RECEIVED by MSC 7/23/2021 5:44:46 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

AHLAM KANDIL-ELSAYED,

Plaintiff-Appellant

Supreme Court
Case No. 162907

v

F&E OIL, INC.,

Defendant-Appellee

Court of Appeals Case
No. 350220
Wayne County Circuit Court
Case No. 18-003569-NO

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

&

APPENDIX OF EXHIBITS

By: Donald C. Brownell (P4884)
Rick Patterson (P55706)
Stephanie L. Arndt (P66870)
Vandeveer Garzia, P.C.
840 W. Long Lake Road, Ste 600
Troy, MI 48098-6340
P. 248.312.2917
E. sarndt@vgpclaw.com

RECEIVED by MSC 7/23/2021 5:44:46 PM

TABLE OF CONTENTS

TABLE OF CONTENTS i
INDEX OF AUTHORITIES ii
INDEX OF APPENDIX OF EXHIBITS iii
STATEMENT OF ORDER APPEALED iv
QUESTION PRESENTED FOR REVIEW v
INTRODUCTION 1
STATEMENT OF RELEVANT FACTS 3
A. Facts related to Plaintiff's premises liability claims. 3
B. The proceedings before the lower court and the Court of Appeals. 4
STANDARD OF REVIEW 6
LEGAL ARGUMENT 7
A. Dismissal of Plaintiff's Complaint was consistent with Michigan's premises liability jurisprudence. 7
B. Plaintiff's Application fails to set forth an issue of jurisprudential significance warranting the grant of leave. 13
CONCLUSION AND RELIEF REQUESTED 16

RECEIVED by MSC 7/23/2021 5:44:46 PM

INDEX OF AUTHORITIES

CASES

Auto-Owners Ins Co v Seils, 310 Mich App 132; 871 NW2d 530 (2015) 7

Bertrand v Alan Ford, Inc, 449 Mich 606; 537 NW2d 185 (1995) 9

Corley v Detroit Bd of Ed, 470 Mich 274; 681 NW2d 342 (2004) 7

El-Khalil v Oakwood Healthcare, Inc, 504 Mich 152; 934 NW2d 665 (2019) 6

Estate of Donna Livings v Sage's Inv Grp, LLC, __ Mich __; __ NW2d __ (2021) ..... passim

Hoffner v Lanctoe, 492 Mich 450; 821 NW2d 88 (2012) ..... passim

Kandil-Elsayed v F&E Oil, Inc., unpublished per curiam opinion of the Court of Appeals, decided March 11, 2021 (Docket No. 350220) ..... iv, 6

Lugo v Ameritech, 464 Mich 512; 629 NW2d 384 (2001) ..... passim

Lymon v Freedland, 314 Mich App 746; 887 NW2d 456 (2016) 5

Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999) 7

Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd, 466 Mich 11; 643 NW2d 212 (2002) 15

Riddle v McLouth Steel Products Corp, 440 Mich 85; 485 NW2d 676 (1992) 14

West v Gen Motors Corp, 469 Mich 177; 665 NW2d 468 (2003) 7

OTHER AUTHORITIES

M Civ JI 3.11 12

RULES

MCR 2.116(C)(10) 6

MCR 7.303(B)(1) iv

RECEIVED by MSC 7/23/2021 5:44:46 PM

INDEX OF APPENDIX OF EXHIBITS

Exhibit	Appx.	Description
A	1	Opinion: *Kandil-Elsayed v F&E Oil, Inc.*
B	4	Opinion: *Estate of Donna Livings v Sage's Inv Grp, LLC*
C	32	Defendant's Motion for Summary Disposition
	48	Exhibit 1: Complaint
	59	Exhibit 2: Excerpt of Plaintiff Transcript
	61	Exhibit 3: Excerpt of Plaintiff Transcript
	65	Exhibit 4: Excerpt of Plaintiff Transcript
	74	Exhibit 5: Excerpt of Plaintiff Transcript
	80	Exhibit 6: Excerpt of Plaintiff Transcript
	83	Exhibit 7: Excerpt of Plaintiff Transcript
	90	Exhibit 8: Excerpt of Plaintiff Transcript
D	99	Plaintiff's Response to Defendant's Motion for Summary Disposition
	111	Exhibit 1: Plaintiff's Deposition Transcript
	145	Exhibit 2: Photograph
E	147	Order granting Summary Disposition

