing, nor did plaintiff offer any evidence to rebut the viability of David's alternative communication methods. Plaintiff's affidavit challenging David's suggested alternatives to walking across the container yard was not before the trial court at the time of the motion hearing, and was submitted later with plaintiff's motion for reconsideration. "When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775

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NW2d 618 (2009). Thus, the trial court did not err by concluding that the dangerous condition was avoidable, and therefore, the trial court properly granted summary disposition.

Next, plaintiff argues that the trial court's order granting summary disposition should be reversed because David was not competent to make the averments in his affidavit, and accordingly, it was admitted in violation of MRE 602 and MCR 2.119(B)(1). Plaintiff did not challenge the admissibility of David's affidavit before or during the motion hearing. Rather, plaintiff first questioned the validity of the affidavit in his motion for reconsideration. Accordingly, this issue is not properly preserved for review. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 117; 724 NW2d 485 (2006). A motion for reconsideration should not be granted if it merely presents the same issues ruled on by the trial court, and "the moving party must demonstrate a palpable error by which the court and the parties have been misled." MCR 2.119(F)(3). Further, this Court will not find that the denial of a motion for reconsideration was an abuse of discretion when the motion for reconsideration rests on evidence that could have been presented the first time the issue was argued. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

In this case, there was no "palpable error" that misled the trial court to justify reversal on reconsideration because plaintiff's challenges to David's affidavit were not based on new facts, and plaintiff could have challenged David's affidavit before the trial court's original order. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for reconsideration. Nevertheless, we note that David's affidavit provides sufficient foundation for his opinions. In his affidavit, David states that he has personal knowledge of the facts therein, that he was working with plaintiff at the time of the accident, and that he worked closely with plaintiff to load and unload the tractor-trailer. These averments are sufficient to satisfy MRE 602 and MCR 2.119(B)(1).

Affirmed.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

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STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. PIFER and ALLYCE K. PIFER,

Plaintiffs-Appellants,

v

DOW CHEMICAL COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 6, 2013

No. 311361
Midland Circuit Court
LC No. 10-006354-NI

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

Although the parties dispute many of the ancillary facts in this case, they do not dispute the facts necessary to this Court's resolution of the issues on appeal. Plaintiff Thomas J. Pifer ("plaintiff") was employed by Bierlien Companies, Inc., which provided services to defendant at defendant's Midland premises. Early one January morning, plaintiff parked his car in a gravel parking lot reserved for Bierlien's employees. As he was walking from the car, he slipped and fell on snow-covered black ice and sustained injuries. Plaintiff brought a premises liability action against defendant. Defendant moved for summary disposition, arguing that the parking lot condition was open and obvious as a matter of law. The trial court determined there were no genuine factual issues and ruled that the parking lot condition was open and obvious. The court also noted that the condition was not effectively unavoidable and granted summary disposition in favor of defendant.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When analyzing a motion for summary disposition under MCR 2.116(C)(10), the court evaluates whether a genuine issue of material fact exists. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, the court may not make factual findings on disputed factual issues during a motion for summary disposition and may not

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make credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

To prevail in a premises liability action, a plaintiff must prove the essential elements of negligence: (1) duty; (2) breach; (3) proximate causation; and (4) damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). Although premises possessors generally owe a legal duty to protect invitees from unreasonably dangerous conditions, that duty does not generally extend to protecting invitees from open and obvious dangers. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). Our Supreme Court recently explained:

> Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with 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. [*Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012) (internal quotation marks and citations omitted.]

Plaintiffs argue that they raised a genuine issue of material fact by attesting that plaintiff was unaware that the snow-covered lot was slippery and contained black ice. Essentially, plaintiffs assert that a subjective lack of awareness of the severity of the slippery condition on the lot meant that the condition was not open and obvious. However, this Court uses an objective standard when considering whether a hazardous condition is open and obvious. *Hoffner*, 492 Mich at 461. Plaintiffs admitted that the lot was covered by approximately two inches of snow. Regardless of whether plaintiff knew that ice rested beneath the snow, snow by itself is an indicia of a slippery condition, such that a reasonable person should be on notice that the road could be hazardous and should either take extra precautions or avoid the risk entirely. *Ververis*, 271 Mich App at 66-67 ("[W]e hold as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery.") Because this case presents the same scenario as *Ververis*, the trial court correctly concluded as a matter of law that the snow-covered icy condition on the parking lot presented an open and obvious hazard.

