

**STATE OF MICHIGAN
IN THE SUPREME COURT**

DONNA LIVINGS,

Plaintiff-Appellee,

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

-vs-

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

Defendant-Appellant.

**PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF**

ORAL ARGUMENT REQUESTED

and

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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JUDGMENT OR ORDER APPEALED FROM

Plaintiff filed a complaint in the Macomb Circuit Court, against Sage's Investment Group, LLC. Two other defendants, T & J Landscaping & Snow Removal, Inc., and Grand Dimitre's of Eastpointe Family Dining, are no longer involved in the case.

The trial court, Edward A. Servitto, J., denied Sage's motion for summary disposition. The Court of Appeals granted Sage's application for leave to appeal. The Court of Appeals (Judges Tukel, Beckering and Shapiro) affirmed. *Living's v Sage's Investment Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued 2/26/19 (Docket No. 339152) ([app 000003a-000011a]). Sage's motion for reconsideration was denied and it filed a timely application for leave to appeal to this Court.

On February 7, 2020, this Court issued an order directing oral argument on the application and requesting briefing of:

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

RELIEF REQUESTED

Plaintiff Donna Living's, by and through her attorneys, Baratta & Baratta, P.C., asks that this Court AFFIRM the February 26, 2019 opinion of the Court of Appeals. In the alternative, plaintiff asks that this Court deny Sage's application for leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I.

IS THE PLAINTIFF'S EMPLOYMENT A RELEVANT CONSIDERATION IN DETERMINING WHETHER THE "OPEN AND OBVIOUS" DEFENSE APPLIES?

Plaintiff-Appellee answers "YES."

Defendant-Appellee would answer "NO."

The Court of Appeals answered "YES."

The trial court answered "YES."

II.

ARE THERE MATERIAL ISSUES OF FACT WHETHER THE ICE WAS "EFFECTIVELY UNAVOIDABLE."?

Plaintiff-Appellee answers "YES."

Defendant-Appellee would answer "NO."

The Court of Appeals answered "YES."

The trial court answered "YES."

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INTRODUCTION AND SUMMARY OF ARGUMENT

“Your money or your life!” “I’m thinking, I’m thinking . . .” That comic interchange – from a classic episode of “The Jack Benny Program” – embodies the dilemma that this case represents, albeit it in its most extreme presentation. But while it is, fortunately, rare that a Michigan employee is required to chose between life and livelihood, nonetheless many have found themselves in, literally, a position of needing to decide whether to risk injury or gamble with the consequences to their jobs.

The present case is a typical example: plaintiff had to traverse a parking lot to get into her workplace, but its entire surface was covered with water and ice. Another employee had “shimmied in” and plaintiff herself had to crawl to a door after the accident. She sued Sage’s, which owned the property.

The trial court agreed that the ice, although it was “open and obvious,” was nonetheless “unavoidable.” The Court of Appeals affirmed. This Court ordered oral argument on defendant’s application for leave, directing briefing on whether the plaintiff’s employment should be a “relevant” consideration and whether there were factual issues remaining in the case.

The only issue the Court needs to consider is whether the plaintiff’s employment is relevant to deciding whether a condition that qualifies as “open and obvious” can be deemed “effectively unavoidable.” Defendant’s argument regarding a “heightened duty” is not germane, because plaintiff has never maintained that stance. All business invitees are owed the same duty, but in *Lugo*, this Court revamped it by removing “open and obvious” conditions from the class of defects that should be remedied. *Lugo* allowed for a narrow exception and the issue is whether, in deciding whether that exception applies, a court should look at the fact that the plaintiff’s employment was a factor in the occurrence.

There is no need for the court to adopt a “subjective” standard for answering this question. Plaintiff suggests factors that could be evaluated to determine, “objectively,” whether the plaintiff’s employment was “relevant” to deciding if a condition was “effectively unavoidable” in a particular case. Courts can add or alter as they see fit.

None of defendant’s other arguments provides a basis for a different outcome. The workers compensation system specifically allows for third-party actions; thus, the availability of benefits under it has no effect on the analysis this Court has requested. The fact that case law has accrued since *Lugo* and its progeny does not mean that the court cannot now clarify or modify the meaning of “effective” unavoidability. Indeed, this is an excellent time to return the concept of “avoidability” to the realm of comparative negligence, where it originated, if not to – as an alternative – revise the approach to “open and obvious” altogether.

Finally, in the specific case at hand, there remain issues of fact whether the icy surface of the parking lot was “unavoidable,” even without considering that plaintiff was there to get to work. Briefly, the record evidence does not support a finding that any alternative route in would have been safer or even that plaintiff could have left and returned without facing the same problem when she came back.

In short, the trial judge’s original call, that defendant was not entitled to summary disposition of plaintiff’s premises liability claim, was correct. This Court should deny defendant’s application for leave to appeal.

STATEMENT OF FACTS

In a majority of cases, by the time a controversy had reached this Court, the facts of the matter have receded into the background and the outcome will be determined by the court's decision whether to revise the existing law. That description applies in part to the present situation, in that this Court has signaled an interest in reconsidering an aspect of Michigan's premises liability law. At the same time, however, the question of whether this plaintiff can proceed against this defendant will require a close evaluation of the individual facts, as is apparent from Question 2 of the court's briefing order.

Defendant's overview of the facts (Defendant's brief, pp 2-3) may provide sufficient background for the court to consider the first question ("whether the plaintiff's employment is a relevant consideration in determining whether a condition is effectively unavoidable"). It does not, however, adequately cover the ground to address the second question ("whether there was a question of fact concerning whether the parking lot constituted an effectively unavoidable condition"). Plaintiff, therefore, has presented a more detailed exposition.