RECEIVED by MSC 7/23/2021 5:44:46 PM

STATEMENT OF ORDER APPEALED

Plaintiff's Application for Leave to Appeal seeks review of the unanimous, unpublished decision of the Michigan Court of Appeals in *Kandil-Elsayed v F&E Oil, Inc.*, unpublished per curiam opinion of the Court of Appeals, decided March 11, 2021 (Docket No. 350220)(Exhibit A, Appx. 1-3). That decision affirmed the Hon. David Allen's Order granting Defendant's Motion for Summary Disposition in this premises liability action based on Plaintiff's failure to establish a genuine issue of material fact regarding whether the narrow exception to Michigan's open and obvious danger doctrine for special aspects existed. In accordance with MCR 7.303(B)(1) this Application is properly before the Court.

RECEIVED by MSC 7/23/2021 5:44:46 PM

QUESTION PRESENTED FOR REVIEW

I. For decades Michigan has applied the open and obvious danger doctrine to determine the duty owed by a land possessor to an invitee, an analysis which considers whether liability may arise when special aspects of a condition make even an open and obvious risk unreasonable. *Lugo* and its progeny were properly applied in affirming dismissal of this case. Since Plaintiff's jurisprudential arguments lack merit, should her Application for Leave to Appeal be denied?

Defendant-Appellee says: Yes
Plaintiff-Appellant says: No

RECEIVED by MSC 7/23/2021 5:44:46 PM

INTRODUCTION

On June 30, 2021, this Court issued an Opinion regarding the limited exception to Michigan's open and obvious danger doctrine relating to when special aspects of a condition make even an open and obvious risk effectively unavoidable. *Estate of Donna Livings v Sage's Inv Grp, LLC,* __ Mich __; __ NW2d __ (2021) (slip op. attached as Exhibit B, Appx. 4-31) There, the issue before the Court was "whether an open and obvious hazard can be considered effectively unavoidable when a plaintiff must confront it to enter his or her place of employment for work purposes." *Id.* at *8, Appx. 10. This case too involves the limited exception for special aspects. However, this case does not involve an employment situation; it involves a plaintiff who chose to purchase gasoline from a particular gas station on a cold, snowy day and claims to have been injured while walking into the gas station to prepay for gas that she had not yet pumped.

The analysis in this case is guided by this Court's decisions in *Hoffner v Lanctoe,* 492 Mich 450; 821 NW2d 88 (2012) and *Lugo v Ameritech,* 464 Mich 512; 629 NW2d 384 (2001). The two-page, unanimous, unpublished Court of Appeals Opinion affirmed the trial court's dismissal of this action citing to *Hoffner* when discussing the "number of possibilities that plaintiff could have chosen to avoid the snow and ice condition…." *Kandil-Elsayed, supra* *2, Appx. 3. Consistent with these decisions, the snowy parking lot did not merit application of the limited exception for special aspects. Plaintiff failed to establish that an unreasonably dangerous condition existed that was effectively unavoidable, as that term has been defined by our case law.

RECEIVED by MSC 7/23/2021 5:44:46 PM

This Court's recent Opinion in *Livings* was accompanied by separately written opinions that questioned whether Michigan's premises liability law should continue in its current form. Chief Justice McCormack stated "I hope this Court will one day consider the legacy of *Lugo* and the special aspects doctrine." (Exhibit B, p. *33, Appx. 20) Justice Clement similarly stated that she would be "open to considering different approaches" to premises liability law in Michigan. *Id.* at *49, Appx. 26. Defendant submits to the Court that this case, and the record that has developed with it, do not embody the type of jurisprudential significance that merits consideration by this Court. The totality of the open and obvious danger doctrine was not fully analyzed by either the trial court or the Court of Appeals – only whether the open and obvious condition was effectively unavoidable. The various intricacies of the Restatements were also not explored by the courts below. There was also no examination of the national precedential trends or legal standards applied outside Michigan.

