

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

DONNA LIVINGS,

Plaintiff-Appellee,

v

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

Defendant-Appellant,

and

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

Defendant-Appellees.

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

**ORAL ARGUMENT
REQUESTED**

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

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Introduction

The Plaintiff's supplemental response is a fact heavy brief that provides little depth on the issues upon which this Court has requested the parties focus their attention. Plaintiff again emphasizes the sympathetic nature of her claim, but that does nothing to address the legal issues that have been raised in the lower courts. Thus, Sage's will do its best to return the attention of this Court to the legal issues that it has raised.

Below, Sage's will explain the following: 1) that the common law clearly directs this Court's duty analysis; 2) how the Legislature has already legislated in this area and decided that employment should not be considered in premises liability claims; and 3) that contrary to the common law, Plaintiff really is seeking a change in the law by advocating for a subjective test. These legal issues are of import because they direct the judiciary's decision not only in this case and the issues upon which this Court has directed the parties to focus but significantly, on the cases that come after this one has been decided.

Argument

I. Michigan Common Law is Not as the Plaintiff Claims it to be

The big takeaway from Plaintiff's supplemental response brief is that she has an enormous problem with the decision in *Lugo*. Calling it an "inflection point" in premises liability law, she has finally unveiled her desire to fully abrogate it. Contradicting the Plaintiff's argument are the decisions in *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495; 418 N.W.2d 381 (1988) ("The duty a possessor of land owes his invitees is not absolute, however. It does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself."), *Riddle v McLouth Steel Prods. Corp.*, 440 Mich 85; 485 N.W.2d 676 (1992) ("Thus, if the dangers are known or obvious

to the invitee, no absolute duty to warn exists, and the invitee cannot recover on that theory.”) and *Bertrand v Alan Ford, Inc.*, 449 Mich 606; 537 N.W.2d 185 (1995) (“[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.”). The fact is that when the list of cases that parrot, yet pre-date *Lugo* gets longer, the harder it is for the Plaintiff to make *Lugo* the “inflection point” of premises liability law in Michigan.

These cases all have in common the belief that a plaintiff must use reasonable care to protect herself, and that obligation is used, in part, to identify the duty the defendant owes her. The argument that identifying the duty owed under the unique circumstances of a case is too harsh is nothing more than a distraction from the legitimate issues this Court is seeking to address. That is because this same reasoning is used to determine whether an entity owes an obligation to a third party, for example, for actions that were either intentional or criminal. See, *McClements v Ford Motor Co.*, 473 Mich 373 (2005), and *MacDonald v PKT Inc.*, 454 Mich 322 (2001), respectively. Thus, this method of determining whether a duty exists is neither novel nor inappropriate.

So, while the Plaintiff here would like to focus on what Sage’s did or did not do, the lesson from the common law is that the proper inquiry to determine whether a duty exists is the nature of the condition and whether it is of such a nature that a plaintiff should recognize its potential danger and, under those circumstances, use reasonable care to avoid it. Focusing on the condition takes this case from the binary, “life or livelihood” dilemma Plaintiff attempts to create in her supplemental response brief. When placing the duty inquiry in its proper context, it is evident here that the Plaintiff was not presented with only one choice (“your money or your life”). Instead, there were numerous options, *a priori*, to avoid the parking lot, some of which Sage’s raised in the

second argument in its supplemental brief. While Plaintiff may find some or all of those options less than appealing, Michigan case law makes it abundantly clear that the fact that those options exist preclude her ability to recover here.

II. The Worker's Disability Compensation Act Has Made this Court's Decision Easy

When it comes to Sage's argument regarding the Worker's Disability Compensation Act ("WDCA") (an argument where Plaintiff drops the mic by citing MCL 418.827(1) and directing this Court to ignore everything Sage's said) it is clear that Plaintiff missed the point. The point was that the Legislature, by reviewing Michigan public policy and enacting the WDCA chose not to provide a precondition that premises liability cases (or any other third party cases) necessarily include a heightened duty under which an injured employee can recover non-economic damages. That point was raised in the one sentence from Sage's supplemental brief that surprisingly was not quoted in Plaintiff's supplemental response brief:

By asking the parties whether Plaintiff's employment is a relevant consideration in this matter, the Court has perhaps unintentionally inquired whether employees are in need of additional protections when their path to work allegedly contains an unavoidable condition.

Thus, Sage's argued that the Legislature has *already spoken* on the first question this Court raised, vis a vis, the WDCA. More yet, the Legislature has perhaps spoken the most through MCL 418.827, which Plaintiff raised in her response brief, than any other provision. That is because what is notably lacking in MCL 418.827 is any indication that the Legislature sought to promote a public policy that would impose a heightened duty to tortfeasors that cause the type and kind of injury the Plaintiff sustained here. Had the Legislature intended to hold those third parties that are liable to employees to a heightened standard of care, it certainly would have included that within MCL 418.817. And while the Plaintiff is seeking to undermine Legislative action for what she

deems a poor public policy decision, this Court “need not be sure of the precise reasons for a statutory judgment or be convinced of the wisdom of the legislation.” *People v Harris*, 499 Mich 332 (2016).