The relevant facts are essentially undisputed. Plaintiff was a server (waitress) at a restaurant named "Grand Dmitri's Family Dining," at 25001 Gratiot in Eastpointe. (Sage's Exhibit O, deposition of Donna Livings¹, pp 19-20 [app 010022a-010023a]; Sage's Exhibit Q, deposition of Debra Buck, p 9 [app 000951a].) The restaurant is located in a strip mall at the southwest corner of 10 Mile Road and Gratiot. (Deposition of James Sage, pp 9-10 [app 000984a]².) Sage's Investment Group, LLC, owns the property. (Sage deposition, p 8 [app 000983a].) James Sage is

¹ Plaintiff died of causes unrelated to her injuries on March 25, 2020. Her de bene esse deposition was taken on April 25, 2019 but is not part of the record on appeal. Defendant has reproduced the original deposition multiple times in its appendix, but Exhibit O is the most readable version.

² Several depositions, including Sage's, were exhibits in the trial court and appear in the present record in that format. There is no dispute that they are part of the record on appeal.

the sole member of the LLC. (Sage deposition, p 8 [app 00983a].) He bought it in 1997. (Sage deposition, p 10 [app 000984a].) The original tenants' leases were then assigned to him but have since expired. (Sage deposition, pp 25, 28 [app 000987a, 000988a].) "They've been a month-to-month for quite some time." (Sage deposition, p 25 [app 000988a]; Tr I, pp 4-5 [app b].)³

The parking lot. There is one parking lot, that "surrounds the whole complex." (Deposition of Thomas Caramagno, p 17 [app 000333a]; Exhibit A, photos A, B, C [parking lot, front and rear together] [app b, photos].) This is one of several photographs [app 001245a] showing the parking area in relation to the building:



³ Defendant's Appendix F, although labeled "Trial Court Oral Argument Transcript," consists of the transcript of later hearing, not the June 19, 2017 hearing on the motion for summary disposition.

The parking area adjacent to Grand Dmitri's would be used by its employees and customers. (Sage deposition, p 54 [app 000360a].) It is "all the employee parking." (Caramagno deposition, p 20 [app 000333a]; Tr I, p 4 [app b].)

Grand Dmitri's employees used the back door. (Buck deposition, pp 18, 20 [app 000318a]; Exhibit B, photos D, E, F [rear door] [app b].) They park in the back of the building. (Livings deposition, p 40 [app 001043a].) This is one of several photos of the rear door:



Employees were required to park there. (Livings deposition, p 40 [app 001043a].) "Normally," that was where they would park. (Buck deposition, p 14 [app 001220a].) Some customers parked in the rear as well, but "the majority of cars back there were employees." (Livings deposition, pp 40, 56 [app 001043a, 001].) No other businesses used that part of the parking area. (Livings deposition, p 41 [app 001044a].) It is "all the employee parking." (Caramagno deposition, p 20 [app 000333a]; Tr I, p 4 [app b])

It was undisputed that “T & J Landscaping and Snow Removal, Inc.” did the snow plowing at the property. Thomas Caramagno, the “T” of “T & J,” testified that T & J would push the snow into the employee parking area. (Caramagno deposition, p 20 [app 000333a].)

[M]y snowplow would angle everything going to the north side of the parking lot up against that wall. Meaning the plow is on an angle, and it, you know, constantly diverts the snow gong north . . . [Caramagno deposition, p 21 [app 000334a].]

The accident. The winter of 2013-2014 was snowy. By the time of the accident in February, snow “had been accumulating every day for two months.” (Livings deposition, pp 42, 52 [app 001045a, 001055a.]) Every time there was new snow, it would be plowed. (Livings deposition, p 42 [app 001045a.]) They never “saw cement.” (Livings deposition, p 42 [app 001045a]; Tr I, p 6 [app b].) There were “trucks there every day.” (Livings deposition, p 104 [app 001107a].) “Thursday was delivery day.” (Livings deposition, p 104 [app 001107a].)

Here’s the situation. It had been snowing for over a month. Every time it snowed, a snowplow would come and plow the area for everybody to walk. The next day, a snowplow would come if it had snowed and plow the area for everybody to walk. [Livings deposition, pp 37-38 [app 001039a-00104a].]

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. [Livings deposition, p 38 [app 001040a].]

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. [Livings deposition, pp 116-117 [app 001119a-001120a].]

The parking lot was completely covered with snow; there was no asphalt visible. (Livings deposition, p 113 [app 001116a].) “When the lot was plowed, it was never plowed to the ground and salted.” (Livings deposition, p 116 [app 001119a]; Tr I, p 6 [app b].)

The employees “complained all the time to [Ayman Shkouhani, the owner of Grand Dmitri’s]” about the parking lot. (Livings deposition, p 100 [app 001103a].) “Some mornings” the customers would complain. (Livings deposition, p 100 [app 001103a].) There was salt in the building, but it was for “the customer sidewalks in the front of the building and the side of the building.” (Livings deposition, p 40 [app 001043a].) There was salt inside the building. (Buck deposition, p 24 [app 001230a].) Buck had only used it “once, twice,” “[j]ust right at the front door.” (Buck deposition, p 24 [app 001230a].) Shkouhani put salt out, also at the front door. (Buck deposition, p 24 [app 001230a].)

Plaintiff and Buck both started work at 6:00 a.m. on Friday, February 21, 2014. (Buck deposition, p 10 [app 001216a]; Livings deposition, pp 30, 41 [app 001033a, 001044a]; Shkouhani deposition, pp 19, 33-34 [app 001178a, 001192a-001193a].) Buck arrived before plaintiff; her car was already in the parking lot when plaintiff arrived. (Livings deposition, pp 31, 34-35 [app 001034a, 001037a-00101038a].)