Here, the record before this Court consists of decisions applying existing Michigan law to a fact-specific situation. Existing Michigan law determined this case. Existing Michigan law supports the dismissal of this case. Based on existing Michigan law, Plaintiff-Appellant's Application for Leave to Appeal should be denied.

RECEIVED by MSC 7/23/2021 5:44:46 PM

STATEMENT OF RELEVANT FACTS

A. Facts related to Plaintiff's premises liability claims.

This litigation stems from injuries that Plaintiff alleges to have sustained sometime in March of 2016 when she claims to have fallen in Defendant's snowy parking lot in Dearborn while attempting to purchase gas.

Plaintiff Ahlam Kandil-Elsayed is a lifelong Michigan resident. (Exhibit C, Defendant's Motion for Summary Disposition Exhibit, p. 70, Appx. 81) She was born in Michigan. *Id.* As a lifelong Michigander, Ms. Kandil-Elsayed is familiar with Michigan winters. *Id.* She admitted to her familiarity with traversing snowy and icy conditions over the course of her life. *Id.* She even testified to having previously fallen while traversing snowy and icy conditions. *Id.* at 71, Appx. 82.

As it relates to the day of her alleged fall at Defendant's gas station, there is no dispute that it was snowing throughout the day. *Id.* at 79, Appx. 75. There is also no dispute that the parking lot was snowy. *Id.* at 87, Appx. 84. Plaintiff admitted that it was snowing throughout the day. *Id.* at 79, Appx. 75. She recalls that the road surfaces were snowy. In fact, because of the wintery conditions, she was wearing snow boots. *Id.* at 87, Appx. 84.

After pulling into Defendant's gas station, Plaintiff observed that the parking lot surface was snowy. *Id.* at 92, Appx. 89. She had no difficulty observing her surroundings and where she was walking. *Id.* Plaintiff was familiar with this gas station; she had patronized it on multiple previous occasions. *Id.* at 80, Appx. 76.

RECEIVED by MSC 7/23/2021 5:44:46 PM

On this day, Plaintiff chose to prepay for her gas. (Exhibit C, p. 85-86, Appx. 78-79) She had $20.00 in cash that she was using to purchase her gas. *Id.* at 101-102, Appx. 94-95. Before she could pump her gas, Plaintiff walked into the gas station to pay the clerk. *Id.* at 101, Appx. 94. As she walked toward the gas station, Plaintiff felt the snow under her feet. *Id.* at 88-89, Appx. 85-86. It was while she was walking into the gas station that she claims to have fallen. Plaintiff acknowledges that she was walking over snow to get into the gas station. *Id.* at 89, Appx. 86.

After her alleged fall, Plaintiff entered the gas station and prepaid for her gas. *Id.* at 99, Appx.92. She engaged in a conversation with the clerk. *Id.* at 101-102, Appx. 93-94. She then exited the gas station and retraced her previous steps, without falling. (Exhibit C, p. 103, Appx. 96) Then, she pumped her gas. *Id.* at 104-105, Appx. 97-98. Once fueled, she walked back around her vehicle, entered the vehicle, and drove home. *Id.* at 195, Appx. 98.

B. The proceedings before the lower court and the Court of Appeals.

Defendant's Motion for Summary Disposition sought dismissal of this action based on Michigan's open and obvious danger doctrine. (Exhibit C, Motion, Appx. 33-47) In accordance with the doctrine, a premises possessor owes a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech,* 464 Mich 512, 516; 629 NW2d 384 (2001). Defendant argued that no duty existed as to the alleged snowy condition of its parking lot, which Plaintiff claimed caused her fall, since the allegedly dangerous condition was

RECEIVED by MSC 7/23/2021 5:44:46 PM

observable by an average person of ordinary intelligence upon casual inspection. (Exhibit C, Motion, Appx. 33-47) As such, the open and obvious danger doctrine precluded the imposition of a duty to Defendant to warn of the snowy conditions.