[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the ballot box, initiative, referendum, or constitutional amendment.

Id.

The obvious path the Legislature could have taken to ensure non-economic recovery in this context or to create a heightened duty for an employee whose route to work is mired with danger would be to enact something along the lines of MCL 554.139:

- (1) In every lease or license of residential premises, the lessor or licensor covenants:
 - (a) That the premises and all common areas are fit for the use intended by the parties.
 - (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

Out of MCL 554.139 comes *Benton v Dart Props.*, 270 Mich App 437; 715 N.W.2d 335 (2006), where the Court of Appeals held that given the presence of a statutory duty, the open and obvious danger doctrine does not apply. (“We hold that the open and obvious danger doctrine cannot bar a claim against a landlord for violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended under MCL 554.139(1)(a).”). Thus, a statutory duty would

permit consideration of employment in this case, but only if the Legislature so desired. The Legislature is presumed to know it could enact legislation that would do so.

In fact, the Legislature very easily could have enacted a statutory duty to ensure that employment considerations are involved when analyzing the duty element in premises liability cases, *but has not done so*. As this Court is all too aware, legislating from the bench, especially where there was an opportunity for the Legislature to act but it chose to refrain, would be absolutely improper. *Autio v Proksch Constr. Co.*, 377 Mich 517; 141 N.W.2d 81 (1966), quoting, *Luyk v Hertel*, 242 Mich 445; 219 N.W. 721 (1928). (“**The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. Rights, remedies, and procedure thereunder are such and such only as the statute provides. If the statute is short of what it should contain in order to prevent injustice, the defects must be cured by future legislation and not by judicial pronouncement.**”)

As explained in its supplemental brief, the Legislature refrained from acting to impose a greater duty for those third parties that injure an employee, and the Court of Appeals, while well-meaning, overstepped its bounds when it relied upon the Plaintiff’s employment to rule in her favor. This Court has the opportunity to reverse the Court of Appeals’ legislative pronouncement that determined a forced dismissal here “cannot be the law” and properly restore the common law that has been followed for decades by dismissing this case.

III. The Common Law Requires Use of an Objective Test

Plaintiff’s analysis of subjective and objective tests is nothing more than a dictionary game. The reasonable person standard is the common law requirement in Michigan premises liability claims. See *Valez v Tuma*, 492 Mich 1; 821 N.W.2d 432 (2012) and *Hoffner v Lanctoe*, 492 Mich 450; 821 N.W.2d 88 (2012). The *Valez* and *Hoffner* cases have been used in tandem before to

resist the temptation of mutating the common law objective standard into a subjective one. See *Coppola v Edward Rose & Sons, LLC*, unpublished per curiam opinion of the Court of Appeals, Docket No. 343172 (decided June 25, 2019). (Defendant’s Reply Appendix, Tab A, p. 1a) This Court has also refused in prior cases to alter the common law reasonable person standard, which provides consistency in the law as opposed to the idiosyncratic nature of subjective tests, and should not be inclined to do so now. *Sidorowicz v Chicken Shack, Inc.*, 469 Mich 919; 673 N.W.2d 106 (2003).

Plaintiff’s response to this is a misinterpretation of what the Court of Appeals has done previously when finding that employees were not confronted by an unavoidable condition. Plaintiff argues “[t]he Court of Appeals has too often made decisions based on its own assessment of the plaintiff’s employment situation.” (Plaintiff’s supplemental response brief, p. 22) In cases such as *Brownlee, Becker and Fuller*, (Defendant’s Appendix, Tabs X and HH, pp. 1282a and 1311a; and Defendant’s Reply Appendix, Tab B, p. 9a) which Plaintiff cites for this proposition, the Court of Appeals has **not** based its decisions on its own determination of the plaintiffs’ employment situations.

Instead, the Court examined in each of those cases the options the plaintiffs had to avoid the situation, which is what Sage’s has done here to address the effectively unavoidable issue. The first option is always to *avoid* the perceived danger, if possible. Thus, suggesting that an employee use a different entrance is just applying the effectively unavoidable doctrine to the specific facts of the case. It is no different than saying that a hazard was not effectively unavoidable where the claimant could simply walk around a grouping of potholes to avoid injury. Therefore, the Plaintiff’s suggestion that what she is asking for here (utilization of “special circumstances” in

identifying the duty owed) is misguided because *Brownlee*, *Becker* and *Fuller* never actually considered employment (or any other “special circumstances”) in rendering a decision.