The parking lot was “a sheet of ice with water on top.” (Buck deposition, p 13 [app 001219a].) “Snow, ice, water.” (Buck deposition, p 13 [app 001219a].) The ice covered the parking lot. (Buck deposition, p 13 [app 001219a].) There was water covering the back parking lot. (Buck deposition, p 22 [app 001228a].) “I remember snow, ice and water pretty much through the parking lot.” (Buck deposition, p 23 [app 001229a].) “It was covered.” (Buck deposition, p 23 [app 001229a].) So was the sidewalk. (Buck deposition, p 23 [app 001229a].) There was no

surface that did not have snow, water or ice on it. (Buck deposition, p 23 [app 001229a].) Buck estimated “a couple [of] inches” of snow.” (Buck deposition, p 23 [app 001229a].)

Normally, Buck would park close to the rear door, “closest to the wall,” near the trash bin. (Buck deposition, pp 31, 32 [app 001237a, 001238a; Exhibit B, **app b.**]) She could not park there that morning. (Buck deposition, pp 31-32, 33-34 [app 001237a-001238a, 001239a, 001240a].)

Normally we park closer to the door, but from what I recall there was . . . a mound of snow in that area, so I could not park that way, and I parked about three or four spots down, still to the back, but not in . . . the spot where I normally park. [Buck deposition, p 14 [app 001220a.]

Buck did not have a key to the building; she had to wait for the chef to come to open the door. (Buck deposition, p 18 [app 001224a].) He went in the front door and came through the building to open the back. (Buck deposition, pp 18, 22 [app 001224a, 001228a].) The front door was relocked, because the restaurant was not yet open. (Buck deposition, p 26 [app 001232a].) Buck and the chef went inside together. (Buck deposition, pp 9, 14, 22 [app 001215a, 001220a, 001227a].) Buck had difficulty walking in. (Buck deposition, pp 13-14 [app 0012219a-001220a].) She “kinda shimmied” her way in. (Buck deposition, p 22 [app 001228a].)

Buck’s shift ended at 2:00 p.m. (Buck deposition, p 18 [app 001224a].) There was still snow and ice on the parking lot when she left. (Buck deposition, p 25 [app 001231a].)

Plaintiff arrived about 5:50 a.m. (Livings deposition, pp 30, 41, 90 [app 001033a, 001044a, 001093a].) It was cold, “in the negative numbers.” (Livings deposition, p 93 [app 001096a].) It had not been above freezing in the preceding 24 hours. (Livings deposition, p 93 [app 001096a].) There had been snow or ice in the parking lot before. (Livings deposition, p 39 [app 001042a].) She did not report it. (Livings deposition, p 39 [app 001042a].)

Plaintiff did not have a key to enter the building from the front. (Livings deposition, p 34 [app 001037a].) The employee [rear] entrance was the only one she could use. (Livings

deposition, p 114 [app 001117a].) She parked in the rear of the building. (Livings deposition, p 33 [app 001036a].) There was one other car in the lot. (Livings deposition, p 31 [app 001034a].) It belonged to Buck. (Livings deposition, pp 31, 34-35 [app 001034a, 001037a-001038a].)

It was dark. (Livings deposition, pp 41, 91 [app 001044a, 001132a].) There was “a night light over the back door.” (Livings deposition, p 41 [app 001044a].) There was some light in a rear window, but it did not illuminate the parking area. (Livings deposition, p 93 [app 001134a].) It was about as bright as an interior nightlight. (Livings deposition, p 41 [app 001044a].) “It just did the door.” (Livings deposition, p 42 [app 001045a].) “It didn’t come out into the parking area.” (Livings deposition, p 42 [app 001045a].) She did not have a flashlight. (Livings deposition, p 93 [app 001096a].)

Plaintiff parked where she was supposed to. (Shkouhani deposition, p 14 [app 001173a].) She estimated she was 70 feet from the building. (Livings deposition, pp 33, 106, 114 [app 001036a, 001109a, 001117a].) She could not have parked any closer. (Livings deposition, p 34 [app 001037a].) “[T]he parking area was all piled up with snow[;] [t]hat was the first available full parking spot.” (Livings deposition, pp 34, 112-113 [app 001037a, 001115a-001116a].) “[T]he fifth parking [spot] was where I parked because one through four was a solid snow mound up to the wall.” (Livings deposition, p 113 [app 001116a].) The other spots were unavailable because snow had been plowed onto them. (Livings deposition, p 113 [app 001116a].)

She was looking down. (Livings deposition, p 35 [app 001038a].) She saw “a sheet of white ice.” (Livings deposition, p 35 [app 001038a].) She estimated that there was approximately six inches of “packed snow” on the ground. (Livings deposition, pp 34, 39, 101, 114 [app 001037a, 001042a, 001104a, 001107a].) It was “flat where it had been plowed.” (Livings deposition, pp 35, 36 [app 001038a, 001039a].)

It was solid. There was no soft stuff. It was solid block. It was just one big block of ice and ground trodden. . . packed. [Livings deposition, p 36 [001039a].]

It was trodden. It was flattened to the ground. There was no fluffy snow. [Livings deposition, pp 35, 105 [app 001038a, 001108a].]

[T]he whole complete area from the driveway coming in which was another 70, 80 feet to the 70 feet that I had to go to the 190 feet going along the building, everything was white, packed snow. [Livings deposition, p 107 [app 001110a].]

She was wearing rubber-soled shoes and carrying her purse. (Livings deposition, pp 43-44 [app 001046a-001047a].) She started to walk toward the rear door, “and maybe three steps and I fell straight back.” (Livings deposition, pp 30, 45, 101 [app 001033a, 001048a, 001104a].) She tried to get up immediately, but it was too slippery. (Livings deposition, pp 45, 102 [app 001105a].)