Plaintiff's Response to Defendant's Motion for Summary Disposition relied on Michigan's limited exception that arises when special aspects of the condition make it effectively unavoidable. (Exhibit D, Plaintiff's Response, Appx. 100-108) Plaintiff's Response did not dispute that the snowy condition of the parking lot was such that an average person of ordinary intelligence would be able to discover the danger and risk presented upon causal inspection. *Id.* Instead, Plaintiff focused on this Court's decision in *Lugo, supra* and argued that the hazard created by the snowy parking lot near its entry to the gas station was effectively unavoidable making the open and obvious defense inapplicable. *Id.* Plaintiff attempted to support her argument that the condition was effectively unavoidable through a discussion of *Hoffner, supra* and *Lymon v Freedland,* 314 Mich App 746; 887 NW2d 456 (2016). *Id.*

After considering oral arguments from the parties, the trial court, the Hon. David Allen, issued an Order Granting Summary Disposition for Defendant on July 24, 2019. The trial court's Order stated that the motion was granted for the reasons stated by the Court on the record during an earlier hearing. (Exhibit E, Order, Appx. 148-149)

The Court of Appeals had the opportunity to conduct a *de novo* review of the trial court's decision after Plaintiff timely filed a Claim of Appeal. That unpublished, unanimous opinion was issued on March 11, 2021. (Exhibit B, Appx. 1-3) There, the Court framed the issue as "Plaintiff argues that a genuine issue of material fact exists as to

RECEIVED by MSC 7/23/2021 5:44:46 PM

whether the snow and ice constituted an effectively unavoidable condition, thereby barring application of the open and obvious danger doctrine. We disagree." *Kandil-Elsayed, supra* at *1, Appx. 2. Citing to *Hoffner* and other appellate decisions, the court explained what was meant by "effectively unavoidable." Then, analyzing the facts of this case, the court stated:

> Here, no material factual dispute exists that plaintiff was not required or compelled to confront the snow and ice condition. While plaintiff testified that she needed to pay cash for her gas inside the building, she admitted that she saw but chose to confront the allegedly dangerous condition. Instead, plaintiff could have simply left that gas station and went to another or she could have called the station and requested that the attendant come out and take her money for the gas. There are any number of possibilities that plaintiff could have chosen to avoid the snow and ice condition; thus, the trial court properly granted defendant's motion for summary disposition.

Kandil-Elsayed, at *2, Appx. 3. Based on its analysis of the record evidence, the Court of Appeals affirmed the dismissal of Plaintiff's Complaint. *Id.*

This Application for Leave to Appeal timely followed.

STANDARD OF REVIEW

An appellate court reviews *de novo* a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159; 934 NW2d 665 (2019).

Defendant relied on MCR 2.116(C)(10) in bringing its motion. A (C)(10) motion tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *El-Khalil,* 504 Mich at 160; *Corley v Detroit*

RECEIVED by MSC 7/23/2021 5:44:46 PM

Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). When considering a motion under MCR 2.116(C)(10), a trial court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is proper if the evidence, affidavits, pleadings, and admissions viewed in a light most favorable to the other party demonstrate that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

LEGAL ARGUMENT

I. For decades Michigan has applied the open and obvious danger doctrine to determine the duty owed by a land possessor to an invitee, an analysis which considers whether liability may arise when special aspects of a condition make even an open and obvious risk unreasonable. *Lugo* and its progeny were properly applied in affirming dismissal of this case. Plaintiff's jurisprudential arguments lack merit and her Application should be denied.