She does also raise the *Lymon* decision as an example of a case where subjective employment considerations were considered, and in that regard she is correct. *Lymon*, which considered an actual life and death situation, looked at the individual plaintiff’s job to see if it was dire, and since the plaintiff provided care to an elderly woman with life threatening medical conditions, the Court of Appeals determined it was. **The determination that the plaintiff’s job was subjectively “important” was the deciding factor in finding that the ice upon which she fell was unavoidable.** That is a subjective analysis, because the case decision relied upon the type of services performed by the plaintiff and not the nature of the condition itself. And, as stated in Sage’s briefing, it disagrees with the *Lymon* decision, as did the dissenting opinion from Judge Tukel. The Supreme Court should Grant Leave to Appeal to resolve the divergent approaches of the Court of Appeals and to provide clarity going forward for a more consistent application of the law.

Plaintiff’s response brief predicts that Michigan Courts can utilize employment considerations (or the subjective need to go to work) in an objective test to ascertain whether a condition is avoidable. But that is not the case. Once the reasonable person standard strays and considers the personal and intimate aspects of a plaintiff’s life, that standard becomes subjective. To the extent that Plaintiff is arguing that a mild deviation from the reasonable person standard, where we “objectively” analyze a particular plaintiff’s employment, can keep the standard objective is wrong. *Levinson v Trotsky*, 199 Mich App 110; 500 N.W.2d 762 (1993). (“We decline to make plaintiff’s subjective beliefs part and parcel of this objective standard as plaintiff would

prefer, because doing so would result in a subjective standard and not an objective ‘reasonable person’ standard.”)

Conclusion

Sage’s application for leave to appeal should be granted because the Court of Appeals did not apply the common law in a consistent and predictable fashion. Plaintiff is perpetuating the errors the Court of Appeals made by inaccurately advocating that the common law provides for the decision the lower courts made (it does not) or by suggesting an entirely new system should be adopted. Sage’s has already identified the common law precedent that requires an objective analysis of the condition, *a priori*. Sage’s has identified and supported with citation to case law that when a plaintiff has options to avoid a condition it is not effectively unavoidable. Sage’s has identified cases where this Court and the Court of Appeals have previously dealt with matters that touched on issues of employment, they have largely and soundly rejected an invitation to consider them, a trend that was broken by the Court of Appeals here. Sage’s has also demonstrated that the Legislature’s enactment of the WDCA reveals that it does not believe that an employee in a third-party action is entitled to a heightened duty vis a vis MCL 554.139.

As for the Plaintiff’s attempts to convince this Court to overhaul the current framework, they are not based on a true desire to better our system of adjudicating these matters. If they were, they would improve upon the thresholds that this Court has historically referenced: predictability of outcome; fairness to the litigants; even-handed application by the lower courts. Subjective tests simply do not provide for those tenets, and there is no question that the Plaintiff here is advocating for a subjective test.

Accordingly, the legal issues that this Court has directed the litigants to answer point to only one conclusion. That conclusion is based upon common law, is fair and provides for the

even-handed administration of predictable justice. The conclusion this Court should make is to grant this application so that a full-throated discussion can be had on the very important issues this Court has identified.

Respectfully Submitted by:

SEGAL MCCAMBRIDGE SINGER & MAHONEY

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Dated: August 4, 2020

PROOF OF SERVICE

The undersigned certifies that a copy of the Defendant-Appellant's Supplemental Reply Brief on its Application for Leave to Appeal and this Proof of Service were served on the attorneys of record of all parties to the above cause via MiFile, the Court's e-filing system, on August 4, 2020.

/s/ Kelly Solak _____
Kelly Solak

**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
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**DEFENDANT-APPELLANT'S APPENDIX IN CONJUNCTION WITH ITS
SUPPLEMENTAL REPLY BRIEF ON ITS APPLICATION FOR LEAVE TO APPEAL**

Table of Contents for Appellant's Appendix

- A - *Coppola v Edward Rose & Sons, LLC*, unpublished per curiam opinion of the Court of Appeals, Docket No. 343172 (decided June 25, 2019).
- B - *Fuller v. Shooks*, unpublished per curiam opinion of the Court of Appeals, Docket No. 269886 (decided October 24, 2006).

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA COPPOLA and TIMOTHY COPPOLA,

Plaintiffs-Appellants,

v

EDWARD ROSE & SONS, LLC,

Defendant,

and

OCCIDENTAL DEVELOPMENT, LLC,

Defendant-Appellee.

UNPUBLISHED

June 25, 2019

No. 343172

Oakland Circuit Court

LC No. 2017-158709-NO

Before: SAWYER, P.J., and O'BRIEN and LETICA, JJ.

PER CURIAM.

In this statutory premises liability action brought under MCL 554.139, plaintiffs appeal as of right an order granting summary disposition to defendant.¹ On appeal, plaintiffs argue that the trial court erred by granting summary disposition to defendant because defendant did not provide reasonable access to plaintiffs' handicapped parking space as required by statute and that the trial court erred by declining to consider an admission by defendant's employee as evidence. We disagree.