Plaintiffs next argue that defendant remains liable for the hazardous condition, notwithstanding its open and obvious state, because the hazard was effectively unavoidable to plaintiff. We disagree. A premises possessor may be liable for failing to protect invitees from open and obvious conditions if the hazard contains a special aspect that renders the risk either unreasonably dangerous or effectively unavoidable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). The *Hoffner* Court stated:

> Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." [*Hoffner*, 492 Mich at 462 (citation omitted).]

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The risk presented by these hazards must be "so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature." *Hoffner*, 492 Mich at 462 (noting also that common conditions and avoidable conditions are not uniquely dangerous).

Plaintiffs do not contend that the snow-covered icy lot was unreasonably dangerous; rather, they argue that the condition was effectively unavoidable because plaintiff was not aware of any other means of ingress to his worksite from the parking lot and because the lot was completely covered in ice. Defendant contends that plaintiff had an alternative route because plaintiff's supervisor was willing to pick him up at his vehicle and drive him to the facility.

A hazardous condition that is avoidable by using any alternative route is not unavoidable. *Hoffner*, 492 Mich at 465-469. In the instant case, plaintiff presented no evidence that he was required to confront the slippery lot, other than as an incidental requirement of his employment. Although his attendance at the facility was necessary to maintain his employment, *Hoffner* suggests that plaintiff's personal obligation does not make the hazard effectively unavoidable. And, as the condition here was a routine one, *Hoffner* further requires us to conclude that it could not fall within the "unreasonably dangerous" exception. We thus conclude, as a matter of law, that defendant owed no duty to protect plaintiff from this hazard. Accordingly, plaintiffs failed to raise a genuine issue of material fact, and defendant was entitled to summary disposition.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell

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STATE OF MICHIGAN

COURT OF APPEALS

SYLVIA PARKER-DUPREE, Plaintiff-Appellant,	UNPUBLISHED June 18, 2013
v	No. 310013 Oakland Circuit Court
THOMAS RALEIGH, JR., Defendant-Appellee.	LC No. 2011-120556-NO

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Sylvia Parker-Dupree, appeals as of right the trial court's order granting summary disposition to defendant, Thomas Raleigh, Jr., on the basis of the open and obvious doctrine. We affirm.

I. FACTUAL BACKGROUND

Plaintiff, a mail carrier for the United States Postal Service, was delivering mail to defendant's residence when she slipped and fell. Plaintiff was aware that it had snowed periodically that day and that snow had accumulated. Meteorological data demonstrated that ice developed two days before plaintiff's fall, and it was subsequently covered with snow.

When plaintiff arrived at defendant's residence, she parked her truck, walked up to the house, and delivered the mail. Using the same pathway she used on her way to deliver the mail, plaintiff was leaving when she slipped and fell on the snow covered pathway leading away from the front door. Plaintiff acknowledged that if she had noticed the slippery condition, she could have stepped off of the path, although the snow would have been deep. Plaintiff also acknowledged that she could have taken an alternative route, her usual route up the driveway, which she generally used when there was no snow.

Plaintiff subsequently filed a complaint alleging premises liability. Defendant, however, filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant contended that the condition causing plaintiff's fall was open and obvious and it was not unreasonably dangerous or effectively unavoidable. The trial court granted defendant's motion, finding that the condition of the sidewalk was open and obvious and there were no special aspects creating an unreasonable risk of harm. Plaintiff now appeals.

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II. SUMMARY DISPOSITION

A. Standard of Review

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(10) based on the open and obvious doctrine. A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Analysis

Generally, "a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Yet, a premises possessor is not required to protect an invitee from open and obvious dangers, as an "invitee might reasonably be expected to discover them[.]" *Id.* (quotation marks and citation omitted). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). Because this is an objective standard, the relevant inquiry is "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 694; 822 NW2d 254 (2012) (quotation marks and citation omitted).

However, "special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519. Special aspects exist only "when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463 (emphasis in original). As the Michigan Supreme Court has recently recognized:

> The touchstone of the "special aspects" analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an "effectively unavoidable" condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. [*Id.* at 455-456 (emphasis in original).]

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In the instant case, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because the snow and ice on the sidewalk was effectively unavoidable.[1] The evidence presented in the lower court contradicts such an assertion.

Plaintiff knew that there was snow on the ground and that it could be covering ice. She also navigated the pathway safely when she delivered the mail, avoiding any slippery areas that would cause a person to fall. Moreover, if plaintiff felt that the pathway she used was too dangerous, she could have notified her supervisor or simply stepped off the pathway. Even more significant is that plaintiff admitted that she could have taken an alternate route, using the walkway leading to the driveway. Thus, plaintiff has not established a genuine issue of material fact that the snowy condition on the walkway was effectively unavoidable. Accordingly, the trial court did not err in finding that that there were no special aspects present and in granting summary disposition to defendant.

III. CONCLUSION

Because there is no genuine issue of material fact regarding the open and obvious nature of the complained of condition that was not effectively unavoidable, the trial court properly granted summary disposition to defendant. We affirm.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[1] Plaintiff does not challenge that the condition was open and obvious and only contends that it was "effectively unavoidable."

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STATE OF MICHIGAN

COURT OF APPEALS

TERRI S. MACKLIN, RICHARD MACKLIN, and JEFF MOYER,

Plaintiffs-Appellants,

v

HJR HOLDING COMPANY, RDR, INC, and NAIWM PROPERTY MANAGEMENT, LLC,

Defendants/Third-Party Plaintiffs-Appellees,

and

KWANTES LAWNCARE & LANDSCAPING, LLC,

Third-Party Defendant-Appellee.

UNPUBLISHED
November 18, 2014

No. 317397
Kent Circuit Court
LC No. 12-004156-NO

Before: M. J. KELLY, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In this suit to recover damages after a slip and fall, plaintiffs, Terri Macklin, Richard Macklin, and Jeff Moyer, appeal by right the trial court's order dismissing their claims under MCR 2.116(C)(10).[1] Because we conclude the trial court erred when it applied the open and obvious danger doctrine to bar plaintiffs' claims, we reverse and remand.

While at work in December 2009, Macklin noticed that the lot where she was parked "glazed over," "looked icy," and became "really slippery." At the end of her work day, she left the building and managed to get to her car. She put her hand on the hood and inched toward the

[1] Richard Macklin sued for loss of consortium and Jeff Moyer, who is a bankruptcy trustee, was added as a plaintiff after Terri and Richard Macklin filed for bankruptcy protection. For ease of reference, we shall use Macklin to refer to Terri Macklin alone.

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driver's side door in order to avoid slipping. Thinking there was a bare spot nearby, she stepped to reach it but slipped, fell, and was injured.

In May 2012, plaintiffs sued HJR Holding Company and RDR, Inc., which owned the building and lot, for breaching their duty to maintain the parking lot in a safe condition. HJR Holding and RDR then sued third-party defendant, Kwantes Lawncare & Landscaping, LLC, for indemnification under their contract for snow and ice removal. Plaintiffs amended their complaint to add defendant, NAIWM Property Management, LLC, which managed the building where the fall occurred.

In February 2013, defendants[2] moved for summary disposition on the grounds that they had no duty to warn about or remedy the snow and ice on the parking lot because the snow and ice constituted an open and obvious hazard and no exception applied. Plaintiffs argued in response that, despite the obvious nature of the snow and ice, defendants still had a duty to rectify the condition because it was effectively unavoidable. The trial court agreed with defendants and dismissed plaintiffs' claims under the open and obvious danger doctrine. Plaintiffs now appeal.

This Court reviews de novo a trial court's decision to dismiss under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

A possessor of land has the duty to warn of known dangers and make the premises safe for his or her invitees. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). This duty includes an obligation to inspect the premises, make repairs, and warn about any hazards. *Id.* A premises possessor does not generally have a duty to warn or protect invitees from open and obvious dangers. *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012). However, a premises possessor remains liable for damages arising from open and obvious hazards where the hazard was effectively unavoidable. *Id.* at 463. A hazard is effectively unavoidable when "a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id.* at 469. For example, an icy parking lot is effectively unavoidable when an invitee must encounter the ice in order to leave the premises possessor's property. *Attala v Orcutt*, ___ Mich App ___; ___ NW2d ___ (2014) (Docket No. 315630). Another example is "a commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001).

It is undisputed that Terri Macklin was an invitee and that the icy parking lot constituted an open and obvious danger. The only dispute concerns whether the icy lot was effectively unavoidable. When examined in the light most favorable to plaintiffs, *Latham*, 480 Mich at 111, a reasonable jury could conclude from the evidence that Macklin was compelled to encounter the icy parking lot in order leave defendants' premises. Macklin testified at her deposition that the parking lot had "glazed over" and was "really slippery." She had to hold onto the hood of her

[2] Kwantes independently moved for summary disposition and concurred with the other defendants' motion.

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car and inch forward to move. Unlike a plaintiff who chooses to face a hazard despite having other options, Macklin was trying to leave her place of work and go home. The evidence left open a question whether she had alternate routes to get into her car. While the trial Court stated that she could have entered through the passenger side, the photographs show that there is a question of fact on that issue. Similarly, there is a question of fact as to whether Macklin could have avoided the hazard by choosing a different parking spot when she first arrived. Because a reasonable jury could find that Macklin was compelled to encounter the icy parking lot, the trial court erred when it determined that the open and obvious danger doctrine barred plaintiffs' claims. See *Lugo*, 464 Mich at 518.

Reversed and remanded for further proceedings. We do not retain jurisdiction. As the prevailing parties, plaintiffs may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

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STATE OF MICHIGAN

COURT OF APPEALS

JACK BARCH,

Plaintiff-Appellant,

v

RYDER TRANSPORTATION SERVICES, RYDER INTEGRATED LOGISTICS, INC., and TOTAL LOGISTIC CONTROL, LLC,

Defendants-Appellees.

UNPUBLISHED
October 20, 2016

No. 327914
Van Buren Circuit Court
LC No. 14-640261-NO

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Jack Barch, appeals as of right the trial court's order granting summary disposition to defendants, Ryder Transportation Services, Ryder Integrated Logistics, Inc., and Total Logistic Control, LLC (collectively, Ryder). We affirm.

I. FACTUAL BACKGROUND

Barch testified at his deposition that he was employed as a truck driver. On February 13, 2012, he was scheduled to deliver ice cream to Ryder's facilities. It was a snowy day and Barch was aware that the parking lot was covered with "[l]ight snow over what I figure was, you know, being icy underneath." When Barch arrived, he parked his truck and walked across the parking lot to the office to receive further instructions about where to unload it. There was no clear path across the parking lot. After walking about ten yards, he slipped and fell on his shoulder.

According to Barch, he went into the office and attempted to report the incident, but the office employee would not accept his report. The employee took Barch's bill of lading and assigned him to a loading dock, where Barch needed help to unload his truck because he was unable to reach high enough to operate the doors. After unloading his truck, Barch arranged for another driver to complete his next delivery.

As Barch drove out of the parking lot, he realized that he had hurt his arm badly, and he stopped the truck. Barch testified that he parked the truck in the middle of the parking lot, "where the cars are parked for the office," and went in to speak with the office employee. Again, the employee would not allow Barch to fill out an accident report, so he returned to his truck, called his employer on his cellular phone, and created an accident report for himself. Barch

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returned to his employer and was eventually diagnosed with a torn rotator cuff in his shoulder, which required surgery.

Barch filed a complaint against Ryder, alleging that the hazard posed by the icy parking lot was effectively unavoidable because Ryder required him to park in a certain area and traverse the parking lot from his truck to the office. Ryder moved for summary disposition, contending that Barch could have chosen not to confront the hazard. The trial court granted summary disposition to Ryder, concluding that the danger was not effectively unavoidable because Barch could have chosen other options than traversing the icy parking lot. Barch now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

Barch contends that the trial court erred when it determined that there was no genuine issue of material fact regarding whether the hazard posed by the icy parking lot was effectively unavoidable because Barch had no choice but to cross the icy parking lot. We disagree.

A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A premises owner has a duty to protect invitees—persons who enter the owner's premises at his or her express or implied invitation—from hidden or latent defects on his or her property. *Id*. at 90-91. The open and obvious doctrine provides that the premises owner does not have the duty to warn invitees of conditions "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them[.]" *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

However, a premises owner may be liable even for open and obvious dangers in some narrow circumstances. *Hoffner v Lanctoe*, 492 Mich 450, 472; 821 NW2d 88 (2012). A landowner may be liable if the open and obvious danger has special aspects "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2010). Special aspects include hazards that are "effectively unavoidable" or that present "a substantial risk of death or serious injury[.]" *Id*. at 518. To be effectively unavoidable, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Hoffner*, 492 Mich at 468. "The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make

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the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014).

In this case, Barch failed to provide support for his assertion that he could not have parked his truck in any other location to avoid the hazard. To the contrary, Barch testified at his deposition that, as he was leaving the facility, he parked his truck near where the cars parked for the office. Barch was not physically trapped. Additionally, there was evidence that Barch had a cellular telephone in his possession and could have either called Ryder to report the conditions, see *Bullard*, 308 Mich App at 413, or called the office to make other arrangements to deliver his bill of lading and receive his delivery bay assignment. We conclude that the trial court did not err when it determined that Barch did not present evidence showing a genuine issue of material fact regarding whether the icy parking lot was effectively unavoidable.

We affirm. As the prevailing party, Ryder may tax costs. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Mark T. Boonstra

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STATE OF MICHIGAN

COURT OF APPEALS

MAUREEN KASSOF,

Plaintiff-Appellee,

v

PAGE AVENUE, LLC,

Defendant/Third-Party Plaintiff-Appellant,

and

EMERALD OUTDOOR, LLC,

Defendant-Third-Party Defendant.

UNPUBLISHED
May 7, 2020

No. 347509
Jackson Circuit Court
LC No. 16-001133-NZ

Before: CAMERON, P.J., and SHAPIRO and LETICA, JJ.

PER CURIAM.

In this premises liability action, defendant Page Avenue, LLC (defendant), appeals from a stipulated judgment in favor of plaintiff. The judgment reserved defendant's right to appeal the trial court's earlier order denying defendant's motion for summary disposition. We affirm, but on different grounds than the trial court.

I. BACKGROUND

This case stems from plaintiff's slip and fall on icy pavement between defendant's two buildings on a single medical campus. Plaintiff, who was 70 years old at the time of incident, worked at the Jackson Veterans Administration Outpatient Clinic (the VA facility) as a certified nurse practitioner. West of the VA facility is a building used by Allegiance Health; defendant owned both buildings. Construction was taking place and so there was limited parking available. Employees were told that the parking lot to the south of the VA was for patients only and that the employees were to park in a new lot to the west of the Allegiance building. There was a paved driveway from Page Avenue that led into the area in front of the Allegiance building and it extended so as to form a paved path to the back of the buildings. Thus, in order to reach the VA

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entrance (which was on the west side of the VA facility), employees had to park west of the Allegiance building, walk through that lot, continue walking east across the front of the Allegiance building and across the paved campus pathway that extended between the Allegiance building and the entrance to the VA.

Plaintiff's fall occurred about 8:20 a.m. on Monday, November 23, 2015. Two days earlier, on Saturday, November 21, 2015, there was precipitation over many hours including both snow and ice. Weather records show that it snowed continuously throughout the day from 7:00 a.m. to 7:00 p.m., with additional snow falling after 8:00 p.m. No additional precipitation occurred before plaintiff's fall about 36 hours later, but temperatures remained below freezing at all times. Plaintiff testified that upon arrival that morning, she parked in the designated employee lot, which she observed to be covered with ice. Plaintiff was "very cautious" as she exited her vehicle and traversed the employee lot. She made it to the concrete walkway in front of the Allegiance building, which she testified was clear of ice, and walked across it. She further explained that, before she stepped off the walkway and onto the paved surface between the Allegiance building and the VA facility, she looked down at the surface immediately adjacent to the walkway and did not see any ice there. However, with her first step onto the lot surface, she slipped on ice and fell, fracturing her elbow. She testified that having fallen to the ground, she could then see the black ice where she slipped.

Plaintiff was not the only person to slip on the icy parking lot that morning. Lori Laier also worked at the VA facility. On November 23, 2015, Laier parked in the employee lot. She testified that as she walked across the lot, ice was visible. Laier was careful, but after walking about 25 feet she slipped on ice and fell. Another VA employee, Jeanette Blackwell, described the conditions as "extremely slick." After Blackwell arrived at the VA facility, she took some salt from the salt bin and "threw some out front" so that no patient would fall. She also called the building manager to tell her that the VA facility "needed someone to salt."

After discovery, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the ice on which plaintiff slipped and fell was open and obvious and not effectively unavoidable. After holding a hearing, the trial court denied defendant's motion, determining that there was a genuine issue of material fact regarding whether the ice where plaintiff fell was observable on casual inspection.[1]

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[1] We review de novo a trial court's decision denying summary disposition. See *Auto Club Group Ins v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and when the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We can affirm a trial court for different reasons than those relied on by the trial court. See *Burise v Pontiac*, 282 Mich App 646, 647; 766 NW2d 311 (2009).