A. Dismissal of Plaintiff's Complaint was consistent with Michigan's premises liability jurisprudence.

This Court's decisions in *Hoffner* and *Livings* provide a detailed summation of Michigan premises liability jurisprudence. As this Court is well-versed in its precedent, Defendant will not recite that summation here. These opinions discussed the general

RECEIVED by MSC 7/23/2021 5:44:46 PM

precepts that are at the foundation of Michigan premises liability law, Michigan's open and obvious danger doctrine, and the "limited exception" that may arise when special aspects of a condition make even an open and obvious risk unreasonable. *Hoffner,* 492 Mich. at 461. The interplay between the open and obvious danger doctrine and special aspects was explained in *Lugo, supra* as follows:

> the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

Lugo, 464 Mich at 517.

Since Plaintiff's Application focuses on this Court's decision in *Lugo* and the development of the open and obvious danger doctrine as it relates to "special aspects," Defendant will focus its discussion there. The "special aspects" exception to the open and obvious danger doctrine is a limited exception. *Hoffner,* 492 Mich at 461, 462. This limited exception arises with an "open and obvious condition that is 'unreasonably dangerous' because it 'present[s] an extremely high risk of severe harm to an invitee' in circumstances where there is 'no sensible reason for such an inordinate risk of severe harm to be presented.'" *Hoffner,* 492 Mich at 463 quoting *Lugo,* 464 Mich at 519 n 2. In analyzing the "limited exception" to the open and obvious danger doctrine, this Court noted that its applicability is reserved for "unusual" conditions. *Id.*

The "limited exception" applicable to special aspects is reserved for conditions where the risk is "so unreasonably high that its presence is inexcusable." *Hoffner,* 492 Mich at 462. The special aspects analysis is an objective analysis that applies the

RECEIVED by MSC 7/23/2021 5:44:46 PM

reasonably prudent person standard. *Bertrand v Alan Ford, Inc,* 449 Mich 606; 537 NW2d 185 (1995). Citing to *Lugo, supra* this Court stated:

> It is worth noting *Lugo*'s emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, **liability may be imposed only for an "unusual" open and obvious condition** that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." The touchstone of the duty imposed on a premises owner being reasonableness, **this narrow "special aspects" exception** recognizes there could exist a condition that presents a risk of harm that is **so unreasonably high that its presence is inexcusable**, even in light of its open and obvious nature.

Hoffner, 492 Mich at 462, emphasis added.

In discussing what it means for a condition to be "effectively unavoidable," the *Hoffner* Court stated:

> 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.

Id. at 468. Similar to the statements in *Hoffner,* the *Livings* Court recently stated:

> This standard's application will depend on the facts of the case, but the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances. Cf. *Perkoviq, 466 Mich at 19-20.* If an employee could have avoided the condition through the use of due care under the circumstances, then the condition was not effectively unavoidable. See *id.*

RECEIVED by MSC 7/23/2021 5:44:46 PM

Id. at *16-17. The *Livings* Court then reaffirmed that this exception to the open and obvious danger doctrine remains a "narrow" exception. *Id.* at *18.

The courts below correctly applied the facts of this case to existing Michigan premises liability law. There is no dispute that the snowy parking lot was observable to an average person of ordinary intelligence upon casual inspection. Plaintiff admitted this in her deposition. Applying the open and obvious doctrine, no duty would exist. A duty would only then exist if the "limited exception" applicable to special aspects was implicated. However, as instructed by *Lugo,* special aspects only exist to dangers that are unreasonably dangerous:

> the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

Lugo, 464 Mich at 517-518. According to *Lugo*, the condition must present a "uniquely high likelihood of harm or severity" to implicate the special aspects limited exception.

In *Lugo,* this Court held that a pothole in a parking lot was not the type of condition that created an unreasonable risk of harm; it was an everyday occurrence. Here, similarly, the snowy parking lot is not the type of condition that created an unreasonable risk of harm. It too is an everyday occurrence in Michigan in March. Moreover, as discussed in the next section, the snowy parking lot was also not effectively unavoidable.

Looking to *Livings* and *Hoffner,* that question of whether a special aspect was effectively unavoidable is answered by considering whether the plaintiff could have

RECEIVED by MSC 7/23/2021 5:44:46 PM

avoided the condition through the use of due care under the circumstances. A condition is only effectively unavoidable when it is "unavoidable or inescapable *in effect* or *for all practical purposes*." *Hoffner,* 492 Mich at 468-469, emphasis in original. Here, as the Court of Appeals discussed, the condition was avoidable through a variety of common, ordinary means – summoning the attendant, patronizing a different station, etc.

The facts of this case are strikingly similar to *Hoffner, supra.* Both cases involved a plaintiff who encountered snowy and icy conditions while trying to enter into a business. Both plaintiffs were invitees. In determining that the plaintiff's claims were precluded by the open and obvious danger doctrine, the *Hoffner* Court noted the following factual observations that are equally applicable here:

- Plaintiff was not forced to confront the risk. She was not "trapped" in a building.
- Plaintiff was not compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.
- Plaintiff presented no evidence that the risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable, even in light of its open and obvious nature.

Hoffner, 492 Mich at 474. Just as the facts of *Hoffner* did not support the finding of special aspects, the facts of this case did not support the finding of special aspects.

Precedent instructs that liability for special aspects may be imposed only for an "unusual" open and obvious condition. *Hoffner, supra.* Plaintiff fails to provide any discussion of what was so unusual about this particular parking lot. There was nothing unusual about it. A snowy parking lot in March in Michigan is not an unusual occurrence, especially here where it had been snowing throughout the day. Plaintiff failed to provide

RECEIVED by MSC 7/23/2021 5:44:46 PM

the Court of Appeals with record evidence that would support the imposition of this "limited exception" where no duty would exist to this readily observable condition.

In this case, the Court of Appeals' discussion on the various means by which Plaintiff's entry into the gas station was avoidable was proper. Examination of Plaintiff's alternatives comes directly from this Court's precedent. *Hoffner* instructed "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id.* at 468. *Livings* similarly instructed: "This standard's application will depend on the facts of the case, but the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances." *Id.* at *17.

Further, the Court of Appeals did not err in its factual development of its "effectively unavoidable" analysis as Plaintiff claims. Just as M Civ JI 3.11 informs jurors that they "may rely on their general intelligence and knowledge of affairs," the Judges on the Court of Appeals have the same abilities. Record evidence existed regarding the circumstances surrounding Plaintiff's prepayment of gas and her alleged fall. From that record evidence and the ordinary knowledge possessed by the Panel related to the procedures for purchasing gas, the court was equipped to make the determination of whether the entry to the gas station was effectively unavoidable for a plaintiff seeking to purchase gas that was not yet paid for or pumped.

Both the trial court and the Court of Appeals correctly applied the precedent of this Court in analyzing whether the snowy conditions near the entry of Defendant's gas station were so unusual and dangerous as to warrant application of the limited exception

RECEIVED by MSC 7/23/2021 5:44:46 PM

for special aspects. In reviewing the record evidence in total, the courts below determined that no legal duty existed for Defendant to warn Ms. Kandil-Elsayed of the snowy parking lot, since it was readily observable to Plaintiff upon casual inspection. Further review by this Court is not warranted. Plaintiff-Appellant's Application for Leave to Appeal should be denied.

B. Plaintiff's Application fails to set forth an issue of jurisprudential significance warranting the grant of leave.

In attempting to garner the attention of the Court, Plaintiff makes several arguments that suggest that *Lugo* has somehow come off the rails and been distorted beyond recognition through recent decisions. In fact, Plaintiff goes so far as to ask this Court to effectively overrule *Lugo,* which would also overrule *Hoffner* and *Livings.* In doing so, Plaintiff advocates for a new, seemingly untested standard. Plaintiff also argues that case law since *Lugo* conflates concepts of comparative fault and contributory negligence; an argument already addressed by this Court previously. Plaintiff additionally argues for a re-examination of Michigan's premises liability law that considers Restatements Second, which was a topic recently discussed in *Livings, supra.* Many of these claimed distortions have already been addressed by this Court in affirming Michigan's continued use of the open and obvious danger doctrine to analyze premises liability litigation. None of them warrant the granting of leave in this case.

Plaintiff argues for the overruling of *Lugo* when she states that "[t]he Lugo 'special aspects' test should not be outcome determinative on the issue of duty." She then

RECEIVED by MSC 7/23/2021 5:44:46 PM

advocates for the replacement of our long-standing framework for analyzing premises liability litigation with a legal standard analogous to the sophisticated user analysis applied in product liability litigation. It appears as though this new standard is plucked from thin air. Plaintiff's discussion of this new standard lacks any analysis of national premises liability analysis or minority and majority views used in other jurisdictions evaluating similar litigation. Plaintiff also does not provide out-of-state support for her newly-created premises liability standard. There is no discussion as to which states use this new standard, if any. There is not even a discussion of how this new standard would work if applied in this case. Instead, Plaintiff asks this Court to discard years of precedent and replace it on a whim with an untested, undeveloped doctrine that does not even appear to have been applied to premises liability litigation previously. Such a haphazard treatment of Michigan law should be rejected.

Likewise without support is Plaintiff's position that *Lugo* confuses concepts of duty with comparative fault or contributory negligence. This Court has already clarified that the open and obvious danger doctrine and comparative negligence are two separate and distinct concepts. This discussion occurred in *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). There, this Court stated:

> The adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive — two doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.

RECEIVED by MSC 7/23/2021 5:44:46 PM

Id. at 95. As discussed in *Riddle,* the open and obvious danger doctrine goes to the preliminary issue of legal duty whereas any comparative fault questions do not arise until establishment of a duty and breach. It is only after these two legal issues are established that a percentage of fault should be allocated to the plaintiff for their own negligence. *Id.* These are distinct concepts that are in no way intertwined. Given this Court's decision in *Riddle,* there is no need to grant leave as to this issue.

Similarly, there was no error in the *Lugo* Court's use of the Restatements. This Court discussed the Restatements Second in *Livings, supra*. There, the majority stated: "Despite the fact that our current framework uses different terminology, we have stressed that our law remains consistent with the Restatement approach." *Id.* at *14. "[W]e have often utilized the Second Restatement since its appearance in 1965, going so far as to say that § 343 and § 343A had been 'adopted' into our law. *Id.* at *14 citing *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd,* 466 Mich 11, 16; 643 NW2d 212 (2002). The *Livings* Court even engaged in a discussion regarding the various intricacies of Restatements Third versus Restatements Second in the various opinions authored in that case, without ultimately reaching a consensus in that case.

While there has been some discussion regarding the continued use of Michigan's open and obvious danger doctrine, Plaintiff's Application has failed to set forth an analysis establishing jurisprudential significance that would warrant setting aside decades of precedent from this Court, including an opinion issued just weeks before this filing. This case, and the record that was developed with it, do not embody the type of jurisprudential significance that merits consideration by this Court. The totality of the

RECEIVED by MSC 7/23/2021 5:44:46 PM

open and obvious danger doctrine was not fully analyzed by either the trial court or the Court of Appeals – only whether the open and obvious condition was effectively unavoidable. The various intricacies of the differing versions of the Restatements were also not explored in the courts below. There was also no examination of national precedential trends or legal standards applied in premises liability actions. Here, the record before this Court consists of decisions applying existing Michigan law to a fact-specific analysis.

Existing Michigan law determined this case. Existing Michigan law supports the dismissal of this case. Based on existing Michigan law, Plaintiff-Appellant's Application for Leave to Appeal should be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant-Appellee respectfully requests that this Court DENY this Application for Leave to Appeal as Plaintiff has failed to present an issue of jurisprudential significance that requires the immediate attention of this Court.

VANDEVEER GARZIA, P.C.

Date: July 23, 2021

By: _/s/ Stephanie L. Arndt

DONALD C. BROWNELL (P48848)
RICK PATTERSON (P55706)
STEPHANIE L. ARNDT (P66870)
Attorney for Defendant-Appellee
840 W. Long Lake Road, Suite 600
Troy, MI 48098-6330
P. 248.312.2917
E. sarndt@vgpclaw.com