In December of 2016, Pamela Coppola (Pamela) and her husband, Timothy Coppola (Timothy), lived in an apartment complex owned and operated by defendant. About one week before December 21, 2016, there was a snow storm that required defendant to remove snow from the parking lot where plaintiffs parked their vehicle. In the week leading up to December 21, 2016, defendant plowed the center of the parking lot, but some snow and ice was still present in

¹ "Defendant" refers solely to Occidental Development, LLC throughout this opinion.

Pamela's assigned handicapped parking spot when Pamela and Timothy left to go out to dinner on December 21, 2016. Pamela and Timothy reached their vehicle without incident, but when they returned home Pamela slipped on ice and snow in her assigned parking spot and injured her right hand and shoulder. Plaintiffs sued defendant for breaching its statutory duty of care to Pamela and the trial court granted summary disposition to defendant. This appeal followed.

Plaintiffs argue defendant breached its statutory duty and MCL 554.139 because Pamela did not have reasonable access to her parking spot. We disagree.

Defendant moved for summary disposition under MCR 2.116(C)(10). A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews 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). 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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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).

The moving party has the initial burden to support its claim with documentary evidence but, once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. See *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016) ("Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient."). This Court may only consider "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). Additionally, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

A trial court's preserved evidentiary decisions are reviewed for an abuse of discretion. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 541; 854 NW2d 152 (2014). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Nowacki v Dep't of Corrections*, 319 Mich App 144, 148; 900 NW2d 154 (2017) (quotation marks and citation omitted). A trial court also abuses its discretion, however, "by admitting evidence that is inadmissible as a matter of law." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016).

A landlord's premises liability for a tenant's injuries on the premises is established in MCL 554.139, which states, in relevant part:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

Our Supreme Court addressed the duty a landlord owes to tenants injured in their parking lot in *Allison*, 481 Mich at 419. In *Allison*, the tenant fell while walking on one to two inches of snow in his apartment complex's parking lot. *Id.* at 423. The *Allison* Court examined MCL 554.139 to determine what duty the landlord owed to the tenant. The *Allison* Court held that the parking lot was a "common area," under MCL 554.139(1)(a), "because it is accessed by two or more, or all, of the tenants and the lessor retains general control." *Id.* at 428. A parking lot is "fit for the use intended by the parties," under MCL 554.139(1)(a), as long as the landlord "ensure[s] that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Id.* at 429. A lessor's duty to clear ice and snow from a parking lot is only triggered under "much more exigent circumstances than those" in *Allison*, meaning an accumulation of one to two inches of snow. *Id.* at 430. MCL 554.139 "does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot." *Id.* Furthermore, "[m]ere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes." *Id.*

The *Allison* Court applied this standard to the specific facts presented in its case and found that the tenant's claim was barred by MCL 554.139(1)(a), because the parking lot was fit for its intended use. *Allison*, 481 Mich at 430. The *Allison* Court also stated that the "[tenant] did not show that the condition of the parking lot in this case precluded access to his vehicle" and, therefore, failed to show that the parking lot was unfit for its intended use. *Id.* at 430-431. Because the defendant did not breach its duty to the plaintiff, the *Allison* Court affirmed the trial court's order granting summary disposition to the defendant. *Id.* at 439.²

The *Allison* Court, however, did not specify whether "reasonable access" was based on a subjective or an objective standard. See *Allison*, 481 Mich at 429-431. We are unaware of any authority regarding whether the reasonable person standard applies to MCL 554.139. When a statute abrogates the common law, however, "the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." *Velez v Tuma*, 492 Mich 1, 11-12; 821 NW2d 432 (2012) (quotation marks and citation omitted). MCL 554.139 is silent on whether it applies the reasonable person standard. See MCL 554.139. Thus, the objective

² Plaintiffs argue that Michigan courts rarely grant summary disposition in cases addressing whether a defendant breached the duty of care owed to the plaintiff. As the *Allison* Court made clear, however, when a defendant clearly has not breached the duty of care owed to a plaintiff, an order affirming the trial court's order granting summary disposition to the defendant is appropriate. *Allison*, 481 Mich at 439.

reasonable person standard used for common law premises liability cases is applicable in this case. See *Velez*, 492 Mich at 11-12; *Hoffner v Lanctoe*, 492 Mich 450, 463-464; 821 NW2d 88 (2012) (applying the objective reasonable person standard to a common-law premises liability case). As such, defendant did not owe Pamela a higher duty of care because she was a handicapped person walking through a handicapped parking spot. See *Velez*, 492 Mich at 11-12; *Hoffner*, 492 Mich at 463-464. Additionally, plaintiffs failed to cite any authority supporting their argument that defendant owed Pamela a higher duty of care and a party cannot simply assert a position and leave it for this Court to research the issue on their behalf. Thus, plaintiffs argument that defendant owed Pamela a higher duty of care because she was handicapped is abandoned. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (“Because plaintiff cites no authority for its argument, we reject it as abandoned on appeal.”).