I tried to stand up and was slipping everywhere, so I got down on my hands and knees and crawled across the parking area. I tried to get to the back door. I could not, so I ended up walking the snow drift, plowed area, whatever you want to call it to walk around the building [Livings deposition, p 46 [app 001049a].]

She called the restaurant from the front door. (Livings deposition, p 46 [app 001049a].) Buck opened the door for her. (Livings deposition, pp 46, 101 [app 001049a, 001103a].) She was able to work that day, but at a reduced level. (Livings deposition, pp 48-49 [app 001051a-001052a].) The next day, however, she was unable to work when she arrived at the restaurant and went for medical help. (Livings deposition, p 49 [app 001052a].) She had three surgical procedures for her back injury. (Livings deposition, pp 66-69 [app 001069a-001072a].) She did not work after the day after the accident and was considered completely disabled. (Livings deposition, pp 17, 21, 18 [app 001020a, 001024a, 001021a].)

After the accident. Plaintiff told Shkouhani about her fall when he arrived, about 9:00 a.m. (Shkouhani deposition, p 11 [app 001170a].) He went to the back to look at the area where she said she had fallen. (Shkouhani deposition, p 11 [app 001170a].) The surface of the plaintiff

slopes toward a drain. (Shkouhani deposition, p 15 [app 001174a].) Water pools around it. (Shkouhani deposition, p 15 [app 001174a].)

“Where she fell, it was water,” “a lot of water.” (Shkouhani deposition, pp 13, 43 [app 001172a, 001202a].) There was ice and debris around the drain. (Shkouhani deposition, p 43 [app 001202a].) The water was up to his ankle. (Shkouhani deposition, p 12 [001171a].) His foot was “soaked.” (Shkouhani deposition, p 12 [app 001171a].) “I think it was a sheet of ice underneath . . . the water.” (Shkouhani deposition, p 13 [app 001172a].) “[W]hen she stepped like from her car to the water, it was like a little ice underneath the water.” [Shkouhani deposition, p 13 [app 001171a.]

Shkouhani “went back to the restaurant . . . grabbed sticks and I try to like, you know, tried to find the hole for the city water.” (Shkouhani deposition, p 11 [app 001170a].) The ice was not thick. (Shkouhani deposition, p 13 [app 001172a].) He was able to “break” it in a few minutes. (Shkouhani deposition, pp 13, 21 [app 001172a, 001180a].) He freed the drain; “like . . . five minutes everything is done.” (Shkouhani deposition, p 11 [app 001170a].)

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

The cities uses [*sic*] our parking lots, I have multiple buildings, as retaining ponds in many cases. So, for example you have six manholes, or catch basins that are about 12 inches in diameter of the drain. When they head out to the street, they do down about six inches. I just learned that. So what happens is, instead of flooding the streets, and instead of having backing up - backups on the streets and that, they hold it in your parking lot. So they use the parking lots as retention centers, as retention. . . [W]hen you get a lot of rain, the drains can only handle so much. [Sage deposition, p 48 [app 000993a.]

Clearing standing water, according to Sage, was the tenants’ responsibility. (Sage deposition, p 60 [app 00996a].)

Procedural history

Briefly, plaintiff filed suit against Sage's in Macomb Circuit Court. That court denied Sage's motion for summary disposition and it applied for leave to appeal. The Court of Appeals granted the application, but affirmed in an unpublished opinion. It held that the ice was "open and obvious." (Opinion, p 9 [app 000001a].) It went on, however, to find that "the record supports a finding that the entire parking lot presented an effectively unavoidable hazard of packed snow and ice." (Opinion, p 11 [app 000010a-000011a].)

Judge Tukel dissented, finding that "plaintiff could have simply declined to enter the premises, thereby avoiding the hazard." (Opinion of Tukel, J., p 4 [app 000017a].) The majority (Judges Shapiro and Beckering) responded, in part:

Put simply, the hazard encompassed the entire premises and it was effectively unavoidable for anyone and everyone, whether coming or going. It simply cannot be the law that a premises owner can render an all-encompassing hazard on the property "effectively unavoidable" by claiming that no one should come near the property. [Opinion, p 11, n 6 [app 00011a].]

Judge Shapiro wrote separately, concurring with the majority opinion, noting that defendant-landowner, not the restaurant's owner or his employees, was responsible for maintenance of the parking lot." (Opinion of Shapiro, J., p 2 [app 000013a].)

Sage's motion for reconsideration. Sage's filed a motion for reconsideration in the Court of Appeals. Only at that point did Sage's argue that plaintiff could have parked in "front" of the "plaza." (Sage's motion for reconsideration, p 2 [app 000756a et seq.]). Plaintiff responded to the motion for reconsideration, which was denied in an order dated April 23, 2019. Sage's filed a timely application for leave to appeal to this Court. On February 7, 2020, this Court ordered oral argument on the application and directed the parties to brief the issues of employment and unavoidability.

ARGUMENT I

THE PLAINTIFF'S EMPLOYMENT IS A RELEVANT CONSIDERATION IN DETERMINING WHETHER THE “OPEN AND OBVIOUS” DEFENSE APPLIES.

Defendant spends a considerable portion of its supplemental brief knocking down a series of straw men, that is, arguing against positions it contends plaintiff has taken or will advance. Rather than counterpunch, however, plaintiff will concentrate on the questions which this Court requested that the parties discuss and address defendant's byroads only to the extent necessary.

(a)

The issue is whether the condition was “effectively” “unavoidable.”

i. A landowner is liable for injuries caused by hidden defects.