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II. ANALYSIS

Plaintiff responded to defendant's motion with two arguments: that the ice where she fell was not open and obvious and that even if it were, it was effectively unavoidable. The trial court denied summary disposition, finding that the ice was not open and obvious as a matter of law. We affirm, but on the grounds that even if the ice was open and obvious,[2] there is a question of fact whether it was effectively unavoidable.

A premises possessor owes a duty to invitees to exercise reasonable care to protect the invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). As stated, on November 21, 2015 snow fell continuously from 7:00 a.m. to 7:00 p.m., with additional precipitation after 8:00 p.m. The temperature remained at or below freezing from 4:00 a.m. on the 21st until plaintiff's fall on the 23rd. The only maintenance defendant procured for the premises before plaintiff's fall was snow plowing that began on 5:00 p.m. on November 21, before the snowfall had ceased, and it does not appear that salt was applied at that time. According to the plow company's records, no other service was provided until after plaintiff's fall.

Although a landowner typically owes no duty to an invitee for a hazard that is open and obvious, special aspects of such a hazard can give rise to liability "when the danger is unreasonably dangerous or when the danger is effectively unavoidable." *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012) (emphasis removed). "Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome." *Id*. at 468 (emphasis removed). A hazard "must truly be, for all practical purposes, one that a person is required to confront under the circumstances" in order to be effectively unavoidable. *Id.* at 472.

In *Lymon v Freedland*, 314 Mich App 746, 764; 887 NW2d 456 (2016), the plaintiff was a home healthcare aide who slipped and fell while walking up her patient's snow- and ice-covered driveway. *Id*. at 750-751. The defendants argued that the driveway "was not effectively unavoidable because plaintiff could have taken a different route to the house by walking on the snow-covered yard." *Id*. at 754. However, we determined that although "other individuals were able to successfully navigate the slippery yard to access the home, reasonable minds could differ regarding whether traversing the yard provided a viable means by which plaintiff could have effectively avoided the slippery conditions." *Id.* at 764. "Further, [a]s a home healthcare aide, plaintiff did not have the option of abandoning her patient . . . ." *Id*. at 763-764. Therefore, we concluded that a genuine issue of material fact existed regarding whether the dangerous condition was effectively unavoidable, and that the trial court did not err in denying the defendant's motion for summary disposition. *Id.* at 764.

Here, defendant argues that the hazard was avoidable because plaintiff should have parked in the patient lot to the south of the VA building, an area that it claims had been plowed and salted.

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[2] Typically, we would address whether the hazard was open and obvious before discussing whether the hazard was effectively unavoidable. However, the parties' have stipulated as to an amount of damages to be paid if the appellate process affirms the trial court on the basis of a question of fact on either issue.

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However, it is undisputed that employees were directed to park in the employee lot and walk the path described above. Indeed, plaintiff testified that the one time she parked in the patient lot in violation of that directive she received a corrective e-mail from her supervisor. Nevertheless, defendant maintains that plaintiff should have parked in the patient lot because there was no written parking policy, and no employee had been sanctioned or disciplined for parking in the patient lot. However, given the corrective e-mail she received from her supervisor after previously parking in the patient lot, plaintiff was properly wary of doing so again. She explained that the employees were expected to be "team employees," and the evidence is that all other employees also parked in the employee lot on November 23, 2015. While the supervisor testified that he would have allowed plaintiff to park in the patient lot had she informed him of the icy conditions and requested that accommodation, plaintiff could not have known that at the time. Further, the credibility of the supervisor's post-accident position on that matter would be for the jury to determine. Indeed, the supervisor agreed that it was considered "very disrespectful" for employees to park in the patient lot considering that those spots were reserved for veterans.

Under the totality of the circumstances, we conclude that a reasonable jury could find that plaintiff was "compelled by extenuating circumstances" to park in the employee lot and to walk the distance from there to her workplace at the VA, *Lymon*, 314 Mich App at 764 (quotation marks and citation omitted), thereby requiring that she confront the icy conditions. The Supreme Court has granted oral argument on the question whether the need to enter one's workplace makes encountering a hazard effectively unavoidable. See *Livings v Sage's Investment Group, LLC*, ___ Mich ___ (2020) (Docket No. 159692). Viewing the evidence in a light most favorable to plaintiff, there is a question of fact for the jury regarding whether parking in the employee lot and walking to the VA building was effectively unavoidable.

Affirmed.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Anica Letica