Plaintiffs failed to specify before the trial court the amount of snow and ice in Pamela’s parking spot on December 21, 2016. Plaintiffs produced photographs of Pamela’s parking spot taken after Pamela’s fall, but these photographs do not show “much more exigent circumstances” than the one to two inches of snow discussed in *Allison*. *Allison*, 481 Mich at 430. Defendant plowed the center of the parking lot and asked tenants to move their vehicles so that their parking spaces could also be plowed. Timothy moved plaintiffs’ vehicle, but it is unknown whether the cars parked next to Pamela’s parking spot also moved their vehicles to allow a snow plow access to clear those parking spaces. Defendant also cleared snow from the sidewalks in the apartment complex and provided plaintiffs with a bucket of salt on their porch to use as they deemed necessary. A landlord is not required to maintain a parking lot in an ideal condition or in the most accessible condition possible; rather, a landlord is only required to maintain a parking lot in a condition that renders it fit for use as a parking lot. *Id.* The parking lot was fit for use as a parking lot because Pamela was not deprived of reasonable access to her parking spot. Thus, the trial court did not err by granting summary disposition to defendant. See *id.* at 429-431.³

We note that plaintiffs argue that published opinions decided by this Court before *Allison*, as well as unpublished opinions by this Court decided after *Allison*, show that defendant breached its duty of care to Pamela. This Court’s unpublished opinions, however, do not have any precedential authority, MCR 7.215(C)(1); *Howell Ed Ass’n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010), and *Allison* carries greater precedential weight than this Court’s published decisions decided before *Allison* because (a) *Allison* is more recent, (b) it is a case decided by our Supreme Court, and (c) it clearly established the duty a landlord owes to his or her tenants under MCL 554.139 when the tenant falls in a parking lot. See *Paige v City of Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006) (holding that until our Supreme Court overrules one of its prior decisions, “all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become

³ The trial granted summary disposition to defendant on plaintiffs’ common-law premises liability claim and plaintiffs have not appealed this portion of the trial court’s order granting summary disposition to defendant. Because common-law premises liability is not at issue on appeal, we will not address the issue here.

obsolete.”). Thus, because *Allison* establishes that defendant did not breach its duty to Pamela, consideration of the other cases cited by plaintiffs is unnecessary.

Finally, plaintiffs argue that the trial court improperly relied on “negative evidence” that Pamela safely walked to her vehicle before going to dinner to demonstrate that she had reasonable access to her parking spot. Our Supreme Court defined “negative evidence” in *Serinto v Borman Food Stores*, 380 Mich 637, 642; 158 NW2d 485 (1968), as “evidence to the effect that a circumstance or fact was not perceived.” Similarly, *Black’s Law Dictionary* defines “negative evidence” as “[e]vidence suggesting that an alleged fact does not exist, such as a witness’s testifying that he or she did not see an event occur.” *Black’s Law Dictionary* (10th ed). Plaintiffs, however, also relied on Michigan’s long-standing rule of evidence that absence of accidents should not be admitted to show an absence of negligence. See, e.g., *Larned v Vanderlinde*, 165 Mich 464, 468; 131 NW 165 (1911); *Kurczewski v Mich State Hwy Comm*, 112 Mich App 544, 550; 316 NW2d 484 (1982). The trial court did not consider “negative evidence” of whether any individuals other than Pamela fell in plaintiff’s parking lot, but it did consider evidence that plaintiffs did not fall in the parking lot on their way to dinner when holding that defendant did not breach its duty to provide Pamela reasonable access to plaintiffs’ vehicle. This was in error.

“Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of a party is affected or unless failure to do so would be inconsistent with substantial justice.” *Landin*, 305 Mich App at 541. “[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings.” *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, citation and quotation marks omitted). Even without considering the fact that plaintiffs safely reached their car on their way to dinner, as discussed above, the facts in this case are not “much more exigent circumstances” than the one to two inches of snow in *Allison*. *Allison*, 481 Mich at 430. Thus, the trial court’s consideration that plaintiffs safely accessed their vehicle when they left for dinner did not affect the outcome of the proceedings. There was sufficient evidence regarding the condition of the parking lot for the trial court to determine defendant did not breach a statutory duty to plaintiff under MCL 554.139.

Plaintiffs argue that the trial court erred by refusing to consider the deposition testimony of Claude Singleton III, a maintenance worker at the apartment complex, where he opines that Pamela did not have reasonable access to her parking spot in granting summary disposition to defendant. We disagree.

To preserve an evidentiary issue for appellate review, the party claiming error must have objected at trial and specified the same ground for objection that the party asserts on appeal. *Genna v Jackson*, 286 Mich App 413, 423; 781 NW2d 124 (2009). Defendant argued that Singleton’s comment about whether Pamela had reasonable access to her parking space was inadmissible because Singleton’s answer was a legal conclusion, not an admissible factual opinion under MRE 701, in its reply to plaintiffs’ response to defendant’s motion for summary disposition. Plaintiffs argued that Singleton’s answer was not a legal conclusion, but plaintiffs failed to argue that Singleton’s answer was admissible under any alternative or specific rule of evidence. Thus, the issue of whether Singleton’s comment that the photograph showed reasonable access to Pamela’s handicapped parking space called for a legal conclusion or was

admissible evidence under MRE 701 is preserved. Whether Singleton's comment was admissible evidence under MRE 704, however, is unpreserved.