It is hardly necessary to repeat here that this Court has retained the traditional classification of persons on the premises into the categories of “trespasser,” “licensee” and “invitee” and that “an invitee is entitled to the highest level of protection.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). “[T]he rationale underlying this rule is that liability for injuries resulting from defectively maintained premises should rest upon the one who is in control or possession of the premises and, thus, is best able to prevent the injury.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91; 485 NW2d 676 (1992).

The principle - that a landowner who asks (“invites”) others onto his land with the expectation that their presence there will be to his pecuniary benefit has a duty to protect them from some kinds of harm - has a long and venerable history in common law.

Bennett v Louisville & NR Co, 102 US 577 (1880), was a diversity case in which the plaintiff fell through an unguarded hole in the dark. Justice Harlan, writing for the court, reviewed “many cases in the English courts” and cited Cooley’s treatise to the effect that “when one ‘expressly or by implication invites others to come upon his premises, whether for business or for

any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.” 102 US 580 (citation omitted). The rule, he wrote, is “founded in justice and necessity.” *Id.*

In what seems to be the first appearance of the rule in Michigan law, the eminent Justice Cooley, citing multiple cases from England, the Supreme Court and other states, described it as “a very just and very familiar principle.” *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164, 170; 13 NW 499 (1882) (pre-workers compensation wrongful death of employee). “Every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware.” *Id.* See also, e.g., *Donaldson v Wilson*, 60 Mich 86; 26 NW 842 (1886) (subtenant’s action for property damage against building owner unaware of foundation defects).

This, then, is the starting point: a landowner is liable for injuries from a condition on the property that the invitee could not “reasonably discover” on his own.

ii. “Unavoidable” as an exception to “open and obvious” is well-established.

According to the second Restatement of Torts, which attempted to distill American tort law into a compact outline⁴, the rule of duty to invitees does not apply where the “danger is known or obvious . . .” 2 Restatement, Torts, 2d, §343A.

This Court reiterated that rule in *Riddle, supra*, where the plaintiff slipped on oil on the floor of a facility where oiled steel was stored. Citing the Restatement, it held “if the dangers are known or obvious to the invitee, no absolute duty to warn exists, and the invitee cannot recover on

⁴ The Restatement is, of course, a secondary authority unless expressly adopted by a judicial entity.

that theory.” 440 Mich 92. *Riddle*, however, also held that “the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger.” 440 Mich 97. And in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1996), this Court held “even though there may not be an *absolute* obligation to provide a *warning*, this rule does not relieve the invitor from his duty to exercise reasonable care to protect his invitees against known or discoverable dangerous conditions.” 449 Mich 613 (emphasis original).

Lugo v Ameritech Corp, 464 Mich 512; 629 NW2d 384 (2001), marked an inflection point in Michigan law, because, for the first time, this Court moved the effect of the nature of the defect from the “breach” element of a negligence claim to that of “duty.” Justice Taylor wrote, “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.” 464 Mich 516.

Nonetheless, even an “open and obvious” defect can give rise to a duty. *Lugo* indicated that, in deciding if an otherwise open danger poses “special risks,” the court should consider whether there are characteristics of the condition “that give rise to a uniquely high likelihood of harm or severity of harm” 464 Mich 519. A condition that is “effectively unavoidable” is “special.” *Id.* at 518.

That is, at no point in Michigan jurisprudence has it been the law that the fact that a defect is not “hidden” means that a landowner has *no* responsibility to invitees on the premises. *Lugo* changed the burdens of the parties, by requiring that the plaintiff establish that a condition was “unavoidable” rather than that the defendant establish that it was not “hidden,” but did not affect the underlying analysis to be engaged in.

iii. Hoffner retained the “unavoidability” exception.

Defendant relies heavily on *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012). The plaintiff in *Hoffner* tried to parlay a contractual right to enter a building (in that case, a health club) into a route to finding it “unavoidable” that she go in. This Court rejected that idea but explained:

Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word “effectively,” thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*. Accordingly, the standard for “effective unavoidability” is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so. [492 Mich 468-469. Footnote omitted.]

The court also held that 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 . . .” 492 Mich 471-472.

Hoffner then held that “an ‘effectively unavoidable’ condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances.” 492 Mich 455-456. It did not, however, do away with “avoidability” as a counter to “open and obvious.” That is, *Hoffner* made the step steeper to climb, but did not block off the stairwell altogether.

(b)

The plaintiff's employment should be a relevant consideration.

i. The availability of workers compensation is irrelevant where the act itself allows for noneconomic recovery against third parties.

Defendant asserts repeatedly that an employee injured in connection with employment should be satisfied with her remedies under the workers disability compensation act (WDCA):

[I]njuries that occur while at work have historically been resolved through the Legislature’s enactment of the Workers’ Disability Compensation Act (“WDCA”),

MCL 418.101 *et seq.*, as the Plaintiff filed and pursued here, and not through civil suit [Defendant's brief, p 6.]

[T]here is a remedy at law for an employee who subjectively believes she is required to encounter a perceived dangerous condition because she must report to work – the WDCA. [Defendant's brief, p 10.]

[E]mployees already have a right to recover under the WDCA. [Defendant's brief, p 26.]

[T]he question here is not whether the Plaintiff's employment should be a consideration in premises liability, but whether, under the circumstances, an employee should be given an expectation to a heightened level of care and, concomitantly, a separate cause of action upon which she can prevail that is in addition to the one she can present pursuant to the WDCA. [Defendant's brief p 27.]

Sage's believes that the sympathy driven intentions behind the Plaintiff's and Court of Appeals arguments are accomplished by the WDCA. [Defendant's brief, p 27.]