A trial court's preserved evidentiary decisions are reviewed for an abuse of discretion. *Landin*, 305 Mich App at 541. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Nowacki*, 319 Mich App at 148 (quotation marks and citation omitted). A trial court also abuses its discretion, however, "by admitting evidence that is inadmissible as a matter of law." *Hecht*, 499 Mich at 604. "To the extent that this inquiry requires examination of the meaning of the Michigan Rules of Evidence, we address such a question in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo." *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Because plaintiffs' MRE 704 argument is unpreserved, it is reviewed for plain error. *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000) (quotation marks omitted), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence*, 320 Mich App 443 (alteration in original, citation and quotation marks omitted). The appellant bears the burden of persuasion with respect to prejudice. See *Carines*, 460 Mich at 763 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Quotation marks and citation omitted.)

Under MCR 2.116(G)(6), "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)--(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." The determinative factor when considering what evidence a trial court can consider when ruling on a motion for summary disposition is the content and substance of the evidence offered, not its form. *Dextrom v Wexford Co*, 287 Mich App 406, 427-428; 789 NW2d 211 (2010).

"Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness' [sic] perception and helpful to a clear understanding of the witness' [sic] testimony or the determination of a fact at issue." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995), citing MRE 701. Questions of law, however, are "within the exclusive responsibility of the trial judge." *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994). Thus, lay witness testimony may not include legal conclusions because legal conclusions are not rationally based on a witness's perception and such testimony would invade the province of the trial judge. See MRE 701; *Richardson*, 213 Mich App at 455; *Thorin*, 203 Mich App at 704.

Singleton was called to plaintiffs' apartment on December 21, 2016, after Pamela's fall. Singleton examined Pamela's parking spot and put salt on the snow and ice covered portions that night. At his deposition, the following exchange occurred:

[Plaintiffs' attorney]: Yeah. I mean, you told me about, you know, the different things you guys have to do to accommodate handicap tenants and things like that. As it was left by the snow removal contractor the night before, what we're looking at in Exhibit 1, is this a representation of reasonable access and accommodation that would allow a handicap resident access to their vehicle?

[Defendant's attorney]: Same objection. Go ahead and answer the question if you can.

[Singleton]: Based on the picture, no.

Plaintiffs asked Singleton for his observation about a photograph of Pamela's parking spot taken the morning after her fall. Singleton personally observed the parking spot on December 21, 2016, and was asked to testify about a photograph of the same location taken on December 22, 2016. Thus, Singleton could testify about what he observed in the photograph as long as his testimony was rationally based on his perception, i.e. how much snow and ice was in Pamela's parking spot or how the condition of Pamela's parking spot in the picture compared to its condition on December 21, 2016. See *Richardson*, 213 Mich App at 455-456 (holding that two police officers could testify as lay witnesses under MRE 701 about pictures taken of a crash site that they had personally investigated). Singleton, however, could not testify about whether the photograph showed that Pamela had "reasonable access" to her parking space, because "reasonable access" is the term established in *Allison*, 481 Mich at 428-431, to determine whether a landlord satisfied their statutory duty of care to tenants in a parking lot. Singleton's answer, therefore, called for a legal conclusion and was inadmissible. See *Maiden v Rozwood*, 461 Mich 109, 130 n 11; 597 NW2d 817 (1999) ("Whether the statutory standard of care was violated is a legal conclusion."). Because Singleton's testimony that Pamela's parking spot did not provide her with "reasonable access" to her vehicle was a legal conclusion, the trial court did not err by refusing to consider it when granting summary disposition to defendant. See MCR 2.116(G)(6).

Even if the trial court abused its discretion by refusing to consider Singleton's testimony, any such abuse of discretion does not require reversal. "Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of a party is affected or unless failure to do so would be inconsistent with substantial justice." *Landin*, 305 Mich App at 541. "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence*, 320 Mich App at 443 (alteration in original, citation and quotation marks omitted). Plaintiffs attached to their response to defendant's motion for summary disposition the photograph shown to Singleton when he testified. The trial court, therefore, was able to examine the photograph and make its own determination regarding whether the snow and ice in Pamela's parking spot prevented her from having reasonable access to her vehicle. Additionally, the trial court was also able to consider Singleton's deposition testimony in full, including his later statement that the center of Pamela's parking spot provided her with

reasonable access to the sidewalk.⁴ Given the trial court's ability to review the photograph at issue and the entirety of Singleton's statements about the condition of the parking spot, the trial court's refusal to consider Singleton's statements about the photograph did not affect the outcome of the proceedings.

Finally, plaintiffs argue that Singleton's statement that Pamela's parking spot did not provide her with reasonable access to her vehicle was admissible under MRE 704. MRE 704 states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The admissibility of such a statement "should not be questioned merely because the determination of liability may turn on whether the jury believes or disbelieves that opinion." *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 91; 910 NW2d 691 (2017) (quotation marks and citation omitted). As explained above, Singleton's testimony was inadmissible under MRE 701 because it called for a legal conclusion. *Maiden*, 461 Mich at 130 n 11. Because Singleton's testimony was not "otherwise admissible," it was also inadmissible under MRE 704. See MRE 704. Furthermore, as explained, the trial court's refusal to consider Singleton's statements about the photograph did not affect the outcome of the proceedings. Thus, even if Singleton's statement about Pamela's parking spot was admissible under MRE 704, and the trial court's refusal to consider it was an abuse of discretion, reversal of the trial court's order granting summary disposition to defendant is not warranted.

Affirmed.

/s/ David H. Sawyer
/s/ Colleen A. O'Brien
/s/ Anica Letica

⁴ We note that Singleton's second answer stating that the middle portion of Pamela's parking spot provided her with reasonable access to the sidewalk also calls for a legal conclusion based on the analysis above, *Maiden*, 461 Mich at 130 n 11, but assuming that Singleton's first answer did not call for a legal conclusion then his second answer also did not call for a legal conclusion. Both of Singleton's statements about whether the photograph showed reasonable access, therefore, should be considered together when determining whether the trial court's potential error requires reversal. See MRE 106.

STATE OF MICHIGAN
COURT OF APPEALS

LANCE FULLER,

Plaintiff-Appellant,

v

THOMAS SHOOKS,

Defendant-Appellee.

UNPUBLISHED

October 24, 2006

No. 269886

Kent Circuit Court

LC No. 05-002704-NO

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant’s motion for summary disposition based on the open and obvious doctrine. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, a self-employed building contractor, served as the general contractor for the construction of his own home. On January 7, 2004, plaintiff, a truck driver for a plumbing supply company, delivered an order of toilets and other plumbing fixtures to the site. There was an accumulation of snow on the driveway when plaintiff arrived. Using a hand truck, plaintiff transported several loads of items up the drive, across a sidewalk, and into the side service entrance of defendant’s garage. While in the process of hauling the third load, plaintiff slipped on the snow, fell, and suffered injury. Plaintiff filed suit, alleging negligence. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the motion on the ground that defendant did not have a duty to protect plaintiff from open and obvious hazards such as the snow-covered driveway.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A question 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.” *Id.*

Parties in possession of land generally have a duty to use reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on their premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). But under most

circumstances, a possessor of land “is not required to protect an invitee from open and obvious dangers.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A hazard is open and obvious if the court determines that an ordinary person of average intelligence would “have been able to discover the danger and the risk presented upon casual inspection.” *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff concedes that the snow in the instant case presented an open and obvious hazard. But he contends that defendant may be found liable as a general contractor because, by failing to remove the snow from his driveway, defendant subjected plaintiff to a high degree of risk in a common work area.

We find the common work area doctrine inapplicable to the current situation. The doctrine provides an exception to the general common law rule that property owners and general contractors “could not be held liable for the negligence of independent subcontractors and their employees.” *Ghaffari v Turner Const Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). Because general contractors have responsibility for coordinating an array of subcontractors, they must take reasonable steps “to guard against readily observable, avoidable dangers in common work areas.” *Id.*, 21, 23, quoting *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). But the duties owed under the common work area doctrine are distinct from the general duties of a premises possessor. *Id.*, 23-24, citing *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19; 643 NW2d 212 (2002).

Plaintiff correctly contends that, in *Ghaffari, supra*, 29-30, our Supreme Court held that the fact that a hazard is open and obvious cannot defeat a claim under the common work area doctrine. But plaintiff does not contend that his injury occurred due to the negligence of defendant’s subcontractors or their employees. Rather, he asserts that a dangerous condition present on defendant’s premises caused the accident. No issue concerning the common work area doctrine arises out of the facts alleged by plaintiff. Thus, the doctrine cannot prevent his premises liability claim from being dismissed on the ground that the hazardous condition that existed on defendant’s driveway was open and obvious.

Even if we were to find the common work area doctrine applicable, plaintiff’s claim would fail. To recover under the doctrine, a plaintiff must establish that:

- (1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority
 - (2) to guard against readily observable and avoidable dangers
 - (3) that created a high degree of risk to a significant number of workmen
 - (4) in a common work area.
- [*Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).]

Here, defendant testified that the construction of the house, with the exception of the installation of some tile and a few fixtures, had been completed by January of 2004. Further, there were no workers at premises on day of plaintiff’s accident. Similarly, plaintiff testified that there was no one else at the home when he made the delivery. Regardless of whether defendant failed to take reasonable steps to guard against the danger presented by a snow-covered

driveway, the parties agree that plaintiff was the only person present. Consequently, the hazardous condition could not have created a high degree of risk to a significant number of workmen and plaintiff cannot recover under the common work area doctrine.