[T]he Legislature has determined that the overarching public concern when an employee is injured is ensuring that she can recover economic damages. The WDCA is intended to do that and, therefore, the employment-related considerations raised by the Plaintiff and the Court of Appeals majority and concurring opinions are met. [Defendant's brief, p 28.]

Perhaps the most telling portion of this argument is defendant's claim that there is no statutory authority for actions like the present:

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

Therefore, in this matter where the Plaintiff has admittedly received benefits under the WDCA . . . consideration of her employment has already been made, and the public interest in compensating her for her economic injuries has been met. There being no similar public interest in compensating her, as an employee, for non-economic damages, her status as an employee is irrelevant to the determination of her premises liability claims. [Brief, pp 28-29. Emphasis added.]

Defendant offers no explanation for it failure to take account of MCL 418.827(1):

Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section. [Emphasis added.]

This Court, then, may simply disregard defendant's Argument I(D).

ii. “Stare decisis” does not mean “the law never changes.”

Stability in the law is a value, but it is neither paramount nor sacrosanct. That is, “stand by things decided” is a principle of law, but it is not immutable.

“Stare” means “to stand” and is the root from which both “statute” and “statue” are derived. www.macmillandictionaryblog.com; www.merriam-webster.com. At a time when many institutions are wrestling with the question of what “statues” should be removed from the public space – that is, no longer continue to “stand” – courts are also reexamining precedents to decide whether they, too, should be reconsidered.

When the time comes, a court can modify, overrule or even disown its own previous decisions. As this Court said recently in *In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019) (overruling a longstanding precedent, *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993)):

The stare decisis analysis should not be applied mechanically . . . [G]enerally we consider these principles: whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. [504 Mich 25. Quotation marks and citations omitted. Emphasis added.]

Defendant here emphasizes the “reliance interest” of (presumably) property owners on cases derived from *Lugo, Hoffner, Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 642 NW2d 212 (2002) and other opinions, asserting that plaintiff is asking to “modify decades of common law premises liability precedent” (Defendant's brief, p 32). Leaving aside the question of

whether 19 years constitutes “decades” in any but the most literal sense of the word, defendant has not explained how property owners have “relied” on the lack of any obligation to correct hazards for persons whose employment occasions their presence on the land versus the same lack of obligation to those who are there for other purposes.

In the present case, for example, both the tenants’ employees and their customers were “invitees” on the premises. How would Sage’s having thought that it could avoid liability to the latter for the all-encompassing ice have made it more attentive to the possibility of injury to the former?

Despite defendant's colorful rhetoric, plaintiff has not previously argued that this Court should “overturn *Lugo* [and] reject this Court’s reliance on the Restatement . . .” (Defendant's brief, p 32). Plaintiff would, of course, cheerfully accept such an outcome (see *infra*), but it is unnecessary in order for this Court to affirm the result from the lower courts.

iii. “Avoidability” must have a logical terminus.

It is worth a moment to look at the Court of Appeals’ decision in *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), *overruled in Hoffner, supra*. The plaintiff was a truck driver who got fuel at a gas station, then walked across the parking area to a convenience store to buy wiper fluid. He slipped and fell on the way. The ground was covered with ice from a storm and the station had received many complaints about the icy conditions in a period of several hours before the accident. The plaintiff admitted the ice was “open and obvious,” but argued that it was “effectively unavoidable.” The case went to trial and the jury found in favor of the plaintiff.

The Court of Appeals affirmed. It made the point that:

Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. *The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any*

liability to those for hazardous conditions as long as the customers even technically had the option of declining the invitation. [268 Mich App 594. Emphasis added.]

While this Court “expressly overruled” *Robertson* as soon as it had the chance (the defendant did not apply for leave), this basic presentation of the rationale of premises liability law should not be ignored.

iv. “Effectively unavoidable” is an objective standard

Defendant claims that plaintiff “wants her employment considerations utilized to expand [“effectively unavoidable hazard”] and thereby create a subjective analysis.” (Defendant’s brief, p 32.) This argument, however, misunderstands what an “objective” standard really is.

This Court “may consult dictionary definitions to give words their common and ordinary meaning.” *Spectrum Health Hospitals v Farm Bureau Mut Ins Co. of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012) (quotations omitted). The same holds true in interpreting terms outside of statutory construction. See, e.g., *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534-535; 676 NW2d 616, 622 (2004) (“owner”).

Merriam-Webster defines “objective” as “expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations; limited to choices of fixed alternatives and reducing subjective factors to a minimum.” www.merriam-webster.com.

The word “subjective” has several definitions, of which the most relevant are “relating to or being experience or knowledge as conditioned by personal mental characteristics or states;” “peculiar to a particular individual;” and “modified or affected by personal views, experience, or background.” www.merriam-webster.com.

There is no reason an assessment of whether “the plaintiff’s employment is a relevant consideration in determining whether a condition is effectively unavoidable” cannot be made

“objectively,” that is, “dealing with facts or conditions as perceived without distortion” or “limited to choices of fixed alternatives.” Testimonial and documentary evidence provided by the plaintiff, the plaintiff’s employer and possibly from other sources can be brought forward, without great difficulty, to allow an observer to determine whether the plaintiff’s employment required her to encounter the hazard. If the plaintiff relies on a “subjective” assertion (“I was afraid I would be fired if I did not do the task”), the defendant is free to seek out contrary testimony from other sources or, indeed, from the plaintiff herself.

Lymon v Freedland, 314 Mich App 746; 887 NW2d 456 (2016) (leave to appeal denied) has occasioned much discussion but can illustrate the point plaintiff is trying to make here.

The plaintiff was a nurse’s aide. She provided home health care for the defendant’s mother, who was severely disabled and could not be left alone. The house was located on a steep hill. The driveway was icy and the plaintiff was unable to drive up it. She parked in the street and walked. The only other way in required walking on snow-covered grass, but it was still necessary to cross part of the driveway. She slipped and fell in the driveway. She sued the homeowner, arguing that the driveway was “unavoidable.” The trial court denied summary disposition for the defendant; the parties stipulated to judgment so the defendant could appeal. The Court of Appeals affirmed.

[P]laintiff was compelled to enter the premises because she was a home health aide who could not abandon her patient. As an essential home health care aide, plaintiff did not have the “option” of failing to appear for work. . . . [T]he alternate route would probably still require someone to traverse part of the driveway. . . . [314 Mich App 761-762.]

The *Lymon* panel applied an objective analysis of the situation. “[T]he record leads us to conclude that all routes to the home were covered in ice and snow” and the plaintiff was there to care for “an elderly patient with dementia and Parkinson’s disease” who could not be left alone. 314 Mich App 763, 764. These facts represent “limited . . . choices of fixed alternatives” and

“facts or conditions as perceived without distortion.” merriam-webster, *supra*. That is, it applied an objective analysis to the established facts in order to determine whether a condition was “effectively” unavoidable.

The Court of Appeals has too often made decisions based on its own assessment of the plaintiff's employment situation⁵. Consider *Becker v Glaister*, unpublished opinion of the Court of Appeals (Docket no. 281481, rel'd 1/22/09) at *4 (“plaintiff could have decided to make the delivery a different day”); *Fuller v Shooks*, unpublished opinion of the Court of Appeals (Docket no. 269886, rel'd 10/24/06) at *3 (“work order [states] that defendant's fiancé wanted the fixtures delivered as soon as they arrived” but “plaintiff could have chosen to make the delivery at another time”); *Brownlee v General Motors Corp*, unpublished opinion of the Court of Appeals (Docket no. 252867, rel'd 8/30/05) at *2 (“plaintiff could have set the dishes in another area without adverse employment repercussions”); and *Holland v State Farm Mut Auto Ins Ass'n*, unpublished opinion of the Court of Appeals (Docket no. 322438, rel'd 9/10/15) at *7 (“it was not practical for [plaintiff] to take another path in order to deliver mail to the businesses subsequent to defendant on his mail route,” but he “was not inescapably required to confront the hazard”).

Scenarios like these, however, can be analyzed using an objective standard, e.g.:

- Was the plaintiff's employment the reason for the plaintiff's presence on the premises?
- Was it necessary for the plaintiff to have encountered the hazard in order to carry out her purpose for being there?
- Was there an alternative route that would have avoided the hazard without compromising the plaintiff's ability to perform the job?

⁵ The bulk of the “avoidability” case law is unpublished. These opinions illustrate the Court of Appeals' approach to the question and thus satisfy the requirement of MCR 7.215(C)(1).

- Did the plaintiff's employer require that the plaintiff take a route or follow a routine for reasons of economy, efficiency or customer satisfaction?
- If the plaintiff refused to confront the hazard, what would have been the result?
- Did the defendant require the plaintiff be exposed to the hazard in order to be compensated for the work?
- Did external factors tied to the plaintiff's work, such as public safety, form part of the reason for the plaintiff's need to encounter the hazard?

These are objective questions with objective answers which, when assembled, permit an objective determination of whether the condition was rendered “unavoidable.”

(c)

“Avoidability” should be returned to the realm of comparative negligence.

It is well-established that a plaintiff's comparative negligence is an issue of fact. In *Lugo* this Court explained:

In a situation where a plaintiff was injured as a result of a risk that was truly outside the open and obvious doctrine and that posed an unreasonable risk of harm, *the fact that the plaintiff was also negligent would not bar a cause of action*. This is because Michigan follows the rule of comparative negligence. Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff's injury, this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether. . . [464 Mich 523.]

“Under Michigan's system of ‘true’ comparative negligence . . . a plaintiff's negligence alone will not support a defendant's motion for summary disposition.” *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 148; 565 NW2d 383 (1997) (opinion of Mallett, J.)⁶

⁶ *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003), did find that the court could make a determination of whether the plaintiff was more than 50% at fault for a motor vehicle accident for purposes of allowing damages under MCL 500.3135(2)(b) (cited in the order as “MCL 500.3101(2)(b)”).

Until *Lugo*, the question of whether a condition was so self-evident that the invitee should have discovered it himself was deferred until the factfinder's decision of how much blame to place on the plaintiff rather than the defendant. Indeed, for much of the state's legal history, it could have barred a claim entirely, in the name of "contributory negligence." *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 32, n. 23; 762 NW2d 911 (2009) (Young, J, dissenting). This Court abrogated contributory negligence in *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979), but effectively brought it back for premises claims by its decision in *Lugo*.

A voluminous body of case law on "avoidability" has developed since *Lugo*. Plaintiff's Appendix B is a summary of it, in tabular form.

As can be seen from a review, the Court of Appeals has inserted the courts into the details of daily life of Michiganders to find that they could have avoided a hazardous condition. Consider *Snell v Avalon Properties of Grand Rapids, L.L.C*, unpublished opinion of the Court of Appeals (Docket no. 327658, rel'd 5/24/16) (plaintiff could have rescheduled "a pre-surgical consultation for a hysterectomy" and "remain[ed] home"); *Patterson v Knollwood Village Associates Ltd. Partnership*, unpublished opinion of the Court of Appeals (Docket no. 314806, rel'd 7/1/14) (plaintiff "could have asked her husband to park in another location" "could have asked to be dropped off at a different spot"); or *Shattuck v Hotel Baronette, Inc*, unpublished opinion of the Court of Appeals (Docket no. 281065, rel'd 2/10/09) (plaintiff could have "wait[ed] for the tub to drain, [dried] her feet off before exiting the bathtub, or plac[ed] a towel on the step next to [it]"); *Milton v Joe Randazzo's Fruit and Vegetable, Inc*, unpublished opinion of the Court of Appeals (Docket no. 323521, rel'd 12/17/15) ("plaintiff could have chosen not to use the restroom").

There is something unseemly about three judges, no matter how learned, making judgments from afar about the medical treatment, marital relationships, personal hygiene and bathroom habits of ordinary people.

It would be consistent with “decades” of Michigan law if this Court shifted the determination of when a hazard is “effectively” unavoidable away from the court and back to the trier of fact – under appropriate instructions regarding the need for an objective determination of how the plaintiff’s employment should be figured in.

(d)

Alternatively, this Court should reevaluate “open and obvious” as a defense to claims based on premises liability.

In *Hoffner, supra*, this Court repeated its prior test for deciding whether a condition is “open and obvious.” “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.” 492 Mich 450 (citations and quotation marks omitted). Had the lower courts stuck to the “casual inspection” standard, the contemporary landscape would be quite different.

In too many instances, however, “reasonably discoverable” upon “casual inspection,” has evolved into “the plaintiff should have guessed that the condition might be there.” Consider, e.g., *Clogg v JNL Ventures, Inc*, 2012 WL 516088, unpublished opinion per curiam of the Court of Appeals, issued 2/16/12 (Docket No. 303197) at *3 (“a leaf-concealed sidewalk lip was an open and obvious danger”); *Williams v Holiday Ventures Apartments, Inc*, 2011 WL 711443, unpublished opinion per curiam of the Court of Appeals, issued 3/1/11 (Docket No. 296051) (“area below the porch was covered in leaves, concealing the edge of the sidewalk” but “a leaf covered walkway . . . should alert the average individual to . . . the possibility of the existence of a hidden condition underneath the leaves”); *Doezema v Bay Harbor Yacht Docks*, unpublished opinion per

curiam of the Court of Appeals, issued 11/21/06 (Docket No. 267681) at *3 (“the open and obvious doctrine required that plaintiff continually glance over his shoulder while walking backward to avoid dangers that may not have been there even seconds before”), and many, many cases holding that invisible (“black”) ice is “open and obvious” because the plaintiff should have expected ice to have formed.

This handful of decisions indicates how far the “open and obvious” rule has been stretched. It is time to reconsider it.

ARGUMENT II

THERE ARE MATERIAL ISSUES OF FACT WHETHER THE ICE WAS “EFFECTIVELY UNAVOIDABLE.”

“You can’t get there from here.” An “expression used . . . by persons being asked for directions to a far distant location that cannot be accessed without extensive, complicated directions.” www.usingenglish.com/reference/idioms. Turn this expression over and you have defendant's approach to the facts of this case: if there was *any* way plaintiff could have entered the building, the icy parking lot was not “unavoidable.”

Plaintiff addressed the specifics of most of defendant's suggestions in her response to the application, but retreats that ground under the court’s briefing order.

Parking somewhere else.

- Defendant's argument ignores the fact that plaintiff would still have had to encounter the ice if she had parked in front, because she would still have had to walk from her car to the covered area.
- Buck testified that the sidewalk was also covered with ice and there is no dispute that plaintiff would have had to walk on the sidewalk even if she had parked in front and entered through the front door.

- Buck “shimmied” in. Plaintiff literally crawled in after the accident.
- If the court agrees that employment is relevant, it will also need to consider that the employees were directed to park in the rear and what would have occurred if plaintiff had “parked parallel to the covered, salted front entrance” (Defendant's brief, p 36.) There is, however, nothing in the record to indicate that the front entrance had been salted.⁷ The record evidence was that there was salt in the building, only for the sidewalks. (Livings deposition, p 40 [app 001043a].) Furthermore, even salt would not melt “a sheet of ice.”

Leave and come back.

- It is always possible to avoid danger by not taking risk, but that choice always creates a different risk. An individual concerned about contracting a contagious disease during the current public health emergency can guarantee that he will not die from it by isolating himself from all human contact until the emergency has abated. But that decision will incur other costs, both to the individual⁸ and society.
- Plaintiff was expecting to work the morning of the accident and expecting to be paid for having worked. Her boss, her colleagues and their customers were expecting her to show up. Her testimony was that the parking lot was icy all winter. She could not simply go home and wait until spring.
- Buck testified the ice was still present when she finished her shift, at 2:00 p.m.

Calling for help.

⁷ Plaintiff's de bene esse deposition does refer to “a small area” near the front that was salted, but that deposition (taken in 2019) is not part of the record in the present appeal.

⁸ See, e.g., <https://www.pbs.org/wgbh/frontline/article/excess-pandemic-deaths-cdc-covid-coronavirus>, estimating over 33,000 people died from other causes because they were afraid to seek medical care during the pandemic.

- Buck and/or “Chef Bob,” even if one of them had been prevailed on to come to plaintiff’s rescue, would not have been able to remedy the situation.

Waiting for the ice to be cleared.

- Caramagno testified that salt would not have melted the entire layer of ice within a reasonable time.
- Applying salt would not have eliminated the water over the ice.

These are the sort of points that should be left to the factfinder to assess. The trial court’s original ruling that “it was unavoidable because it was the employee parking lot” was a sufficient basis to deny defendant’s motion for summary disposition. This Court should deny the application for leave to appeal.

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Dated: July 21, 2020

PROOF OF SERVICE

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

/s/ Melany Dranberg
Melany Dranberg

Dated: July 21, 2020