In his second issue on appeal, plaintiff contends that, although the hazard presented by the snow was open and obvious, special aspects making the condition unreasonably dangerous existed and prevented defendant from being entitled to summary disposition.

Although a landowner does not generally have a duty to protect invitees from open and obvious dangers, he must take reasonable steps to protect invitees from harm where “special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Lugo, supra*, 517. When determining whether such special aspects exist, courts must “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Id.*, 523-524. But “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 v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

Special aspects are found in two sets of circumstances. The condition must give rise to (1) a uniquely high likelihood of harm, or (2) cause a severe harm if the risk is not avoided. *Lugo, supra*, 519. The first of these occurs when a person cannot effectively avoid the dangerous condition. *Id.*, 518. In explaining this situation, our Supreme Court provided the example of a business in which standing water covers the only exit and traps a customer inside. *Id.* The second circumstance occurs when the open and obvious condition imposes “an unreasonably high risk of severe harm.” *Id.* Here, the Court gave the example of an unguarded thirty-foot pit in the middle of a parking lot. *Id.*

In the instant case, plaintiff does not argue that the snow created an unreasonably high risk of severe harm. Rather, plaintiff asserts that the danger presented by driveway, like the hazardous condition in *Robertson*, was effectively unavoidable because his instructions dictated that he deliver the fixtures as soon as possible and place them in defendant’s garage using the side service entrance.

In *Robertson, supra*, 591, the plaintiff slipped on ice in the parking lot of the defendant’s gas station as he walked to the station’s convenience store to purchase windshield washer fluid. In rejecting the defendant’s argument in favor of summary disposition based on the open and obvious doctrine, this Court stated that the hazard presented by the icy conditions was effectively unavoidable because no ice-free path to the service station existed and it would have been unsafe, given the weather conditions, to drive away without windshield washer fluid. *Id.*, 593-594. This Court further stated that the defendant’s contention that the plaintiff could have gone elsewhere was inconsistent with its purpose in operating a gas station and inviting the public onto its premises for commercial purposes. *Id.*, 594-595.

Contrary to plaintiff’s assertions, *Robertson* does not require reversal of the trial court’s order. While both plaintiff and his counterpart in *Robertson* were licensees, their situations can be distinguished. In *Robertson, supra*, 594-595, the defendant made a general invitation to all members of the public to shop at its service station. Here, plaintiff was not a “paying customer”

who came to defendant's premises on a weekly basis. *Id.*, 591. Rather, plaintiff went to defendant's home a single time to deliver goods defendant had purchased from his employer.

More importantly, unlike the plaintiff in *Robertson*, the snow-covered driveway did not effectively trap plaintiff. Rather than being unable to safely leave the premises, plaintiff could have chosen to make the delivery at another time after the driveway had been cleared of snow. Plaintiff's work order does state that defendant's fiancé wanted the fixtures delivered as soon as they arrived. But plaintiff testified that he had already put off delivering the goods until his last delivery of the day and that no one was present at the home when he arrived. Nothing in the record suggests that plaintiff, upon observing the hazard presented by the snow, could not have simply delayed making the delivery until some later time.

Further, a decision reversing the trial court's order granting defendant motion for summary disposition would be at odds with our Supreme Court's recent decision in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005). In *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 101; 689 NW2d 737 (2004), this Court reversed the trial court's order granting the defendant's motion for summary disposition. In lieu of granting leave to appeal, our Supreme Court reversed this Court's decision for the reasons stated in Judge Griffin's dissenting opinion. *Kenny, supra*, 472 Mich 929.

In *Kenny, supra*, 264 Mich App 115, the plaintiff and four companions drove to the defendant's funeral home to attend the funeral of a co-worker. After they parked the car in defendant's snow-covered parking lot, plaintiff attempted to walk around behind the vehicle, slipped, and fell. Plaintiff argued that the icy condition was unavoidable because there was only one vacant parking space available and, as a passenger in the car, she had no control over where the driver parked. *Id.*, 122. But Judge Griffin noted, "Neither a common condition nor an avoidable condition is uniquely dangerous." *Id.*, 117, citing *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). He found that the plaintiff's circumstances did "not rise to the level of making her encounter with the allegedly icy condition 'effectively unavoidable' such that it constituted an unreasonable risk of harm." *Id.*, 122. Judge Griffin therefore held that, because the condition of the parking lot was both common and avoidable, no special aspects existed and the trial court's decision granting the funeral homes motion for summary disposition should be affirmed. *Id.*

Like the hazard encountered by the plaintiff in *Kenny*, the snow-covered driveway in the instant case did not present any special aspects making it unreasonably dangerous. Rather, the condition was both common and avoidable. Consequently, the trial court did not err in granting defendant's motion for summary disposition on the basis of the open and obvious doctrine.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens